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SECURITIES AND EXCHANGE COMMISSION

17 CFR 229, 239, and 240

[Release Nos. 33-10825; 34-89670; File No. S7-11-19]

RIN 3235-AL78

Modernization of Regulation S-K Items 101, 103, and 105

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to modernize the description of business, legal proceedings, and risk factor disclosures that registrants are required to make pursuant to Regulation S-K. These disclosure items have not undergone significant revisions in over 30 years. The amendments update these rules to account for developments since their adoption or last revision, to improve disclosure for investors, and to simplify compliance for registrants. Specifically, the amendments are intended to improve the readability of disclosure documents, as well as discourage repetition and the disclosure of information that is not material.

DATES: The final rules are effective on November 9, 2020.

FOR FURTHER INFORMATION CONTACT: Sean Harrison, Office of Rulemaking, at (202) 551-3430, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is amending

Commission Reference	**CFR Citation (17 CFR)**
Regulation S-K	§ 229.10 *et seq.*

	Item 101	§ 229.101
	Item 103	§ 229.103
	Item 105	§ 229.105
Securities Act of 1933 (Securities Act)[1]	Form S-4	§ 239.25
Securities Exchange Act of 1934 (Exchange Act)[2]	Schedule 14A	§ 240.14a-101

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[1] 15 U.S.C. 77a *et seq*.

[2] 15 U.S.C. 78a *et seq*.

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I. INTRODUCTION AND BACKGROUND

On August 8, 2019, the Commission proposed amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosure requirements in Regulation S-K.[3] The proposals were intended to improve these disclosures for investors and to simplify compliance for registrants.[4]

Pursuant to Section 108 of the Jumpstart Our Business Startups Act ("JOBS Act"),[5] the Commission staff prepared the *Report on Review of Disclosure Requirements in Regulation S-K* ("S-K Study"),[6] which recommended that the Commission conduct a comprehensive evaluation of its disclosure requirements. Based on the S-K Study's recommendation, the staff initiated an evaluation of the information our rules require registrants to disclose, how this information is

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3 *See Modernization of Regulation S-K Items 101, 103, and 105*, Release No. 33-10668 (Aug. 8, 2019) [84 FR 44358 (Aug. 23, 2019)] ("Proposing Release").

4 The proposals were also consistent with and further promoted the objectives of the Fixing America's Surface Transportation Act ("FAST Act"). *See* Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015) (requiring, among other things, that the SEC conduct a study, issue a report, and issue a proposed rule on the modernization and simplification of Regulation S-K).

5 Pub. L. No. 112-106, Sec. 108, 126 Stat. 306 (2012). Section 108 of the JOBS Act required the Commission to conduct a review of Regulation S-K to determine how such requirements can be updated to modernize and simplify the registration process for emerging growth companies.

6 *See Report on Review of Disclosure Requirements in Regulation S-K* (Dec. 2013), available at https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf ("S-K Study").

presented, where this information is disclosed, and how we can better leverage technology as part of these efforts (collectively, the "Disclosure Effectiveness Initiative").[7] The overall objective of the Disclosure Effectiveness Initiative was to improve our disclosure regime for both investors and registrants.

In connection with the S-K Study and the launch of the Disclosure Effectiveness Initiative, the Commission staff invited public input on how to improve registrant disclosures.[8] In a separate Concept Release issued in 2016,[9] the Commission staff revisited the business and financial disclosure requirements in Regulation S-K and requested public comment on whether these requirements provide the information that investors need to make informed investment and voting decisions, and whether any of our rules have become outdated or unnecessary.

In developing the proposed amendments to Items 101, 103, and 105 of Regulation S-K, we considered input from comment letters we received in response to these disclosure modernization efforts. We also took into account the staff's experience with Regulation S-K arising from the Division of Corporation Finance's disclosure review program and changes in the regulatory and business landscape since the adoption of Regulation S-K. As a recent example, in response to the COVID-19 pandemic, the Division of Corporation Finance closely monitored registrants' disclosure about how COVID-19 affected their financial condition and

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7 *See SEC Spotlight on Disclosure Effectiveness*, available at https://www.sec.gov/spotlight/disclosure-effectiveness.shtml.

8 To facilitate public input on the Disclosure Effectiveness Initiative, the Commission invited members of the public to submit comments. *See* Request for Public Comment, available at http://www.sec.gov/spotlight/disclosure-effectiveness.shtml. Public comments received in response to that request for comment are available on our website. *See* Comments on Disclosure Effectiveness, available at https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.

9 *See Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064 (Apr. 13, 2016) [81 FR 23915 (Apr. 22, 2016)] ("Concept Release").

results of operations. Division staff observed that our principles-based disclosure requirements generally elicited detailed discussions of the impact of COVID-19 on registrants' liquidity position, operational constraints, funding sources, supply chain and distribution challenges, the health and safety of workers and customers, and other registrant- and sector-specific matters.[10]

We also considered the many changes that have occurred in our capital markets and the domestic and global economy in the more than 30 years since the adoption of these disclosure requirements, including changes in the mix of businesses that participate in our public markets, changes in the way businesses operate, changes in technology (in particular technology that facilitates the provision of, and access to, information), and other changes that have occurred simply with the passage of time. Many of the amendments reflect our long-standing commitment to a principles-based, registrant-specific approach to disclosure. Our disclosure requirements, while prescriptive in some respects, are rooted in materiality and facilitate an understanding of a registrant's business, financial condition and prospects through the lens through which management and the board of directors manage and assess the performance of the registrant. We believe that modernizing Items 101, 103, and 105 will result in improved disclosure, tailored to reflect registrants' particular circumstances, and reduce disclosure costs and burdens.

In response to the proposed amendments, we received numerous comment letters, which we discuss in context below.[11] In general, commenters supported some or all of the proposed

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10 *See Division of Corporation Finance CF Disclosure Guidance: Topic No. 9A* (June 23, 2020) (encouraging companies to evaluate the current and expected impact of COVID-19 through the eyes of management and to proactively revise and update disclosures, including MD&A, as facts and circumstances change), available at https://www.sec.gov/corpfin/covid-19-disclosure-considerations.

11 The public comments we received are available at https://www.sec.gov/comments/s7-11-19/s71119.htm. Unless otherwise indicated, the comment letters cited herein are those received in response to the Proposing Release.

amendments, although many suggested modifications to, and expansions of, the proposals. In some cases, commenters opposed one or more of the proposed amendments, or aspects of them.

After considering all of the public comments received, we are adopting the amendments substantially as proposed with certain modifications. The table below briefly summarizes the final amendments: [12]

Regulation S-K Item	Summary of Existing Item Requirements	Summary of the Final Amendments
Item 101(a)	Requires a description of the general development of the business of the registrant during the past five years, or such shorter period as the registrant may have been engaged in business.	Revises Item 101(a) to: • Be largely principles-based, requiring disclosure of information material to an understanding of the general development of the business, and eliminating the previously prescribed five-year timeframe. Revises Item 101(h) to: • Eliminate the three-year timeframe with respect to smaller reporting companies. Revises Items 101(a) and (h) to clarify that: • Registrants, in filings made after a registrant's initial filing, may provide an update of the general development of the

[12] The final amendments to Items 101 and 103 will affect only domestic registrants and "foreign private issuers" that have elected to file on domestic forms subject to Regulation S-K disclosure requirements. Regulation S-K does not apply to foreign private issuers unless a form reserved for foreign private issuers (such as Securities Act Form F-1, F-3, or F-4) specifically refers to Regulation S-K. Form 20-F is the combined registration statement and annual report form used by foreign private issuers under the Exchange Act. It also sets forth certain disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. Instead of Items 101 and 103, the foreign private issuer forms refer to Part I, Item 4 and Item 8.A.7., respectively, of Form 20-F. In contrast, the amendment to Item 105 will affect both domestic and foreign registrants because Forms F-1, F-3, and F-4, like their domestic counterparts, all refer to that Item. *See, e.g.*, Item 3 of Form F-1. A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents; and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States; (ii) more than 50% of its assets are located in the United States; or (iii) its business is principally administered in the United States. *See* Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 3b-4(c) [CFR 240.3b-4(c)].

		business rather than a full discussion. The update must disclose all of the material developments that have occurred since the registrant's most recent filing containing a full discussion of the general development of its business, and incorporate by reference that prior discussion.
Item 101(c)	Requires a narrative description of the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in its financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment must include disclosure of several specific matters.	Revises Item 101(c) to: • Clarify and expand the principles-based approach of Item 101(c), with a non-exclusive list of disclosure topic examples (drawn in part from the topics currently contained in Item 101(c)); • Include, as a disclosure topic, a description of the registrant's human capital resources to the extent such disclosures would be material to an understanding of the registrant's business; and • Refocus the regulatory compliance disclosure requirement by including as a topic all material government regulations, not just environmental laws.
Item 103	Requires disclosure of any material pending legal proceedings including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Similar information is to be included for any such proceedings known to be contemplated by governmental authorities. Contains a threshold for disclosure based on a specified dollar amount ($100,000) for proceedings related to Federal, State, or local environmental protection laws.	Revises Item 103 to: • Expressly state that the required information may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document to avoid duplicative disclosure; and • Implements a modified disclosure threshold that increases the existing quantitative threshold for disclosure of environmental proceedings to which the government is a party from $100,000 to $300,000, but that also affords a registrant the flexibility to select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings, provided that the threshold does not exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis.

Item 105	Requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky and specifies that the discussion should be concise, organized logically, and furnished in plain English. The Item also states that registrants should set forth each risk factor under a subcaption that adequately describes the risk. Additionally, Item 105 directs registrants to explain how each risk affects the registrant or the securities being offered and discourages disclosure of risks that could apply to any registrant.	Revises Item 105 to: • Require summary risk factor disclosure of no more than two pages if the risk factor section exceeds 15 pages; • Refine the principles-based approach of Item 105 by requiring disclosure of "material" risk factors; and • Require risk factors to be organized under relevant headings in addition to the subcaptions currently required, with any risk factors that may generally apply to an investment in securities disclosed at the end of the risk factor section under a separate caption.

We discuss our revisions with respect to the proposed amendments in more detail below.

II. DISCUSSION OF THE AMENDMENTS

A. General Development of Business (Item 101(a))

Item 101(a) of Regulation S-K currently requires a description of the general development of the business of the registrant during the past five years, or such shorter period as the registrant may have been engaged in business. In describing the general development of the business, Item 101(a)(1) requires disclosure of the following:

- The year in which the registrant was organized and its form of organization;
- The nature and results of any bankruptcy, receivership or similar proceedings with respect to the registrant or any of its significant subsidiaries;
- The nature and results of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries;
- The acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; and

- Any material changes in the mode of conducting the business.

The Concept Release solicited input on whether the disclosure provided under this Item continues to be useful and how this Item might be improved.[13] A number of commenters on the Concept Release recommended eliminating or streamlining the requirements in Item 101(a).[14] Several of these commenters recommended limiting Item 101(a) disclosure to material developments,[15] and a few commenters supported executive summaries and layering techniques for the business section.[16]

In light of this feedback, we proposed to amend Item 101(a)(1) to make it more principles-based and to provide registrants more flexibility to tailor disclosures to their unique circumstances. We discuss the proposals and our revisions with respect to the final amendments below.

1. Elimination of the Five-Year and the Three-Year Disclosure Timeframes

a. Proposed Amendments

Item 101(a) requires a description of the general development of the registrant's business during the past five years, or such shorter period as the registrant may have engaged in business. Item 101(a) also requires information to be disclosed for earlier periods if material to an understanding of the general development of the business. A requirement to provide a brief outline of the general development of the business for the preceding five years was included in

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13 *See* Concept Release, *supra* note 9, at 23932.

14 *See* Proposing Release, *supra* note 3, at 44361.

15 *See id*.

16 *See id*.

the earliest form requirements for registration statements and annual reports.[17] The first version of Regulation S-K, adopted in 1977, included a requirement to describe the development of the registrant's business during the prior five years, or such shorter period as the registrant may have been in business.[18]

Item 101(h) sets forth alternative disclosure standards for smaller reporting companies that allow these registrants to, among other things, provide a less detailed description of the registrant's business than is required under Item 101(a).[19] In addition, Item 101(h) requires a description of three years rather than five years of development of a smaller reporting company's business.

We proposed to amend Item 101(a) to eliminate the five-year disclosure timeframe and to apply a materiality standard to all of a registrant's disclosure of the general development of its business. In addition, we proposed a corresponding amendment to Item 101(h) to eliminate the three-year disclosure timeframe applicable to smaller reporting companies.[20]

b. Comments on the Proposed Amendments

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17 *See*, *e.g.*, Item 6 of Form A-2 adopted in 1935, which required registrants to outline briefly "the general development of the business for the preceding five years." *See* Release No. 33-276 (Jan. 14, 1935) [not published in the Federal Register]. Additionally, Item 5 of Form A-1, adopted in 1933, required registrants to briefly describe the length of time the registrant had been engaged in its business. *See* Release No. 33-5 (July 6, 1933) [not published in the Federal Register]. *See also* S-K Study, *supra* note 6 at 32, n. 88.

18 *See Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules*, Release No. 33-5893 (Dec. 23, 1977) [42 FR 65554 (Dec. 30, 1977)].

19 The term "smaller reporting company" is defined in 17 CFR 230.405 and 17 CFR 240.12b-2 as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that had a public float of less than $250 million; or had annual revenues of less than $100 million, and either no public float, or a public float of less than $700 million.

20 The proposed amendment to Item 101(h), however, retained the requirement that if a smaller reporting company has not been in business for three years, it must provide the same information for its predecessors if there are any.

A number of commenters expressed general support for eliminating the five-year disclosure timeframe.[21] Several commenters stated that a prescribed disclosure timeframe does not elicit the most relevant disclosure.[22] One of these commenters stated that the one-size-fits-all, fixed time period under the current rule may discourage registrants from providing relevant disclosure relating to periods outside of the five-year timeframe or result in an inadequate discussion of meaningful recent developments.[23]

Several commenters opposed eliminating the five-year disclosure timeframe.[24] One of these commenters stated that the proposal complicates an area where there are no existing reporting problems.[25] Another commenter stated that the current five-year timeframe is appropriate because it corresponds with other financial reporting requirements in Regulation S-K that have similar five-year disclosure timeframes, such as the selected financial data required by Item 301.[26] A different commenter stated that, without a prescribed timeframe, some registrants might consider it necessary to include information from decades past, which could

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21 *See*, *e.g.*, letters from International Bancshares Corporation ("IBC"), California Lawyers Association ("CLA"), Ernst & Young LLP ("E&Y"), Edison Electric Institute and American Gas Association Accounting Advisory Council ("EEI and AGA"), Society for Corporate Governance ("Society"), British Columbia Investment Management Corporation ("BCI"), Davis Polk & Wardwell ("DP&W"), Nareit, US Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC"), FedEx Corporation ("FedEx"), and General Motors Company ("GM").

22 *See*, *e.g.*, letters from GM, Society, EEI and AGA, CLA, and IBC.

23 *See* letter from GM.

24 *See*, *e.g.*, letters from Financial Executives International ("FEI"), CFA Institute, and California Public Employees' Retirement System ("CalPERS").

25 *See* letter from CalPERS (stating that under the proposal, a registrant could choose to disclose a bankruptcy for only two years rather than for five years as required under the current timeframe).

26 *See* letter from CFA Institute. Item 301 of Regulation S-K [17 CFR 229.301] requires registrants to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading. We have recently proposed amendments to eliminate this requirement. *See infra* note 32 and accompanying text.

significantly increase the amount of disclosure with minimal added value to users.[27] This commenter recommended that we retain the five-year timeframe and emphasize that only material developments be disclosed.

We received a few comments on the proposed elimination of the three-year timeframe in Item 101(h).[28] One commenter supported eliminating the three-year timeframe.[29] This commenter stated that investors are generally better able to make informed investment decisions when the disclosure requirements provide a basis for comparison, but noted that smaller reporting companies are by their nature much less comparable to other companies. Another commenter indicated that the Commission should retain the current requirement to provide business development disclosure for predecessors, if any, of the smaller reporting company if the smaller reporting company has not been in business for three years.[30]

c. Final Amendments

After considering the comments, we are adopting the amendments to Item 101(a) and Item 101(h) as proposed, but with a minor change to the rule text of Item 101(h) for clarity. The amendment to Item 101(a) will focus registrants on information material to an understanding of the development of their business, irrespective of a specific timeframe. Similarly, the amendment to Item 101(h) will eliminate the provision that requires smaller reporting companies to describe the development of their business during the last three years, and will direct smaller reporting companies, in describing the development of their business, to provide

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27 *See* letter from FEI.

28 *See*, *e.g.*, letters from CLA and CFA Institute.

29 *See* letter from CLA.

30 *See* letter from CFA Institute.

information for the period of time that is material to an understanding of the general development of the business.

While we have considered commenter concerns about eliminating a fixed timeframe for the description of a registrant's business, we continue to believe that the current timeframes of five years and three years, respectively, may not always elicit the most relevant disclosure. With respect to one commenter's belief that the five-year time period should be retained because it corresponds to other disclosure requirements, we do not think that elimination of the specified period will result in the loss of an important correlation with other disclosure requirements.[31] We believe the final amendments will improve disclosure by affording registrants additional flexibility to tailor their disclosure and provide information material to an understanding of their business. Some registrants may prefer to describe the development of their business over a longer period in order to provide the information that may be material to an investment or voting decision, while others may conclude that the material aspects of their business development can be described over a shorter timeframe. Moreover, we believe the benefits of more tailored and effective disclosure in this context would justify any corresponding loss in comparability.

2. Updated Disclosure in Subsequent Filings

a. Proposed Amendments

Currently, registrants are required to provide disclosure regarding the general development of the business in certain registration statements and annual reports. For filings

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[31] As noted above, the Commission recently proposed to eliminate Item 301 of Regulation S-K, which requires disclosure of five years of selected financial data, because the information required by that item is largely duplicative of other requirements. *See Commission Guidance on Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, Release No. 33-10750 (Jan. 30, 2020) [85 FR 12068 (Feb. 28, 2020)] ("MD&A Release").

made after a registrant's initial filing, we proposed to amend Item 101(a)(2) and Item 101(h) to permit a registrant to provide only an update of its business development disclosure with a focus on material developments, if any, in the reporting period. In addition, the proposed amendments would require a registrant that is using this provision to incorporate by reference a discussion of the general development of the registrant's business that, together with the update, would contain the full discussion. The registrant would be required to incorporate the prior discussion by reference using one active hyperlink to the registrant's most recent filing containing that discussion.[32] Under this approach, a reader would have access to a full discussion by reviewing the updated business development disclosure and the disclosure from the previous filing that is incorporated by reference. Alternatively, a registrant could elect to provide a complete discussion of its business development, including any material updates, in which case, it would not need to incorporate by reference business development disclosure from a previous filing.

b. Comments on the Proposed Amendment

A number of commenters generally supported permitting the use of incorporation by reference, and hyperlinking to the most recently filed full discussion of the general development of the registrant's business.[33] One of these commenters stated that this would result in a more organized and efficient picture of the registrant's business for the investing public.[34] Some of these commenters, while supportive of the proposal, did not support mandating the proposed method to present updated Item 101(a)(1) disclosure, as this method might not always be useful

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32 Pursuant to Securities Act Rule 411 [17 CFR 230.411] and Exchange Act Rule 12b-23 [17 CFR 240.12b-23], registrants must, in most cases, include an active hyperlink to information incorporated by reference.

33 *See*, *e.g.*, letters from Council of Institutional Investors ("CII"), Jeff LaBerge ("LaBerge"), E&Y, FEI, William F. Dunker ("Dunker"), BCI, DP&W, CCMC, Nareit, and FedEx.

34 *See* letter from Dunker.

to investors.[35] These commenters stated that when registrants have frequent material updates (*e.g.*, multiple significant acquisitions), including the full disclosure of the general development of the business in each filing (or every few filings) may be the most effective way to provide appropriate information to investors in a format that is easy for them to understand.

A number of commenters opposed the proposal to allow registrants to provide an update of material developments during the reporting period and require a hyperlink to the full discussion of the general development of the registrant's business disclosure, because they stated that this approach could lead to a disjointed narrative that would not be user-friendly.[36] One commenter stated the approach would not reduce burdens on registrants as the prior period disclosure has already been prepared.[37] Several other commenters expressed concern that the term "reporting period" limited the period of time over which a registrant could provide an update about material developments.[38]

We also received comments recommending that the proposal should not mandate the use of a single hyperlink reference.[39] These commenters stated that if there are multiple updates in more than one reporting period, registrants should be allowed to incorporate by reference and hyperlink to all relevant filings to provide a full discussion of the general development of the business.

c. Final Amendment

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35 *See* letter from EEI and AGA.

36 *See*, *e.g.*, letters from Chevron Corporation ("Chevron"), CLA, GM, CFA Institute, New York City Bar Association ("NYC Bar Association"), and International Corporate Governance Network ("ICGN").

37 *See* letter from GM.

38 *See*, *e.g.*, letters from CLA, E&Y and CalPERS.

39 *See* letter from EEI and AGA.

After considering the comments, we are adopting the amendments to Item 101(a)(2) and Item 101(h) substantially as proposed, but with clarifications.[40] Under the final amendments, for filings subsequent to its initial registration statement, a registrant may provide an update of the general development of its business disclosing all of the material developments that have occurred, if any, since the most recent full discussion of the general development of its business disclosed in a previously filed registration statement or report. If a registrant chooses this approach, it must incorporate by reference the most recent full discussion of the general development of the registrant's business. Moreover, under the final amendments, registrants are only permitted to incorporate the full discussion of the general development of its business from a single previously filed document. If a registrant does not choose this approach, it must provide a complete discussion of its business development, including any material updates in each filing. In this regard, the approach that we are adopting is more restrictive than existing incorporation by reference requirements that, subject to certain limits, allow registrants to provide disclosure by incorporating by reference some or all of it from more than one previously filed document.[41]

In response to the concerns expressed by some commenters that the proposal should not

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[40] We are also adopting corresponding amendments to Item 101(h) to permit a smaller reporting company, for filings other than initial registration statements, to provide an update to the general development of the business disclosure, instead of a full discussion, that complies with Item 101(a), including the hyperlink option.

[41] Securities Act Rule 411(e) and Exchange Act 12b-23(e), however, provide that information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing, such as incorporating by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document. We remind registrants that, consequently, a filing that includes an update and incorporates by reference the more complete Item 101(a) discussion could not be incorporated by reference into a subsequent filing, such as a Form S-3 or Form S-4.

be mandatory,[42] we have added language to the final amendment to clarify that the revision to Item 101(a)(2) provides an optional method for updating general business development disclosure using incorporation by reference to one document. In addition, based on comments received expressing concerns that the term "reporting period" limited the period of time over which a registrant could provide an update about material developments,[43] the final amendments clarify that registrants using the update option must disclose all of the material developments that have occurred since the most recent full discussion of the general development of its business disclosed in a previously filed registration statement or report.

As we noted in the Proposing Release, the repetition of Item 101(a) disclosure in successive filings may obscure important developments in a registrant's business. To the extent that registrants present and update their Item 101(a) disclosure under this method, we believe that the final amendments will help focus investor attention on material developments in a registrant's business.

3. Disclosure about Business Strategy

a. Proposed Amendments

We proposed amending the existing prescribed disclosure topics in Item 101(a)(1) to make them more principles-based. The proposed amendments would replace the list of prescribed disclosure topics with a non-exclusive list of the types of information that a registrant may need to disclose. The proposed amendments would also clarify that disclosure of a topic would be required only to the extent such information is material to an understanding of the general development of a registrant's business. As proposed, amended Item 101(a)(1) no longer

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42 *See, e.g.,* letters from EEI and AGA.

43 *See*, *e.g.*, letters from CLA, E&Y and CalPERS.

would include disclosure of the year that the registrant was organized and its form of organization, or disclosure of any material changes in the mode of conducting the registrant's business in its list of disclosure topics. Nevertheless, such disclosure would continue to be required if material to an understanding of the general development of the registrant's business. In addition, we also proposed to include a new disclosure topic that would require, if material to an understanding of the general development of the business, disclosure of transactions and events that affect or may affect the company's operations, including material changes to a registrant's previously disclosed business strategy. We noted that such disclosure may be material to investors and many registrants currently include it in their initial registration statements.

b. Comments on the Proposed Amendment

Many commenters expressed general support for moving to a more principles-based approach to disclosure about the development of a registrant's business.[44] Several commenters stated that a more principles-based approach would reduce the disclosure of immaterial information and give registrants the flexibility to focus on information that is material and unique to the registrant.[45] Several commenters, however, opposed the more principles-based approach under the proposals.[46]

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44 *See*, *e.g.*, letters from CII, Nasdaq, LaBerge, EEI and AGA, Society, BCI, Dunker, DP&W, Nareit, CCMC, FedEx, FEI, and the Humane Society of the United States ("Humane Society").

45 *See*, *e.g.*, letters from Society, Nasdaq, Dunker, DP&W, and FEI.

46 *See*, *e.g.*, letters from Public Citizen, AFL-CIO (principle-based approach would increase the reliance on the subjective judgment of management), Better Markets, Domini Impact Investments LLC ("Domini") (principles-based approach could reduce the usefulness of corporate disclosures for investors), Principles for Responsible Investment ("PRI"), Breckinridge Capital Advisors ("Breckinridge"), ICGN, and letters from individuals and entities using Letter Type A.

A number of commenters expressed support for including "material changes to a registrant's previously disclosed business strategy" as a non-exclusive disclosure example.[47] One commenter viewed the strategic orientation of a company as material to investors and suggested that changes to it should be disclosed to investors on a continuing basis.[48] Several other commenters stated that disclosure of a registrant's business strategy, not just changes to previously disclosed business strategy, should be required for all registrants.[49] Another commenter expressed concern that limiting the requirement to disclose only material changes in business strategy would reduce the amount of business strategy information that companies are currently providing annually to their investors.[50] This commenter recommended that the Commission require annual disclosure of a company's business strategy. Another commenter who expressed support for requiring disclosure of material changes to a previously disclosed business strategy stated that the rules should not mandate disclosure of business strategy because it could cause some registrants to disclose competitive or sensitive forward-looking information.[51] To help mitigate this risk, this commenter recommended that a safe harbor provision be added to the amendment.

Several commenters opposed including transactions and events that affect or may affect the company's operations and material changes to a registrant's previously disclosed business

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47 *See*, *e.g.*, letters from CII, BCI, CCMC, FedEx, American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), FEI, CFA Institute, and CalPERS.

48 *See* letter from BCI.

49 *See*, *e.g.*, letters from AFL-CIO and CFA Institute. *See also* letter from CalPERS (suggesting that the rule should make "clear that material changes in business strategy would not have to be disclosed prospectively").

50 *See* letter from AFL-CIO.

51 *See* letter from FEI.

strategy as non-exclusive disclosure topics.[52] Some of these commenters stated that disclosure of material changes to a registrant's previously disclosed business strategy is unnecessary and duplicative because disclosure regarding changes in business strategy would already be reflected in the MD&A.[53] Other commenters stated that to the extent any change would constitute a known trend or uncertainty likely to cause the most recent financial results not to be indicative of future results, Item 303 of Regulation S-K already requires such disclosure.[54] Some commenters that opposed this disclosure topic also stated that the disclosure standard in the proposed amendment was different from the disclosure standard under the MD&A requirements, which provides for disclosure of information that a registrant "reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[55] These commenters recommended that, if the proposed amendment were adopted, the amendment should be revised to harmonize its standard with the MD&A disclosure standard.

Another commenter noted that, absent a definition of the term "business strategy," it would be difficult for registrants to determine whether disclosure is warranted.[56] Another commenter stated that there is a broad range in the interpretation of what "strategy" means and that the amendment would not result in disclosures that would enable investors to make

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52 *See*, *e.g.*, letters from UnitedHealth Group Incorporated ("UnitedHealth Group"), Dunker, Society, DP&W, Chevron, and GM.

53 *See*, *e.g.*, letters from UnitedHealth Group, Society, DP&W, Chevron, and GM.

54 *See*, *e.g.*, letters from DP&W, Chevron, and GM.

55 *See*, *e.g.*, letters from Society and GM.

56 *See* letter from CLA.

meaningful comparisons among companies, even among companies within the same industry.[57]

Several commenters expressed concern that the proposal would require registrants to disclose sensitive proprietary or business information regarding a registrant's business strategy.[58] One of these commenters recommended that, if adopted, the Commission should clarify that disclosure of proprietary or competitively sensitive information is not required.[59]

Several commenters stated that the proposal could result in disparate treatment between registrants that provide disclosure of their business strategy and therefore would be required to disclose any material changes to their strategy, and registrants that have not previously provided disclosure of their business strategy.[60] One of these commenters stated that a requirement to provide disclosure of any material change in business strategy could become a deterrent to companies considering conducting an initial public offering.[61]

c. Final Amendments

We are adopting the amendments to Item 101(a)(1) largely as proposed, but with several modifications in response to comments received. As proposed, the final amendments retain the existing disclosure topics addressing the results of any bankruptcy, receivership, or similar proceedings; the nature and results of any other material reclassification, merger, or consolidation of the registrant or any of its significant subsidiaries; and the acquisition or

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57 *See* letter from Chevron.

58 *See*, *e.g.*, letters from UnitedHealth Group, Dunker, Society, DP&W, and GM.

59 *See* letter from GM.

60 *See*, *e.g.*, letters from UnitedHealth Group, Dunker, and Society.

61 *See* letter from Society.

disposition of any material amount of assets otherwise than in the ordinary course of business.[62]

We are revising the disclosure topic regarding transactions and events that affect or may affect the company's operations, including material changes to a registrant's previously disclosed business strategy, to eliminate the requirement to disclose transactions and events that affect or may affect the company's operations. We were persuaded by the commenter who stated that this disclosure would be required under Item 303 of Regulation S-K.[63] We agree that the proposed disclosure requirement could result in repetitive disclosures, which would be contrary to one of our objectives in amending Item 101(a). However, we are adopting as a disclosure topic material changes to a registrant's previously disclosed business strategy. While some commenters indicated that the proposal could result in disparate treatment between registrants that currently provide disclosure of their business strategy and those that do not,[64] we believe that once a registrant has disclosed its business strategy, it is appropriate for it to discuss changes to that strategy, to the extent material to an understanding of the development of the registrant's business. As noted by one commenter, many registrants currently tailor their responses under existing Item 101(a) to provide disclosure regarding their business strategy, although this disclosure is not specifically required.[65] The final amendments build on these

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62 The language of the disclosure topic regarding the results of any bankruptcy, receivership or similar proceedings differs slightly from the proposal by calling for disclosure of the "nature and effects of any material bankruptcy, receivership, or any similar proceeding *with respect to the registrant or any of its significant subsidiaries*." The proposed rule text did not include the italicized language. Because the introductory text to Item 101(a)(1) indicates that the disclosure should be provided with respect to the registrant and its subsidiaries, we are making it explicit that Item 101(a)(1)(ii) disclosure should be provided with respect to registrants and their significant subsidiaries.

63 *See* letter from Chevron.

64 *See*, *e.g.*, letters from UnitedHealth Group, Dunker, and Society.

65 *See* letter from AFL-CIO.

practices. We emphasize, however, that the principles-based approach of the final amendments will provide registrants with the flexibility to determine the appropriate level of detail for these disclosures and should mitigate any disincentives the amendments create for registrants to disclose their business strategy. We are also not adopting a definition of the term "business strategy," as suggested by one commenter,[66] to provide registrants with the flexibility to tailor their disclosures according to their facts and circumstances.

We are not adding a requirement to disclose a company's business strategy annually, contrary to the suggestion of a commenter.[67] Given that the final amendments are intended to make Item 101(a) more principles-based and require disclosure only to the extent material to an understanding of a registrant's business, we believe that requiring annual disclosure of a company's business strategy would be inconsistent with these goals.

In addition, we are not adopting a safe harbor to address the concern of disclosing competitive or sensitive forward-looking information, as recommended by one commenter. We believe the principles-based nature of the final amendments to Item 101(a)(1) will provide registrants with considerable flexibility to tailor their disclosures to avoid disclosing competitively harmful information while still providing material information to investors. In addition, the amendments do not alter the application of existing statutory safe harbor provisions of the Private Securities Litigation Reform Act ("PSLRA") that would be available for forward-looking statements made by registrants.[68] We therefore do not believe a new safe harbor is necessary.

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66 *See* letter from CLA.

67 *See* letter from AFL-CIO.

68 *See* Section 27A of the Securities Act [15 U.S.C. 77z-2 (b)] and Section 21E of the Exchange Act [15 U.S.C. 78u-5(b)].

B. Narrative Description of Business (Item 101(c))

Item 101(c) requires a narrative description of the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment must include ten specific items listed in Item 101(c) (*see* Items (1)-(10) in the list below). Item 101(c) specifies two other items that must be discussed with respect to the registrant's business in general (*see* Items (11)-(12) in the list below), although, where material, the registrant must also identify the segments to which those matters are significant. Item 101(c) requires disclosure of:[69]

(1) Principal products produced and services rendered;

(2) New products or segments;

(3) Sources and availability of raw materials;

(4) Intellectual property;

(5) Seasonality of the business;

(6) Working capital practices;

(7) Dependence on certain customers;

(8) Dollar amount of backlog orders believed to be firm;

(9) Business subject to renegotiation or termination of government contracts;

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[69] Item 101(c)(1) [17 CFR 229.101(c)(1)] specifies that, to the extent material to an understanding of the registrant's business taken as a whole, the description of each segment must include the information specified in paragraphs (c)(i) through (x). Information in paragraphs (c)(xi) through (xiii) is required to be discussed for the registrant's business in general and, when material, the segments to which these matters are significant also must be identified.

(10) Competitive conditions;

(11) The material effects of compliance with environmental laws; and

(12) Number of persons employed.[70]

Many of the enumerated disclosure requirements in Item 101(c) were adopted in 1973.[71] As businesses, markets, and technology have changed since that time, some of the prescribed disclosure topics in Item 101(c) are not relevant to all registrants, and these disclosure requirements may elicit disclosure that is not material to a particular registrant. In the S-K Study, the staff recommended a review of these requirements in light of changes that have occurred in the way businesses operate.[72] In addition, the Concept Release invited comment on whether Item 101(c) continues to provide useful information to investors and how the Item's requirements may be improved.[73]

To facilitate application of our principles-based revisions to Item 101, we proposed to amend Item 101(c) to be more clearly principles-based by replacing the current list of specific items with a non-exclusive list of disclosure topic examples.[74] In developing the proposal, we took into account the comments received on the Concept Release. For example, a number of

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70 The Commission removed and reserved Item 101(c)(1)(xi), which required disclosure of company- and customer-sponsored research and development activities, largely because U.S. GAAP requires similar, but broader, disclosure. *See Disclosure Update and Simplification Final Rule*, Release No. 33-10532 (Aug. 17, 2018) [83 FR 50148 (Oct. 4, 2018) ("DUSTR Adopting Release")*.* Thus, there currently are twelve enumerated disclosure items under Item 101(c).

71 *See New Ventures, Meaningful Disclosure*, Release No. 33-5395 (June 1, 1973) [38 FR 17202 (June 29, 1973)].

72 *See* S-K Study, *supra* note 6, at 99-100.

73 *See* Concept Release, *supra* note 9.

74 We did not propose to amend the disclosure requirements for smaller reporting companies in Item 101(h)(1) through (6). We believe that this approach will continue to permit smaller reporting companies to provide a less detailed description of their business, consistent with the current scaled disclosure requirements for these companies.

commenters on the Concept Release stated that working capital practices might be better addressed in MD&A.[75] Under the proposed amendments to Item 101(c), the revised rule would not explicitly reference the disclosure requirements under Item 101(c)(1)(vi) regarding disclosure of working capital practices, Item 101(c)(1)(ii) requirement regarding disclosure about new segments, or the Item 101(c)(1)(viii) dollar amount of backlog orders believed to be firm. Nevertheless, under the proposed principles-based approach, registrants would have to provide disclosure about these topics, as well as any other topics regarding their business, if they are material to an understanding of the business and not otherwise disclosed. For example, if supply chain finance arrangements used by a registrant are a significant part of its working capital practices, they may be material to understanding the nature of its commercial relationships. While MD&A disclosures on the topic are more focused on the potential material impact of such arrangements on the registrant's periodic cash flows and financial condition, the proposed principles-based approach would call for additional disclosure if material to an understanding of those commercial relationships. We discuss the proposals and our revisions with respect to the final amendments below.[76]

1. Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families, or customers, including governmental customers

a. Proposed Amendments and Comments

We proposed to retain as a listed disclosure topic information regarding revenue-

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75 *See* Proposing Release, *supra* note 3, at 44364.

76 Consistent with the proposal, the final amendments to Item 101(c) no longer explicitly reference the disclosure requirements under Item 101(c)(vi) regarding disclosure of working capital practices; or the Item 101(c)(viii) requirement regarding disclosure about new segments and the dollar amount of backlog orders believed to be firm.

generating activities, products and/or services, and any dependence on key products, services, product families or customers, including governmental customers, to the extent this information is material to an understanding of the registrant's business. We did not receive any comments that addressed this proposal.

b. Final Amendments

We are adopting the amendment as proposed.[77] Although we did not receive any comments on this proposal, feedback in response to the Concept Release indicated that these elements are key to how reasonable investors often evaluate the future prospects of a registrant's business and that highlighting these topics should elicit more informative disclosures.[78] We continue to believe that disclosure regarding revenue-generating activities, products and/or services, and any dependence on key products, services, product families, or customers, including governmental customers, generally would be material to an investment decision.

2. Status of development efforts for new or enhanced products, trends in market demand, and competitive conditions

a. Proposed Amendments and Comments

We proposed to retain as a listed disclosure topic information regarding development efforts for new or enhanced products, trends in market demand, and competitive conditions. We had proposed this disclosure topic, which elicits more granular information of the type currently specified in Item 101(c), in response to comments received on the Concept Release.

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77 In connection with this amendment, the Commission also proposed several conforming amendments to Form S-4. *See* Section II.C.1 of the Proposing Release, *supra* note 3. We did not receive any comments on these conforming amendments and are adopting them as proposed as well.

78 *See* Proposing Release, *supra* note 3, at 44365.

Commenters had recommended more disclosure of a registrant's competitive position, especially the market share of its products and industry trends shaping the nature of competition.[79] Our principles-based approach to this topic was intended to provide registrants with flexibility to disclose this information to the extent material to an understanding of their business. We received a few comments on this proposal.[80] One commenter recommended that the proposal clarify that registrants are not required to disclose proprietary or other sensitive information, which could damage their competitive position.[81] Another commenter recommended that this disclosure topic be revised to include "substantial trends known to the company that may ultimately affect market demand.[82]

b. Final Amendments

We are adopting the amendments as proposed. We are not adding a clarification that the disclosure of proprietary or other sensitive information is not required, as suggested by one commenter. We believe the principles-based nature of Item 101(c) disclosure, which the final amendments are intended to improve, should provide registrants with sufficient flexibility in how they disclose this information, to the extent material, without causing undue harm to their business operations. Indeed, based on our experience with the current rules, we are not aware that registrants have faced significant difficulties providing this disclosure. We are also not adopting revisions to the final amendments to include disclosure of substantial trends known to the company that may ultimately affect market demand, as suggested by one commenter. The

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79 *Id.*

80 *See* letters from Society and Investor Environmental Health Network ("IEHN").

81 *See* letter from Society.

82 *See* letter from IEHN (noting particularly disclosure of trends in the development of peer-reviewed scientific literature demonstrating potential for substantial health or environmental risks associated with the preparer's products or activities).

principles-based disclosure topic should provide registrants with flexibility to disclose information about competition that is material to an understanding of their business. We also note that Item 303(a)(3)(ii) of Regulation S-K requires a registrant to describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations. In addition, if the registrant knows of events that will cause a material change in the relationship between costs and revenues, the change in the relationship must be disclosed under Item 303(a)(3)(ii).[83] Thus, including this disclosure in Item 101(c) could result in duplicative disclosures.

3. Resources material to a registrant's business

Currently, two of the twelve disclosure requirements in Item 101(c) relate to registrants' resources: Item 101(c)(1)(iii) requires disclosure of the sources and availability of raw materials, and Item 101(c)(1)(iv) requires disclosure of the importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises, and concessions held, each to the extent material to an understanding of the registrant's business taken as a whole. We proposed amending these requirements to refocus registrants' disclosure on all resources material to their business. Specifically, we proposed to retain these disclosure topics with minor modifications and combine them into one principles-based, non-exclusive set of examples of information that should be disclosed to extent material to an understanding of a registrant's business as a whole.

a. Raw materials

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[83] We recently proposed amendments to our MD&A disclosure requirements to modernize and enhance MD&A disclosures. *See* MD&A Release, *supra* note 32.

Item 101(c)(1)(iii) currently requires disclosure of the sources and availability of raw materials. We received several comment letters in response to the Concept Release that specifically addressed this requirement.[84] A few commenters on the Concept Release recommended retaining this requirement.[85] One of these commenters specified that the disclosure requirement should be retained with a materiality overlay,[86] while the other commenter stated that disclosure should only be required if raw materials are difficult to obtain.[87] Another commenter on the Concept Release stated that, when material, registrants provide disclosures in response to the specific sub-items in Item 101(c), including sources and availability of raw materials, in the business narrative or elsewhere, including MD&A.[88] We proposed retaining sources and availability of raw materials as a listed disclosure topic in Item 101(c).

(ii). Comments on the Proposed Amendments

We received limited comment on this aspect of the proposed amendments. One commenter supported the proposal, but suggested that it should specifically direct registrants to discuss how climate change will affect access to raw materials.[89] Another commenter stated that the availability of raw materials as a disclosure topic was established at a time when the U.S.

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84 *See* Proposing Release, *supra* note 3, at 44365.

85 *See* letters from Fenwick West LLP (dated Aug. 1, 2016) ("Fenwick") and New York State Society of Certified Public Accountants (dated July 19, 2016) ("NYSSCPA"), available at https://www.sec.gov/comments/s7-06-16/s70616.htm.

86 *See* letter from Fenwick.

87 *See* letter from NYSSCPA.

88 *See* letter from Davis Polk & Wardwell LLP (dated July 22, 2016), available at https://www.sec.gov/comments/s7-06-16/s70616.htm.

89 *See* letter from Southern Environmental Law Center ("SELC").

economy was largely manufacturing-based and is no longer representative of the value drivers of today's technology-based and intangible-based economy.[90]

(iii). Final Amendments

After considering the comments received, we are adopting the amendments as proposed. In accordance with our overall approach to Item 101(c), the final amendments emphasize a principles-based approach and clarify that disclosure regarding sources and availability of raw materials is required only when material to a registrant's business. Although the disclosure topic of raw materials might not be applicable to all registrants, we continue to believe that, for businesses whose products or services depend on raw materials, disclosures regarding such raw materials should be provided to the extent material. The one commenter's suggestion that the final amendments should require all registrants to specifically discuss how climate change will affect access to raw materials is not consistent with the principles-based nature of Item 101(c), so we are not adopting it.

b. The duration and effect of all patents, trademarks, licenses, franchises, and concessions held

(i). Proposed Amendments

Item 101(c)(1)(iv) requires disclosure of the duration and effect of all patents, trademarks, licenses, franchises, and concessions held to the extent material to an understanding of the registrant's business taken as a whole. Since the promulgation of this disclosure requirement, intellectual property has become increasingly important to the business of a broad range of registrants. Correspondingly, many registrants provide detailed disclosure in response to Item 101(c)(1)(iv), although disclosure varies among registrants and across industries. The

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90 *See* letter from CFA Institute.

Concept Release solicited feedback on whether to maintain, expand or revise the current scope of this Item and requested comment on the competitive costs of this disclosure. Numerous commenters supported maintaining the current scope of Item 101(c)(1)(iv),[91] with many of these opposed to expanding this Item based on competitive concerns.[92]

In light of this feedback we proposed to retain as a listed disclosure topic the duration and effect of patents, trademarks, licenses, franchises, and concessions held as non-exclusive types of property that may be material to a registrant's business.

(ii). Comments on the Proposed Amendments

In response to the Commission's request for comment on whether the proposed amendments should include as a disclosure topic the duration and effect of copyright and trade secret protection, one commenter stated that the duration and effect of copyright protection is extrinsic information that is derived from applicable U.S. and foreign copyright laws.[93] This commenter, however, opposed requiring disclosure of the duration of trade secret protection on the ground that this information is generally indefinite as it lasts only as long as the secret is maintained. Another commenter stated that disclosure of a registrant's reliance on copyrights and trade secrets is warranted because such disclosure is significant to an understanding of the

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91 *See*, *e.g.*, letters from 36 Organizations with an Interest in Trade Secret Protection (dated Aug. 8, 2016) ("36 Organizations"), Association of American Publishers (dated July 21, 2016), American Intellectual Property Law Association (dated Aug. 9, 2016) ("American IP Law Association"), Intellectual Property Owners Association (dated July 15, 2016) ("IP Owners Association"), and Financial Services Roundtable (dated July 21, 2016), available at https://www.sec.gov/comments/s7-06-16/s70616.htm.

92 *See*, *e.g.*, letters from 36 Organizations, American IP Law Association, Financial Services Roundtable, and IP Owners Association, available at https://www.sec.gov/comments/s7-06-16/s70616.htm. Item 101(c)(1)(iv) currently does not refer to disclosure of copyrights or trade secrets and these commenters expressed concern that requiring such disclosure would impose substantial costs on registrants and could have an adverse impact on shareholder value.

93 *See* letter from CLA.

registrant's business and strategic plans.[94] Other commenters, however, opposed requiring disclosure of copyrights and trade secrets, contending that such disclosure would not benefit investors and would be costly and time-consuming for registrants to prepare.[95] These concerns are consistent with comments we received on the Concept Release, in which commenters indicated that because copyright and trade secret protection is not contingent on registration, a requirement to disclose even a subset of these two types of intellectual property would force registrants to systematically identify and catalog these types of intellectual property, which could impose substantial costs and require significant time.[96]

(iii). Final Amendment

After consideration of the comments, we are adopting the amendment as proposed. We are retaining, as a non-exclusive example, disclosure about the duration and effect of all patents, trademarks, licenses, franchises, and concessions held to the extent material to an understanding of the registrant's business taken as a whole. We are not expanding the requirement to include the duration and effect of copyright and trade secret protections because of the cost and other concerns highlighted by commenters.

4. A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government

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94 *See* letter from CFA Institute.

95 *See* letters from Society and GM.

96 *See, e.g.,* letters from 36 Organizations, American Intellectual Property Law Association (Aug. 9, 2016), U.S. Chamber of Commerce (July 20, 2016), FedEx Corporation (July 21, 2016), Intellectual Property Owners Association (July 15, 2016), National Association of Manufacturers (July 21, 2016), Association of American Publishers (July 21, 2016), available at https://www.sec.gov/comments/s7-06-16/s70616.htm. *But see* letters from International Integrated Reporting Council (July 20, 2016) and CFA Institute (Oct. 6, 2016) (supporting the inclusion of copyrights under Item 101(c)), available at https://www.sec.gov/comments/s7-06-16/s70616.htm.

a. Proposed Amendment and Comments

Item 101(c)(1)(ix) requires, to the extent material to an understanding of the registrant's business taken as a whole, disclosure of any material portion of a business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government.

Business contracts with agencies of the U.S. government and the various laws and regulations relating to procurement and performance of U.S. government contracts impose terms and rights that are different from those typically found in commercial contracts. In a 1972 Notice to Registrants, the Commission noted that government contracts are subject to renegotiation of profit and to termination for the convenience of the Government.[97] At any given time in the performance of a government contract, an estimate of its profitability may be subject not only to additional costs to be incurred, but also to the outcome of future negotiations or possible claims relating to costs already incurred.[98]

Registrants with U.S. Government contracts tend to disclose that the funding of these contracts is subject to the availability of Congressional appropriations and that, as a result, long-term government contracts are partially funded initially with additional funds committed only as Congress makes further appropriations. These registrants disclose that they may be required to maintain security clearances for facilities and personnel in order to protect classified information. Additionally, these registrants state that they may be subject to routine government audits and investigations, and any deficiencies or illegal activities identified during the audits or

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97 *See Defense and Other Long Term Contracts; Prompt and Accurate Disclosure of Information*, Release No. 33-5263 (June 22, 1972) [37 FR 21464 (Oct. 11, 1972)].

98 *See id*.

investigations may result in the forfeiture or suspension of payments and civil or criminal penalties.

We proposed to retain renegotiation or termination of government contracts as a disclosure topic, citing our continued belief that, when material to a business, disclosure of this information is important for investors. We did not receive any comments that addressed this proposal.

b. Final Amendment

We are adopting the amendment as proposed for the reasons discussed above.

5. The extent to which the business is or may be seasonal

a. Proposed Amendment and Comments

Item 101(c)(1)(v) requires, to the extent material to an understanding of the registrant's business taken as a whole, disclosure of the extent to which the business of the segment is or may be seasonal. Although we recently considered eliminating this disclosure requirement, noting that other Regulation S-K disclosure requirements and U.S. GAAP require disclosures about seasonality in interim periods,[99] we ultimately decided to retain Item 101(c)(1)(v) and instead to delete Instruction 5 to Item 303(b) of Regulation S-K, which also required a discussion of any seasonal aspects that have had a material effect on a registrant's financial condition or results of operations.[100] We proposed to retain this Item out of concern about the

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99 *See Disclosure Update and Simplification Proposed Rule*, Release No. 33-10110 (July 13, 2016) [81 FR 51607 (Aug. 4, 2016)] ("DUSTR Proposing Release"). Public comments on the DUSTR Proposing Release are available at https://www.sec.gov/comments/s7-15-16/s71516.htm.

100 The Commission decided to eliminate Instruction 5 to Item 303(b) because U.S. GAAP in combination with the remainder of Item 303 requires disclosures in interim reports that convey reasonably similar information to the disclosures required by Instruction 5 to Item 303(b). *See* DUSTR Adopting Release, *supra* note 71, at 50169.

potential loss of information in the fourth quarter regarding the extent to which the business of a registrant or its segment(s) is or may be seasonal because U.S. GAAP may not elicit this disclosure.[101]

We received one comment on this aspect of the proposed amendments. The commenter recommended that the Commission require registrants with seasonal businesses to discuss the impact of climate change on their businesses.[102]

b. Final Amendment

We are adopting the amendment as proposed. Consistent with our previous evaluation of this Item, we continue to believe that the seasonality of the business or a segment should be disclosed to the extent it is material to an understanding of the registrant's business. Although a commenter suggested that this non-exclusive example should require disclosure about the impact of climate change on seasonal businesses, consistent with our response to a similar suggestion regarding the raw materials disclosure topic, we are not adding this additional specificity to avoid undermining the principles-based nature of Item 101(c). Our principles-based approach to this disclosure affords registrants sufficient flexibility to address relevant factors that may affect seasonality to the extent material to an understanding of the registrant's business.

6. Compliance with material government regulations, including environmental regulations

a. Proposed Amendment

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101 *See id*. ASC 270-10-45-11 states that entities should consider supplementing interim reports with information for 12-month periods ended at the interim date to avoid the possibility that interim results with material seasonal variations may be taken as fairly indicative of the estimated results for a full fiscal year.

102 *See* letter from SELC.

Item 101(c)(1)(xii) requires disclosure of the material effects of compliance with environmental laws on the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries, as well as any material estimated capital expenditures for the remainder of the fiscal year, the succeeding fiscal year, and such future periods that the registrant deems material.

Pursuant to the National Environmental Policy Act of 1969 ("NEPA"),[103] which mandated consideration of the environment in regulatory action, in 1973, the Commission adopted a new provision to require disclosure of the material effects that compliance with Federal, state, and local environmental laws may have on the capital expenditures, earnings, and competitive position of the registrant, now designated as Item 101(c)(1)(xii).[104] Subsequent litigation[105] concerning both the denial of a rulemaking petition and adoption of the 1973 environmental disclosure requirements resulted in the Commission initiating public proceedings primarily to elicit comments on whether the provisions of NEPA required further rulemaking.[106] As a result of these proceedings, the Commission in 1976 amended the Item 101 requirements to specifically require disclosure of any material estimated capital expenditures for environmental control facilities for the remainder of the registrant's current and succeeding

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103 Pub.L. 91-190, 42 U.S.C. 4321-4347 (Jan. 1, 1970).

104 *See Disclosure with Respect to Compliance with Environmental Requirements and Other Matters*, Release 33-5386 (Apr. 20, 1973) [38 FR 12100 (May 9, 1973)] ("Environmental Disclosure Adopting Release").

105 *See* Natural Resources Defense Council, Inc. v. SEC, 389 F. Supp. 689 (D.D.C. 1974); and Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979), rev'g 432 F. Supp. 1190 (D.D.C. 1977). *See also* U.S. Sec. & Exch. Comm'n, *Staff Report on Corporate Accountability* 1, 251-259 (Comm. Print 1979) ("Staff Report") (providing a description of this litigation).

106 *See Disclosure of Environmental and Other Socially Significant Matters*, Release No. 33-5569 (Feb. 11, 1975) [40 FR 7013 (Feb. 18, 1975)].

fiscal years, and for any further periods that are deemed material.[107]

Although there is no separate line item requiring disclosure of government regulations that may be material to a registrant's business, it is common practice for many registrants to include disclosure regarding such information in response to Item 101(c)(1)(xii). In response to the Concept Release, a few commenters supported requiring registrants to disclose all government regulations material to their business given that many registrants already voluntarily provide such information.[108]

In recognition of this common practice and because we believed this disclosure would provide important information to investors, we proposed including the material effects of compliance with material government regulations, not just environmental laws, as a listed disclosure topic in Item 101(c).

b. Comments on the Proposed Amendment

A number of commenters supported the proposal to include the material effects of compliance with material governmental regulations, not just environmental laws, as a listed disclosure topic in Item 101(c).[109] Several of these commenters affirmed that the proposal was consistent with current market practice and would provide material information to investors.[110]

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107 *See Conclusions and Final Action on Rulemaking Proposals Relating to Environmental Disclosure*, Release No. 33-5704 (May 6, 1976) [41 FR 21632 (May 27, 1976)]. For further discussion of how the Commission has sought to consider environmental effects in its business disclosure requirements, *see infra* Section II.C.2.

108 *See* Concept Release, *supra* note 9. For a more extensive discussion of the related comment letters *see* Section II.B.6 of the Proposing Release, *supra* note 3.

109 *See*, *e.g.*, letters from La Berge, EEI and AGA, Nareit, CCMC, FedEx (expressing support for the comments provided by CCMC), Virginia Harper Ho ("Harper Ho"), American Securities Association ("ASA"), PRI, and Humane Society.

110 *See*, *e.g.*, letters from CCMC, FedEx, and PRI.

One commenter suggested that the Commission should require disclosure of the impact of material government regulations on the business and specify that this must include disclosure about environmental risks.[111] This commenter also recommended the Commission adopt a more prescriptive approach to ensure that this disclosure provides investors with consistent, comparable data about regulatory compliance matters. Other commenters recommended that the Commission should require disclosure of international tax strategies.[112]

One commenter stated that the proposed amendment was confusing because the text of the amendment repeatedly used the term "material" and urged the Commission to clarify the rule text.[113] Another commenter recommended that the rule should define the term "environmental regulations" to include, as examples of regulations warranting disclosure, animal-welfare and wildlife regulations, and regulations relating to climate change.[114]

Several commenters opposed the proposal to include the material effects of compliance with material governmental regulations, not just environmental laws, as a listed disclosure topic in Item 101(c).[115] All of these commenters stated that registrants are already required to disclose the material impact of compliance with material governmental regulations in their MD&A, risk factor, or financial statement disclosure. Some of these commenters also expressed concern that the preparation of this disclosure could be burdensome to registrants and may result in boilerplate disclosure, as registrants might feel compelled to provide lengthy recitations of all of

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111 *See* letter from PRI.

112 *See*, *e.g.*, letters from individuals and entities using Letter Type A and PRI.

113 *See* letter from Nareit.

114 *See* letter from the Humane Society.

115 *See*, *e.g.*, letters from Society, DP&W, FEI and GM.

the laws that affect their business and operations.[116]

c. Final Amendment

After considering the comments received, we are adopting the amendments largely as proposed with certain modifications. Some commenters opposed the proposal, asserting that disclosure of the material impact of compliance with material governmental regulations is required under MD&A or financial statement requirements. Item 101(c)(1), however, seeks to elicit broader disclosure that may be material to an understanding of the registrant's business as a whole, whereas disclosure in a registrant's MD&A or financial statements may focus more narrowly on the specific impact on a registrant's financial results, liquidity and capital resources or balance sheet. As such, we agree with the commenters that supported the proposal and stated that it would provide material information to investors.[117]

The final rule will require, to the extent material to an understanding of the business taken as a whole, disclosure of the material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries. The final rule also will continue to require registrants to include the estimated capital expenditures for environmental control facilities for the current fiscal year and any other subsequent period that is material.

In response to the concerns of a commenter,[118] we have revised the text of the proposed rule to eliminate the second instance of the word "material" that appeared before the term

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116 *See*, *e.g.*, letters from Society, GM and DP&W.

117 *See*, *e.g.*, letters from CCMC, FedEx and PRI.

118 *See* letter from Nareit.

"government."[119] Although we included "material" there to make clear that disclosure should not include a discussion of every regulation that may apply to a registrant, we were persuaded by commenters that the dual use of the term "material" in the text of the proposed amendment could be confusing.[120] The final amendment more closely follows the existing text of Item 101(c)(1)(xii). As we noted in the Proposing Release, while existing Item 101(c)(1)(xii) does not require disclosure of government regulations that are material to a registrant's business, it is common practice for many registrants to include such disclosure in response to the Item. Consequently, we think this formulation will be less likely to cause confusion. In addition, we believe that this principles-based requirement will help provide investors with material information about a registrant's compliance with the government regulations that are material to an understanding of the registrant's business. For this reason, we are not adding prescriptive requirements to the final amendment, such as requiring disclosure of international tax strategies as recommended by some commenters.[121] The principles-based approach of the final rule should improve the ability of each registrant to tailor its disclosure to discuss only those governmental regulations that are of particular importance to it. The Item does not call for, or require, a recitation of every regulation that affects a registrant's business and operations.

With respect to one commenter's suggestion that the final amendment define the term "environmental regulations" to include animal-welfare and wildlife regulations, and regulations relating to climate change,[122] we do not believe that this additional specificity is necessary. One

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119 We have also made other non-substantive, clarifying changes to the text of this disclosure topic.

120 *See supra* note 116.

121 *See*, *e.g.*, letters from individuals and entities using Letter Type A and PRI.

122 *See* letter from the Humane Society.

of the purposes of the final amendment is to make the disclosure of the material effects of compliance with government regulations more principles-based. Although specific categories of government regulations are not identified in the final amendment, disclosure of the material effects of compliance with government regulations, including animal-welfare and wildlife regulations, would be required if material to an understanding of the registrant's business.

7. Human capital disclosure

a. Proposed Amendment

Item 101(c)(1)(xiii) currently requires disclosure of the number of persons employed by the registrant. Some registrants distinguish between the number of full-time and part-time employees, and others specify the number of employees in each department or division. Some registrants with large numbers of employees disclose the approximate number of employees and some registrants discuss their employees' membership in a union or similar organization.

The Concept Release solicited input on this disclosure requirement, requesting feedback on, among other things, whether this numeric disclosure is still important to investors, and what, if any, improvements could be made.[123] Some commenters on the Concept Release recommended retaining and expanding the requirement, while others questioned the continued relevance of the requirement.[124]

Subsequent to the issuance of the Concept Release, we received a rulemaking petition requesting that the Commission adopt new rules, or amend existing rules, to require registrants to disclose information about their human capital management policies, practices and

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123 *See* Concept Release, *supra* note 9, at 23936.

124 *See* Proposing Release, *supra* note 3, at 44369.

performance.[125] This rulemaking petition generated a substantial number of comments supporting increased disclosure of human capital management policies and specific human capital metrics.[126]

In light of the feedback that we received on the Concept Release and the Human Capital Rulemaking Petition, and as part of our efforts to modernize disclosure, we proposed to amend Item 101(c) to replace the current requirement to disclose the number of persons employed by the registrant with a requirement to provide a description of the registrant's human capital resources, including in such description any human capital measures or objectives that management focuses on in managing the business, to the extent such disclosures would be material to an understanding of the registrant's business taken as a whole.[127] In addition, the proposed amendment included non-exclusive examples of human capital measures and objectives that may be material, depending on the nature of the registrant's business and workforce, such as measures or objectives that address the attraction, development, and retention of personnel.

b. Comments on the Proposed Amendment

Many commenters expressed general support for the inclusion of human capital as a

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125 *See* Rulemaking petition to require registrants to disclose information about their human capital management policies, practices and performance, File No. 4-711 (July 6, 2017) ("Human Capital Rulemaking Petition"), available at https://www.sec.gov/rules/petitions/2017/petn4-711.pdf

126 *See* Comments to File No. 4-711 available at https://www.sec.gov/comments/4-711/4-711.htm.

127 *See* Proposing Release, *supra* note 3. The SEC Investor Advisory Committee also recommended that the Commission take measures to improve the disclosure of a registrant's human capital management, and suggested that any disclosure requirements "should be crafted so as to reflect the varied circumstances of different businesses, and to eschew simple 'one-size-fits-all' approaches that obscure more than they add." *Recommendation of the Investor Advisory Committee Human Capital Management Disclosure* (Mar. 28, 2019), available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf.

disclosure topic.[128] Several commenters expressly supported a principles-based approach to human capital disclosure.[129] While supporting the principles-based approach in the proposal, some commenters urged the Commission to proceed with caution and expressed concerns that prescriptive requirements may elicit immaterial disclosures.[130] Many other commenters called for a combination of principles-based and prescriptive requirements that would include disclosure of specified quantitative metrics.[131]

Many other commenters expressed opposition to the proposed principles-based approach to human capital disclosure.[132] Some of these commenters stated that the proposed principles-

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128 *See*, *e.g.*, letters from International Center for Enterprise Engagement ("ICEE"), JT Foxx Reviews Research Team ("JT Foxx"), Intellivest Securities, Inc. , Enhance Product Development, Inc. ("EPD"), the Hashimoto's Solution ("Hashimoto"), Auto Connection Manassas VA ("Auto Connection"), Yoga Burn Challenge ("Yoga Burn"), Sustainability Accounting Standards Board (letter dated Oct. 17, 2019, "SASB 1"), Legal & General Investment Management ("LGIM"), CFA Institute, Breckinridge, Paul Rissman ("Rissman"), LaBerge, E&Y, Oregon State Treasury ("OST"), IEHN, Calvert Research and Management ("Calvert"), Dunker, EEI and AGA, CtW Investment Group ("CtW"), CCMC, FedEx, UnitedHealth Group, Harper Ho, Los Angeles County Employees Retirement Association ("LACERA"), PRI, Society for Human Resource Management ("SHRM"), California State Teachers' Retirement System ("CalSTRS"), Judy Schultz ("Schultz"), DP&W, Hermes Equity Ownership Services Limited ("Hermes"), Better Markets Inc. ("Better Markets"), Willis Towers Watson ("Towers Watson"), AFL-CIO, Mercer, Human Capital Management Coalition ("HCMC"), HR Policy Association ("HR Policy"), Senator Mark Warner, ("Sen. Warner"), Public Citizen, Norges Bank Investment Management ("Norges Bank"), CalPERS, the Forum for Sustainable and Responsible Investment ("SIF"), Domini, New York State Common Retirement Fund ("NYSCRF"), Radiant Value Management ("RVM"), GRI, New York City Comptroller ("NYC Comptroller"), BCI, Timothy G. Coville ("Coville"), JUST Capital, Qin Li, ShareAction, Service Employees International Union ("SEIU"), Catherine Smith ("C. Smith"), and.

129 *See*, *e.g.*, letters from ICEE, CII, LaBerge, SHRM, Towers Watson, Mercer, HR Policy, Hashimoto, EPD, Auto Connection, GRI, Yoga Burn, EEI and AGA, CCMC, C. Smith, SEIU and FedEx.

130 *See*, *e.g.*, letters from SHRM, FedEx, and CCMC.

131 *See*, *e.g.*, letters from LGIM, Calvert, OST, CtW, Harper Ho, LACERA, PRI, CalSTRS, Hermes, Better Markets, AFL-CIO, HCMC, BCI, Sen. Warner, Coville, Norges Bank, CalPERS, SIF, Domini, NYSCRF, CFA Institute, ShareAction, JUST Capital and NYC Comptroller.

132 *See*, *e.g.*, letters from UnitedHealth Group; CLA; David Burton ("Burton"); Amazon Watch, American Federation of State, County and Municipal Employees, As You Sow, California Clean Money Campaign, Campaign for Accountability, Center for American Progress, Congregation of Sisters of St. Agnes, Environment America, Friends Fiduciary Corporation, Global Witness, Green Century Capital Management, Harrington Investments, Inc., Institute for Agriculture and Trade Policy, Interfaith Center on Corporate Responsibility, Jantz Management LLC, Miller/Howard Investments, Inc., New Progressive Alliance, Newground Social Investment, SPC, NorthStar Asset Management, Inc., Northwest Coalition

based approach would not likely elicit meaningful information about human capital practices, or provide sufficiently comparable disclosure, unless grounded in standardized metrics.[133] Several commenters stated that companies disclose a wide range of human capital information and that this could lead to confusion among investors.[134] One commenter stated that requiring human capital disclosure would be inconsistent with the Commission's mission.[135] Some commenters urged the Commission to consider providing interpretive guidance on human capital in light of existing disclosure obligations.[136] Other commenters expressed concern based on their view that the principles-based approach would rely entirely on the judgment of management to determine the substance of the information to disclose and would result in less disclosure being provided than would be the case under a prescriptive disclosure requirement.[137]

In the Proposing Release, we requested comment on whether the proposed amendment should include other non-exclusive examples of human capital measures or objectives, such as the number and types of employees, including the number of full-time, part-time, seasonal, and temporary workers. A number of commenters supported the inclusion of specific human capital

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for Responsible Investment, Oil Change International, OIP Trust, Oxfam America, Pax World Funds, Public Citizen, Railroads & Clearcuts Campaign, Reynders, McVeigh Capital Management LLC, Sierra Club, Teamsters, Tri-State Coalition for Responsible Investment, U.S. PIRG, Union of Concerned Scientists, Women's Institute for Freedom of the Press. ("33 Organizations"); GM; DP&W; Domini; NYSCRF; Public Citizen; RVM; FEI; Schultz; Rissman; Society; ICGN; and Breckinridge.

133 *See*, *e.g.*, letters from Domini, RVM, HCMC, CalPERS, Rissman, LGIM, ICGN, OST, NYSCRF, NYC Comptroller, FEI and LACERA.

134 *See*, *e.g.*, letters from FEI, LACERA, HCMC and NYSCRF.

135 *See* letter from the Heritage Foundation (contending that the mission of the Commission does not include furthering any social, environmental or other criteria).

136 *See*, *e.g.*, letters from GM, Society, DP&W and Chevron.

137 *See*, *e.g.*, letters from HCMC, CalPERS, NYC Comptroller, Domini, NYSCRF, FEI, PRI, LACERA, Breckinridge, ShareAction and SEIU.

management disclosure metric requirements or examples.[138] Many of these commenters emphasized the importance of comparability and stated that the use of different metrics would make it difficult for investors to analyze and compare information.[139] Several commenters recommended that we require specific, or encourage companies to use certain, third-party disclosure standards or frameworks to provide human capital disclosure.[140] One commenter supported the inclusion of non-exclusive examples that do not focus on numerical measurements, and argued that the disclosure requirement should not promote comparability.[141] This commenter stated that because every registrant is different, the way in which each registrant defines and measures human capital related objectives necessarily varies widely.

A number of commenters, also highlighting the limitations of mandating or suggesting certain metrics for the purpose of increasing comparability in this area, opposed the inclusion of either non-exclusive examples or prescriptive human capital management disclosure metrics.[142]

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138 *See*, *e.g.*, letters from Louis E. Matthews, Jr., Schultz, SASB 1, LGIM, IEHN, Dunker, FCLTGlobal ("FCLTGlobal"), PRI, CalSTRS, Better Markets, HCMC, BCI, Sen. Warner, Public Citizen, CalPERS, SIF, Domini, NYSCRF, NYC Comptroller, ICEE, OST, LACERA, Hermes, Burton, SEIU, CtW, ICGN, Towers Watson, AFL-CIO, 33 Organizations, JT Foxx, EPD, Hashimoto, Auto Connection, Yoga Burn, Bec Brideson, Calvert, Breckinridge, CFA Institute, ShareAction, Qin Li, JUST Capital and Letter Type A.

139 *See*, *e.g.*, letters from SASB 1, LGIM, Calvert, E&Y, OST, FCLTGlobal, LACERA, PRI, CalSTRS, Hermes, SEIU, E&Y, Better Markets, HCMC, BCI, Sen. Warner, Coville, Public Citizen, Norges Bank, CalPERS, SIF, Domini, NYSCRF, RVM, Breckinridge, ShareAction, CFA Institute and NYC Comptroller.

140 *See*, *e.g.*, letters from Domini (recommending frameworks published by the International Organization for Standardization, the Global Reporting Initiative, the Sustainability Accounting Standards Board, the Workforce Disclosure Initiative, and the Carbon Disclosure Project), SASB 1, Coville, Norges Bank (recommending the Sustainability Accounting Standards Board framework), Breckinridge (recommending the Sustainability Accounting Standards Board framework) and RVM. *See also*, *e.g.*, letters from GRI, ICEE, SASB 1, Coville, CII, LACERA, Domini, RVM, Breckinridge and Norges Bank.

141 *See* letter from Towers Watson.

142 *See*, *e.g.*, letters from CCMC, FedEx, SHRM, GM, Mercer, Society, HR Policy, DP&W, FEI and Chevron.

Some of these commenters stated that there was no consensus on the most appropriate metrics or methodology for human capital management disclosure.[143] Other commenters expressed concern that a list of non-exclusive examples could be viewed as mandated disclosure, which could result in registrants providing immaterial disclosure.[144]

In the Proposing Release, we also requested comment on whether we should define human capital. Several commenters stated that human capital should be defined,[145] while a few opposed a Commission definition of the term.[146] One of these commenters stated that there were many definitions of human capital and that the concept is often tailored to the circumstances and objectives of individual companies.[147] The other commenter stated that the Commission should resist defining human capital because there is no standard method to assess "human capital management" and because it is a complex concept with many factors influencing human capital management that vary across industries and individual companies.[148]

We also requested comment on whether we should retain the requirement in Item 101(c) for registrants to disclose the number of persons employed by the registrant. Several

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143 *See*, *e.g.*, letters from HR Policy, Society and GM.

144 *See*, *e.g.*, letters from Mercer ("[P]roviding specific examples of the types of measures or objectives that companies focus on in managing their business, such as those that address the attraction, development, and retention of personnel, as proposed, could result in disclosure that is potentially misleading and is less valuable to investors because it is not tailored to a company's specific business or industry."), Towers Watson, and HR Policy.

145 *See*, *e.g.*, letters from CalSTRS, CtW, HCMC, NYC Comptroller, Towers Watson, ICEE and PRI (advocating for defining human capital management as "people's competencies, capabilities and experience, and their motivations to innovate."). *Cf.* letter from Burton ("definition for human capital should include human capital measures or objectives that management focuses on in managing the business").

146 *See* letters from Mercer and HR Policy.

147 *See* letter from HR Policy.

148 *See* letter from Mercer.

commenters urged the Commission to retain the requirement.[149] One of these commenters stated that this disclosure provides investors with valuable information that can be used in assessing productivity growth, compensation measures, and capital allocation.[150] A number of commenters recommended that the Commission require additional information regarding the number of persons employed by the registrant, such as the number of full-time, part-time, and contingent workers; the number of seasonal employees; the ratio of full-time to part-time employees; or the number of domestic and foreign employees.[151] Some commenters, however, stated that the requirement to disclose the number of employees was arbitrary, outdated, and of limited use.[152]

c. Final Amendment

After considering public comments, we are adopting this amendment substantially as proposed with certain modifications. Under the final amendments, Item 101(c) will require, to the extent such disclosure is material to an understanding of the registrant's business taken as a whole, a description of a registrant's human capital resources, including any human capital measures or objectives that the registrant focuses on in managing the business. We believe that, in many cases, human capital disclosure is important information for investors. Human capital is a material resource for many companies and often is a focus of management, in varying ways, and an important driver of performance.

The final amendments identify various human capital measures and objectives that

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149 *See*, *e.g.*, letters from CII, 33 Organizations, PRI and CtW.

150 *See* letter from CtW.

151 *See*, *e.g.*, letters from CalSTRS, Domini, CalPERS, CII, Burton, BCI, NYC Comptroller, ICEE, LGIM, OST, LACERA, PRI, Hermes, SEIU, CFA Institute, CtW, ICGN, Towers Watson, AFL-CIO, HCMC, Sen. Warner, CalPERS, SIF and NYSCRF.

152 *See*, *e.g.*, letters from EEI and AGA, CCMC, Hermes, Better Markets, CalSTRS, FedEx and Mercer.

address the attraction, development, and retention of personnel as non-exclusive examples of subjects that may be material, depending on the nature of the registrant's business and workforce. We emphasize that these are examples of potentially relevant subjects, not mandates. Each registrant's disclosure must be tailored to its unique business, workforce, and facts and circumstances. Consistent with the views expressed by some commenters, we did not include more prescriptive requirements because we recognize that the exact measures and objectives included in human capital management disclosure may evolve over time and may depend, and vary significantly, based on factors such as the industry, the various regions or jurisdictions in which the registrant operates, the general strategic posture of the registrant, including whether and the extent to which the registrant is vertically integrated, as well as the then-current macro-economic and other conditions that affect human capital resources, such as national or global health matters.[153] Although several commenters expressed concern that the principles-based approach could result in less comparability (as compared to a more prescriptive approach), given the varied and evolving nature of human capital considerations, we believe that this approach will likely lead to more meaningful disclosure being provided to investors. Moreover, we do not believe that prescriptive requirements or a designated standard or framework will ensure more comparable disclosure given the variety in registrant operations as well as how registrants define, calculate, and assess human capital measures.[154] Furthermore, we note that

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153 *See, e.g.,* letters from Mercer and HR Policy.

154 *See, e.g.,* U.S. Gov't Accountability Office, GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM (July 2020), *available at* https://www.gao.gov/assets/710/707949.pdf (finding lack of consistency across companies that use the same framework to assess environmental, social, and governance (ESG) matters); Alex Edmans, Grow the Pie: How Great Companies Deliver Both Purpose and Profit (2020) (stating that non-financial measures are inherently incomparable because they depend on a company's unique purpose).

while the final amendments do not require registrants to use a disclosure standard or framework to provide human capital disclosure, as recommended by some commenters,[155] a principles-based approach affords registrants the flexibility to tailor their disclosures to their unique circumstances, including by providing disclosure in accordance with some or all of the components of any current or future standard or framework that facilitates human capital resource disclosure that is material to an understanding of the registrant's business taken as a whole.

We also are not adopting a definition of the term "human capital" as recommended by some commenters because this term may evolve over time and may be defined by different companies in ways that are industry specific. This approach is consistent with the view expressed by a number of commenters that noted that there are many definitions of human capital and that the concept, while generally well understood, is often tailored to the circumstances and objectives of individual companies.[156]

In a change from the proposal, a registrant will need to disclose, to the extent material to an understanding of the registrant's business, the number of persons employed by the registrant. We agree with commenters that this disclosure topic should be retained and that it can provide investors with important and useful information that is material to an understanding of the registrant's business.[157] The number of persons employed by the registrant can help investors assess the size and scale of a registrant's operations as well as changes over time. In addition,

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155 *See*, *e.g.*, letters from GRI, ICEE, SASB 1, Coville, CII, LACERA, Domini, RVM, Breckinridge and Norges Bank.

156 *See, e.g.,* letter from HR Policy and Mercer.

157 *See*, *e.g.*, letters from CII and CtW.

we believe this disclosure will complement, and could provide essential context to, any discussion of a registrant's human capital management. Although many commenters recommended that we expand this disclosure topic to include additional metrics, such as the number of full-time, part-time, and contingent workers, and employee turnover,[158] we are not adopting these prescriptive elements because we believe that they would be inconsistent with our objective to make Item 101(c) more principles-based. We note that, under the principles-based approach we are adopting, to the extent that a measure, for example, of a registrant's part-time employees, full-time employees, independent contractors and contingent workers, and employee turnover, in all or a portion of the registrant's business, is material to an understanding of the registrant's business, the registrant must disclose this information.

C. Legal Proceedings (Item 103)

Item 103 requires disclosure of any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Item 103 also requires disclosure of the name of the court or agency in which the proceedings are pending, the date instituted, and the principal parties thereto and a description of the factual basis alleged to underlie the proceeding and the relief sought. Similar information is to be included for such proceedings known to be contemplated by governmental authorities.

The Commission first adopted a requirement to disclose all pending litigation that may materially affect the value of the security to be offered, describing the origin, nature and name

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158 *See*, *e.g.*, letters from CalSTRS, Domini, CalPERS, CII, Burton, BCI, NYC Comptroller, ICEE, LGIM, OST, LACERA, PRI, Hermes, SEIU, CFA Institute, CtW, ICGN, Towers Watson, AFL-CIO, HCMC, Sen. Warner, CalPERS, SIF and NYSCRF.

of parties to the litigation, as part of Form A-1 in 1933.[159] Over time, this disclosure requirement was expanded to include, among other things, the date the proceeding was instituted, the identity of the responsible court or agency, and a requirement that material bankruptcy proceedings involving the registrant or its significant subsidiaries be described and any material proceeding involving a director, officer, affiliate, or principal security holder.[160] Moreover, in connection with NEPA, the legal proceedings disclosure requirement was expanded to require additional disclosure about environmental matters.[161]

In the Proposing Release, we noted that Item 103 and U.S. GAAP have overlapping disclosure requirements, but that these requirements nonetheless differ in certain respects.[162] Often, in complying with Item 103, registrants repeat some or all of the disclosures provided in the notes to the financial statements under U.S. GAAP or include a cross-reference thereto. In the DUSTR Proposing Release, the Commission solicited comment concerning whether to retain, modify, eliminate, or refer the Item 103 disclosure requirements to the Financial Accounting Standards Board for potential incorporation into U.S. GAAP.[163] Many of the commenters on the DUSTR Proposing Release opposed the integration of Item 103 into U.S. GAAP.[164]

In response to these concerns, the Commission decided to retain the disclosure

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159 *See* Form A-1, Item 17, adopted in Release No. 33-5 (July 6, 1933) [not published in the Federal Register].

160 *See* Proposing Release, supra note 3, at 44372.

161 *See* Environmental Disclosure Adopting Release, *supra* note 107.

162 *See* Proposing Release, *supra* note 3, at 44373.

163 *See Disclosure Update and Simplification Proposed Rule*, Release No. 33-10110 (July 13, 2016) [81 FR 51607 (Aug. 4, 2016)] ("DUSTR Proposing Release") at 51633.

164 *See* Proposing Release, *supra* note 3, at 44372.

requirements in Item 103, stating that further consideration was warranted with respect to the implications of potential changes to these requirements.[165] Given the concerns expressed by commenters in response to the DUSTR Proposing Release, and after further consideration of how to improve the disclosure requirements in Item 103, we proposed the following amendments to Item 103.

1. Expressly provide for the use of hyperlinks or cross-references to avoid repetitive disclosure

a. Proposed Amendment

In an effort to encourage registrants to avoid duplicative disclosure, we proposed to amend Item 103 to expressly state that this disclosure may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document, such as in Management's Discussion & Analysis (MD&A), Risk Factors, or notes to the financial statements.

b. Comments on the Proposed Amendment

Many commenters supported the use of hyperlinks or cross-references to provide legal proceedings disclosure and to avoid repetitive disclosure.[166] Several commenters indicated that this approach would help decrease duplicative disclosures in filings.[167] Other commenters stated that using hyperlinks would improve the navigability of documents.[168] One commenter stated that many registrants commonly cross-reference to disclosures concerning legal proceedings

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165 *See* DUSTR Adopting Release, *supra* note 71.

166 *See*, *e.g.*, letters from IBC, CLA, EEI and AGA, DP&W, Nareit, CCMC, FedEx, CII, Society, GM, NYC Bar Association, Nasdaq, Chevron, and ASA.

167 *See*, *e.g.*, letters from EEI and AGA, IBC, CCMC, ASA, Chevron and Nasdaq.

168 *See*, *e.g.*, letters from Society, GM and Nasdaq.

contained in the notes to the financial statements or elsewhere in a filing.[169]

Another commenter, although supportive of this proposal, expressed concern that the use of multiple hyperlinks or cross-references could increase search costs for investors who would have to spend additional time retrieving and piecing together disclosures located in different sections of a filing.[170] This commenter recommended that the amendment place limits on a registrant's use of multiple hyperlinks.

One commenter expressed opposition to the use of hyperlinks to provide legal proceedings disclosure because it would result in "search expeditions" to find the disclosure.[171] This commenter claimed that a registrant is best positioned to determine the most effective means to organize and present information in its filing to investors. Another commenter claimed that duplicative information was not problematic if such disclosures were consistent throughout the filing. In addition, this commenter indicated that the proposal did not address inaccurate or inactive hyperlinks.[172]

c. Final Amendment

We are adopting the amendment as proposed. The final rules will clarify that registrants are permitted to provide disclosure responsive to Item 103 by hyperlink or cross-reference to legal proceedings disclosure elsewhere in the document, such as in MD&A, Risk Factors, or a note to the financial statements.

We do not believe it is necessary to place a restriction on the ability of registrants to use

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169 *See* letter from FEI.

170 *See* letter from CII.

171 *See* letter from ICGN.

172 *See* letter from CalPERS.

multiple hyperlinks to provide disclosure of legal proceedings pursuant to revised Item 103 or address inactive hyperlinks as suggested by some commenters,[173] because a hyperlink used in response to Item 103 would be an internal hyperlink that connects a reader to a different section within the same document or web page (and also would be less likely to become broken or inactive) as opposed to an external hyperlink that connects a reader to a different document. Clarifying that registrants can use hyperlinks furthers a primary goal of the proposal to reduce duplicative disclosure. As we noted in the Proposing Release, in order to comply with existing Item 103, many registrants commonly repeat some or all of the disclosures that are provided in the notes to the financial statements under U.S. GAAP or include a cross-reference to those disclosures. We believe placing restrictions on the use of hyperlinks or cross-references would reduce the flexibility of registrants to present this information in a manner that they deem to be the most effective.

2. Updated disclosure threshold for environmental proceedings in which the government is a party

a. Proposed Amendments

Instruction 5.C. to Item 103 specifically requires registrants to disclose any proceeding under environmental laws to which a governmental authority is a party unless the registrant reasonably believes it will not result in sanctions of $100,000 or more; provided, however, that such proceedings which are similar in nature may be grouped and described generally. The Commission added this requirement to Item 103 in 1982.[174] Since that time, the $100,000

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173 *See* letters from CII and CalPERS.

174 *See Adoption of Integrated Disclosure System*, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380 (Mar. 16, 1982)] ("1982 Integrated Disclosure Adopting Release").

disclosure threshold for environmental proceedings in which the government is a party has not been changed. We proposed to increase this threshold to $300,000 to adjust it for inflation.[175] In addition, we proposed to reorganize Item 103 to incorporate its instructions into the text of the Item.

b. Comments on the Proposed Amendments

Comments on the proposed amendment were mixed. Several commenters supported the proposal to revise the $100,000 threshold for environmental proceedings to which the government is a party to $300,000 to adjust for inflation, or supported the retention of a quantitative threshold without recommending a specific amount.[176] One of these commenters concurred that a bright-line disclosure threshold provides a useful benchmark and promotes comparability.[177] Another commenter, while supportive of the increased threshold, recommended that the Commission consider whether the fixed dollar amount should be eliminated in favor of a materiality standard.[178] Other commenters recommended that the threshold should be periodically indexed for inflation.[179] A few commenters suggested adopting a hybrid approach of requiring disclosure of any fine above a quantitative threshold of at least $300,000 that is determined to be material.[180]

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175 Starting from May 1981, the month the release in which the $100,000 amount was first published, Commission staff used the Consumer Price Index (CPI) Inflation Calculator (available at https://data.bls.gov/cgi-bin/cpicalc.pl) to calculate the inflation adjusted amount to be $285,180.40 as of May 2019. For ease of reference, the Commission rounded this figure to $300,000.

176 *See*, *e.g.*, letters from Harper Ho, SELC, NYC Bar Association and Nasdaq.

177 *See* letter from SELC.

178 *See* letter from Nasdaq.

179 *See*, *e.g.*, letters from DP&W, Society and GM.

180 *See*, *e.g.*, letters from Society and DP&W.

Many commenters opposed the proposal to revise the $100,000 threshold to $300,000 to adjust for inflation.[181] Several of these commenters recommended that the proposed amendment use a materiality-based standard rather than a fixed dollar amount.[182] Some of these commenters recommended that the proposed amendment include a non-exhaustive list of qualitative factors that a registrant should consider when assessing the materiality of an environmental proceeding.[183] These commenters suggested that such factors could include whether a fine brought by a governmental authority is indicative of potentially significant environmental compliance problems and whether the fine relates to conduct for which the company previously has been sanctioned. These commenters also suggested that if the Commission were to retain a quantitative threshold, we should correlate the threshold to a registrant's market capitalization or some other benchmark that may be more indicative of materiality on a company-specific basis.[184] Some of these commenters stated that the use of a materiality-based standard would eliminate the guesswork to determine whether a potential monetary sanction will equal or exceed the dollar threshold and require disclosure.[185] Several commenters that supported a materiality-based threshold stated that one-size-fits-all quantitative thresholds are arbitrary and result in disclosure that may not be material to investors and can obscure other, more meaningful information about a company's material legal proceedings.[186]

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181 *See*, *e.g.*, letters from CII, 33 Organizations, E&Y, IEHN, Society, DP&W, CCMC, NYSCRF, EEI and AGA, David Young, FedEx, FEI, Chevron, CalPERS, Humane Society, Domini, PRI, CFA Institute and GM.

182 *See*, *e.g.*, letters from E&Y, Society, DP&W, CCMC, FedEx, Chevron and GM.

183 *See* letters from Society, DP&W and GM.

184 *Id*.

185 *See* letters from Society and DP&W.

186 *See*, *e.g.*, letters from Society and DP&W.

Other commenters, however, opposed the use of a materiality standard for environmental proceedings and stated that larger registrants likely would not provide any disclosure of environmental proceedings under Item 103.[187] A few commenters recommended that we retain the current $100,000 threshold.[188] Several commenters expressed concerns that the proposed $300,000 threshold may result in reduced environmental proceedings disclosure.[189]

We also received comments that supported increasing the disclosure threshold above $300,000.[190] However, these commenters did not believe that the threshold should be a fixed dollar amount. These commenters stated that it was more burdensome for larger registrants to gather and disclose environmental proceedings based on a universal fixed threshold applicable to all registrants as such a threshold would likely not be material to larger registrants. These commenters recommended using a threshold that was the greater of $1 million or an amount that was material to the registrant.[191] These commenters stated that such an approach would ensure that information disclosed is useful to investors without the risk of being overly burdensome to the preparers of filings or becoming obsolete due to passage of time.

c. Final Amendment

After considering the public comments, we are adopting the amendments to reorganize

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187 *See*, *e.g.*, letters from CalPERS and PRI.

188 *See*, *e.g.*, letters from CalPERS and Humane Society (suggesting that the $100,000 threshold be maintained or adjusted to reflect an actual data-driven dollar amount that more accurately represents a division between environmental proceedings that pose material risks to businesses and those that do not).

189 *See*, *e.g.*, letters from IEHN, Public Citizen, CalPERS, Domini and PRI.

190 *See* letter from EEI and AGA.

191 *Id*.

Item 103 to eliminate the current instructions to the Item and incorporate their contents in the text of Item 103 as proposed. In addition, as discussed in more detail below, we are adopting a modified disclosure threshold that increases the existing quantitative threshold but that also affords a registrant some flexibility by providing a range within which the registrant can select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings.[192]

The Commission has in the past considered and received feedback on a materiality standard for environmental disclosures.[193] As the Commission noted when it first adopted the $100,000 threshold for disclosure of environmental proceedings in 1981, disclosure of fines by governmental authorities may be of particular importance in assessing a registrant's environmental compliance, as governmental fines may be more indicative of possible illegality and conduct contrary to public policy.[194] At the same time, as pointed out by several commenters on the proposal, for many registrants a one-size-fits-all quantitative threshold may result in the disclosure of information that is not material in assessing whether a registrant has significant environmental compliance problems.[195]

We further observe that environmental proceedings often can be complex from a factual

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192 We are also amending Schedule 14A to update a cross-reference to the instructions to Item 103.

193 For example, in 1996, the Task Force on Disclosure Simplification recommended replacing the $100,000 threshold with a general materiality standard or, alternatively, recommended raising the dollar threshold. *See Report of the Task Force on Disclosure Simplification* (Mar. 5, 1996), available at https://www.sec.gov/news/studies/smpl.htm. More recently, in 2016, the Commission received feedback from commenters on the DUSTR Proposing Release that opposed the elimination of any bright-line thresholds in Commission disclosure requirements because the thresholds establish a baseline of disclosure for all registrants in certain areas. *See* DUSTR Proposing Release, *supra* note 99.

194 *See Proposed Amendments to Item 5 of Regulation S-K Regarding Disclosure of Certain Environmental Proceedings*, Release No. 33-6315 (May 5, 1981) [46 FR 25638 (May 8, 1981)].

195 *See*, *e.g.*, letters from Society and DP&W.

and legal standpoint. A bright-line test can help registrants assess whether a particular proceeding is subject to disclosure and provide certainty about when disclosure is required. However, we also recognize that a single numerical threshold may result in some disclosures that are not material.

After weighing these various considerations, we are persuaded by commenters who suggested a hybrid approach that includes a quantitative threshold while also providing registrants with the flexibility to apply a more tailored disclosure threshold that would best accomplish the Commission's objectives.[196] We believe a hybrid approach will continue to elicit information that is important to investors in assessing a registrant's environmental compliance while enabling registrants to apply a disclosure threshold that is more indicative of materiality on a company-specific basis. For these reasons, we are adopting a modified disclosure requirement for environmental proceedings involving monetary sanctions that sets forth a quantitative disclosure threshold range within which registrants may determine a threshold that will result in disclosure of material information concerning environmental proceedings.

Accordingly, under the final rule, disclosure will be required for any proceeding that involves potential monetary sanctions of $300,000 or more, or at the election of the registrant, such other amount that the registrant determines is reasonably designed to result in disclosure of any such proceeding that is material to its business or financial condition. However, irrespective of any alternative threshold adopted by the registrant, disclosure will be required in all cases for any proceeding when the potential monetary sanctions exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis.

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196 *See supra* note 184.

Furthermore, if a registrant chooses to use a threshold other than the $300,000 threshold, it must disclose this threshold (including any change thereto) in each annual and quarterly report. We believe this approach avoids a mandatory one-size-fits-all disclosure threshold that may potentially result in the disclosure of information that is not material by allowing registrants to determine a company-specific disclosure threshold that is more relevant to their particular circumstances.

We acknowledge commenters' concerns that use of a materiality standard for environmental proceedings could result in larger registrants providing less disclosure under Item 103. For that reason, the final rule stipulates that the alternative disclosure threshold may not exceed certain parameters. The sliding-scale standard of the lesser of $1 million or one percent of the current assets builds on commenter suggestions to use a higher dollar threshold, such as $1 million, or a company-specific benchmark that scales with the size of the company. These parameters, together with the bright-line $300,000 threshold, are intended to ensure that investors continue to receive relevant information about environmental sanctions while also realizing the benefits of a more principles-based approach.

D. Risk Factors (Item 105)

Item 105 requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky and specifies that the discussion should be concise and organized logically.[197] The principles-based requirement further directs registrants to explain how each risk affects the registrant or the securities being offered, discourages

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[197] Smaller reporting companies are not required to provide the information under Item 105 in their Exchange Act filings on Form 10 [17 CFR 249.210], Form 10-K [17 CFR 249.310], and Form 10-Q [17 CFR 249.308a].

disclosure of risks that could apply generically to any registrant, and requires registrants to set forth each risk factor under a sub-caption that adequately describes the risk.

In proposing amendments to Item 105, we aimed to address the lengthy and generic nature of the risk factor disclosure presented by many registrants. Although the length and number of risk factors disclosed by registrants vary, some recent studies have indicated that risk factor disclosures have increased over time.[198]

The inclusion of generic, boilerplate risks that could apply to any offering or registrant appears to contribute to the increased length of risk factor disclosure. Although Item 105 instructs registrants not to present risks that could apply generically to any registrant, and despite longstanding Commission and staff guidance stating that risk factors should be focused on the "most significant" risks and should not be boilerplate,[199] it is not uncommon for companies to include generic risks. Registrants often disclose risk factors that are similar to those used by others in their industry without tailoring the disclosure to their circumstances and particular risk profile.

To address these concerns, we proposed the following amendments to the Item 105 risk factor disclosure requirement.

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198 For example, one study found that registrants increased the length of risk factor disclosures from 2006 to 2014 by more than 50 percent in terms of word count, compared to the word count in other sections of Form 10-K that increased only by about ten percent, and that this increase in risk factor word count may not be associated with better disclosure. *See* Anne Beatty et al., *Are Risk Factor Disclosures Still Relevant? Evidence from Market Reactions to Risk Factor Disclosures Before and After the Financial Crisis*, 36 CONTEMP. ACCT. RES., 805 (2019). To examine the "informativeness" of risk factor disclosures, the authors of this study analyzed risk factor disclosures about financial constraints and argue that as litigation risk increased during and after the 2008 financial crisis, registrants were more likely to disclose immaterial risks, resulting in a deterioration of disclosure quality.

199 *See*, *e.g.*, *Plain English Disclosure*, Release No. 33-7497 (Jan. 28, 1998) [63 FR 6370 (Feb. 6, 1998)] ("Plain English Disclosure Adopting Release"). *See also* Updated Staff Legal Bulletin No. 7: Plain English Disclosure (June 7, 1999), available at https://www.sec.gov/interps/legal/cfslb7a.htm.

1. Summary risk factor disclosure if the risk factor section exceeds 15 pages

a. Proposed Amendment

As a way of addressing the length of risk factor disclosure, the Commission has previously considered requiring a page limit for risk factor disclosure.[200] However, comments received in response to prior initiatives have dissuaded the Commission from adopting such a requirement. For example, while the Concept Release did not seek specific feedback on reducing or limiting the length of risk factor disclosure, several commenters on the Concept Release nonetheless opposed a page limit.[201] Commenters on the Concept Release attributed the growing length of risk factor disclosure to the fear of litigation for failing to disclose risks if events turn negative.[202] Similar comments were received in response to the Disclosure Effectiveness Initiative's general solicitation of comment.[203]

Given the increasing length of risk factor disclosure and after considering the feedback on the Concept Release, we proposed to amend Item 105 to require summary risk factor disclosure in the forepart of the document if the risk factor section exceeds 15 pages.

b. Comments on the Proposed Amendment

Several commenters supported the proposal to require summary risk factor disclosure.[204] One commenter stated that a summary would enhance readability and make documents

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200 For example, as part of the *Plain English Disclosure* rulemaking, the Commission solicited comment on whether to limit risk factor disclosure to a specific number of risk factors or a specific number of pages. *See Plain English Disclosure*, Release No. 33-7380 (Jan. 14, 1997), [62 FR 3152, 3163 (Jan. 21, 1997)]. The Commission ultimately did not adopt such limits on risk factor disclosure in that rulemaking. *See* Plain English Disclosure Adopting Release, 63 FR at 6372.

201 *See* Proposing Release, *supra* note 3, at 44375.

202 *See id*.

203 *See id*.

204 *See*, *e.g.*, letters from CII, E&Y, Better Markets, CCMC, CFA Institute and David Young.

containing risk factor disclosure more user-friendly and recommended a lower threshold based on investor-testing.[205] Another commenter recommended that summary risk factor disclosure should be required for all registrants.[206]

A number of commenters opposed the proposal.[207] Several of these commenters expressed concern that investors may focus only on the risk factor summary, which may give them an imprecise understanding of the risks.[208] A few commenters stated that the proposed risk factor summary would not enhance the readability of the document.[209] One of these commenters suggested that the risk factor summary could result in investors discounting the full risk factor presentation.[210] Another commenter stated that registrants would provide lengthy summaries of their risks out of concern about the potential liability for any omissions in their disclosure.[211] Other commenters stated that grouping similar risk factors and including subheadings would achieve the objective of enhancing the readability of risk factors, making a summary duplicative.[212]

Several commenters emphasized that many registrants decide to provide lengthy risk factor disclosure because they believe this will help limit their legal exposure.[213] One of these

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205 *See* letter from Better Markets.

206 *See* letter from CFA Institute.

207 *See*, *e.g.*, letters from CalPERS, International Bancshares, Society, Nareit, UnitedHealth Group, CLA, ICGN, DP&W, and FEI.

208 *See*, *e.g.*, letters from IBC, ICGN, Society, CLA and FEI.

209 *See* letters from Society and DP&W.

210 *See* letter from DP&W.

211 *See* letter from Nareit.

212 *See*, *e.g.*, letters from UnitedHealth Group, Nareit, and Society.

213 *See*, *e.g.*, letters from CCMC, FEI and Allen Huang ("Huang").

commenters stated that many registrants have risk factors that exceed 15 pages in order to provide adequate disclosure about risks that are important for investors to be aware of and to limit legal exposure.[214] This commenter stated that a risk factor summary would not include the appropriate level of detail necessary to understand fully a registrant's risk factors and could open up companies to potential litigation. Another commenter stated that the proposal would not eliminate boilerplate disclosure.[215] One commenter recommended that summary risk factor disclosure be optional.[216]

Another commenter expressed concern that the proposal to require registrants to summarize the "principal" risk factors would effectively require registrants to rank their risk factors, which some registrants may find difficult.[217] Yet another commenter expressed concern that providing summary risk factor disclosure could be burdensome on registrants and stated that the proposal could discourage some companies from going public.[218]

c. Final Amendment

We are adopting the amendments substantially as proposed with a modification in response to comments received. Under the final amendments, if a registrant's risk factor disclosure exceeds 15 pages, Item 105(b) will require in the forepart of the document a series of concise, bulleted or numbered statements summarizing the principal factors that make an

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214 *See* letter from FEI.

215 *See* letter from ICGN.

216 *See* letter from UnitedHealth Group.

217 *See* letter from Nareit.

218 *See* letter from Society.

investment in the registrant or offering speculative or risky.[219] We believe specifying this format for the risk factor summary will avoid concerns that the requirement could lead to lengthy summaries or result in investors discounting the full risk factor presentation. In a change from the proposal, and for similar reasons, the final amendments limit the risk summary to no more than two pages. We believe that imposing a page limit on the risk summary should lessen the burden of preparing the summary and also act as an incentive for registrants to give due consideration to the risk factors that are material to investors. Because the risk summary is not required to contain all of the risk factors identified in the full risk factor discussion, registrants may prioritize certain risks and omit others. Nonetheless, we believe that a summary of the principal risks will help investors navigate lengthy risk factor disclosure that exceeds 15 pages and enhance the readability and usefulness of the disclosure for investors. We also note that the requirement to provide a risk factor summary may create an incentive for registrants to reduce the length of their risk factor discussion to avoid triggering the summary requirement, to the extent that such an incentive outweighs perceived litigation risks.

With respect to commenters' concerns that the risk factor summary would require registrants to rank their risk factors or would not include the appropriate level of detail necessary to fully understand a registrant's risks and could subject companies to potential litigation,[220] we note that the final amendment is similar to other disclosure requirements under

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219 Item 3(b) to Form S-11 [17 CFR 239.18] includes such a requirement, stating that where appropriate to a clear understanding by investors, an introductory statement shall be made in the forepart of the prospectus, in a series of short, concise paragraphs, summarizing the principal factors which make the offering speculative. The risk factor summary included in a Form S-11 filing typically consists of a series of bulleted or numbered statements comprising no more than one page on average. Given our experience with this format in the Form S-11 context, we think it provides an appropriate model for the summary risk factor presentation required under the final amendments.

220 *See* letters from FEI and Nareit.

our rules that require disclosure of a summary.[221] Based on Commission staff experience with those rules, we believe that a summary will not detract from a registrant's more extensive disclosure elsewhere in a filing or subject a registrant to greater litigation risk. Instead, we believe a summary will enhance the ability of investors to process relevant information and will focus registrants on disclosing material risks.

Finally, although some commenters suggested a lower threshold for triggering the summary risk factor disclosure or requiring the summary in all instances,[222] we continue to believe that the 15-page threshold is an appropriate threshold. Based on an analysis of filings, Commission staff estimates that the 15-page threshold would affect approximately 40 percent of filers.[223] Thus, if registrants maintain the same length of their risk factor disclosure, the final amendments will result in summary risk factor disclosure being provided in a significant number of filings, without imposing undue costs on registrants with less complex risk profiles.

2. Replace the requirement to disclose the "most significant" factors with the "material" factors

a. Proposed Amendment

Since the Commission first published guidance on risk factor disclosure in 1964,[224] it has underscored that risk factor disclosure should be focused on the "most significant" or "principal" factors that make a registrant's securities speculative or risky.[225] Notwithstanding

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221 *See*, *e.g.*, Item 3(b) to Form S-11 and the optional summary in Item 16 to Form 10-K.

222 *See, e.g.,* letter from Better Markets.

223 *See* Proposing Release, *supra* note 3, at 44382-44383.

224 *See Guides for Preparation and Filing of Registration Statements*, Release No. 33-4666 (Feb. 7, 1964) [29 FR 2490 (Feb. 15, 1964)] ("1964 Guides").

225 "Principal" was the term used in the 1982 Integrated Disclosure Adopting Release and "most significant" was the term used in the Plain English Disclosure Adopting Release.

this additional guidance, the length of risk factor disclosure and the number of risks disclosed has increased in recent years.

We proposed to amend Item 105 to change the standard for disclosure from the "most significant" risks to "material" risks[226] to focus registrants on disclosing the risks to which reasonable investors would attach importance in making investment or voting decisions.

b. Comments on the Proposed Amendment

Comments on this proposal were generally supportive. Many commenters expressed support for replacing the requirement to discuss the "most significant" risks with "material" risks.[227] Some commenters stated that changing to a materiality standard would significantly enhance the informative value of this disclosure.[228] Another commenter stated that this proposal could reduce or eliminate generic risk factors.[229] A different commenter conditionally supported the proposal, recommending that we revise the definition of "material" to include "information in which there is a substantial likelihood that disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available in deciding how to vote or make an investment decision."[230] This commenter

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226 Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 12b-2 [17 CFR 240. 12b-2] both generally define materiality as information to which there is a substantial likelihood that a reasonable investor would attached important in it investment decision.

227 *See*, *e.g.*, letters from Harper Ho, Burton, NYC Bar Association, GRI, IBC, Better Markets, Nareit, David Young, Nasdaq, CFA Institute and Humane Society.

228 *See*, *e.g.*, letters from IBC and David Young.

229 *See* letter from Nasdaq.

230 *See* letter from CII. *Cf.* letter from CalPERS (requesting that the Commission clarify and simplify the definition of materiality and use "the definition for materiality that is used in Regulation S-X. Under Regulation S-X, Rule 1-02(0), material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters about which an average prudent investor ought reasonably to be informed.").

expressed concern that the current definition excludes consideration of voting decisions.

A few commenters opposed the proposed amendment.[231] One of these commenters stated that the other proposed amendments to Item 105 would adequately address the increase in risk factor disclosure without the need to revise the current disclosure standard.[232] Another commenter stated that registrants are subject to litigation over immaterial misstatements or omissions and suggested that, therefore, registrants may prepare their risk factors to address many risks, including risks that are not material.[233] This commenter further expressed concern that a change from the current disclosure standard could create a presumption of materiality in the risk factor section that could lead to some registrants choosing to disclose fewer risks.

Other commenters stated that changing the disclosure standard from "most significant" to "material" would likely not meaningfully reduce the amount of risk factor disclosures in filings.[234] One commenter recommended that registrants should be required to disclose cybersecurity risk.[235]

c. Final Amendment

After considering the comments, we are adopting the amendment as proposed. Under the final amendment, registrants will be required to disclose the material factors that make an investment in the registrant or offering speculative or risky. We believe that the final amendment will result in risk factor disclosure that is more tailored to the particular facts and

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231 *See*, *e.g.*, letters from CCMC, AFL-CIO and Chevron.

232 *See* letter from AFL-CIO.

233 *See* letter from CCMC.

234 *See*, *e.g.*, letters from Chevron and FEI.

235 *See* letter from Better Markets.

circumstances of each registrant, which should reduce the disclosure of generic risk factors and potentially shorten the length of the risk factor discussion, to the benefit of both investors and registrants.[236] Consistent with this principles-based approach, we are not adding a specific requirement to disclose cybersecurity risk as recommended by a commenter.[237] Although certain commenters expressed concerns about the use of the term "material,"[238] we do not believe that the use of that term would be too narrow or would lead to the disclosure of fewer risks. Materiality is a broad concept that encompasses both investment and voting decisions. As the Commission explained in the Concept Release, the concept of materiality is used throughout the federal securities laws. The Supreme Court has held that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision.[239] The Court further explained that information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available.[240] The term "material" as used in the final amendments to Item

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236 At the same time, we do not expect the final amendment will discourage registrants from disclosing material risks that would enable investors to make informed investment decisions.

237 *See* letter from Better Markets.

238 *See*, *e.g.*, letters from CCMC, CII and CalPERS.

239 *See Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). In *TSC Industries*, the Supreme Court adopted a standard for materiality in connection with proxy statement disclosure under Schedule 14A and Rule 14a–9 of the Exchange Act. 426 U.S. at 449 at n. 10 (. [T]he SEC's view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability is entitled to consideration [and] [t]he standard we adopt is supported by the SEC.").

240 *See Matrixx Initiatives, Inc. v. Siracusano*, 131 U.S. 1309, 1318 (2011) quoting *TSC Industries*, 426 U.S. at 449). In *Matrixx Initiatives*, the Court applied the materiality standard, as set forth in *TSC Industries* and *Basic*. In articulating these standards, the Supreme Court recognized that setting too low of a materiality standard for purposes of liability could cause management to "bury shareholders in an avalanche of trivial information." *Id.* at 1318 (quoting *TSC Industries*,426 U.S. at 448–449).

105, as well as in the amendments to Items 101 and 103, is defined under Rule 12b-2 of the Exchange Act and Rule 405 of the Securities Act. As the Commission has previously stated, the definitions of "material" in Rule 12b-2 and Rule 405 are consistent with the Supreme Court's holding in *TSC Industries*.[241]

3. Require registrants to organize risk factors under relevant headings

a. Proposed Amendment

Since 1964, the Commission has periodically emphasized the importance of organized and concise risk factor disclosure.[242] Most recently, in the Concept Release, the Commission solicited public input on ways in which we could improve the organization of registrants' risk factor disclosure to help investors better navigate the disclosure.[243]

After considering the comments received on the Concept Release, we proposed to amend Item 105 to require registrants to organize their risk factor disclosure under relevant headings in addition to the subcaptions that are currently required. In addition, the proposed amendments would require registrants to present risks that could apply to any registrant or any offering at the end of the risk factor section under a separate caption entitled "General Risk Factors." The proposed amendments were intended to improve the organization of risk factor disclosure in an effort to help readers comprehend lengthy risk factor disclosures.

b. Comments on the Proposed Amendment

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241 *See* Concept Release, *supra* note 9, at 23926; *see also*, MD&A Release *supra* note 32.

242 *See*, *e.g.*, 1964 Guides, *supra* note 224; 1982 Integrated Disclosure Adopting Release, *supra* note 174; and *Securities Offering Reform*, Release No. 33-8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)].

243 *See* Concept Release, *supra* note 9, at 23956.

Many commenters supported organizing risk factors under relevant headings.[244] Several commenters stated that this proposal would make risk factor disclosure more user-friendly and improve the readability of this disclosure.[245] One commenter stated that the proposal would enable investors to more easily discern those risk factors that are more general in nature.[246] Other commenters stated that many registrants already categorize their risk factors.[247]

Some commenters opposed organizing risk factors under relevant headings.[248] One commenter stated that organizing risk factors under relevant headings could result in less investor-friendly disclosure because it would preclude the practice that many registrants currently employ, which is to organize risks in order of materiality.[249] This commenter stated that registrants should have the flexibility to organize risk factors in a way that a registrant believes is most useful to investors.

Comments were mixed on the proposed amendment to require registrants to disclose generic risk factors at the end of the risk factor section under a separate "General Risk Factors" caption. A number of commenters agreed with the proposed amendment.[250] Several commenters, however, opposed this aspect of the proposal, or expressed concern about it.[251]

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244 *See*, *e.g.*, letters from UnitedHealth Group, CII, AGA and EEI, Better Markets, Society, BCI, Nareit, CCMC, FEI, Chevron, NYC Bar Association, CFA Institute and Nasdaq.

245 *See*, *e.g.*, letters from CII, Better Markets, Society, Nareit, Chevron and Nasdaq.

246 *See* letter from UnitedHealth Group.

247 *See*, *e.g.*, letters from AGA and EEI, Society and Nasdaq.

248 *See*, *e.g.*, letters from GM and PRI.

249 *See* letter from GM. *But see* letter from Society (opposing any amendment to require risk factor prioritization on the basis that it would be unduly burdensome and conflict with the proposal to organize risk factors under relevant headings).

250 *See*, *e.g.*, letters from CII, David Young, CFA Institute, and FEI.

251 *See*, *e.g.*, letters from AGA and EEI, Society, BCI, NYC Bar Association, Nasdaq, and Huang.

Some of these commenters stated that this proposal has the potential to undermine the existing ways registrants' categorize risk factors.[252] One commenter expressed concern that this amendment creates a second-class tier of risk factors that investors might automatically perceive as less important simply due to their different characterization and that such a result is counter to the notion of risk factors generally.[253]

Another commenter stated that registrants use risk factor disclosure to satisfy the "meaningful cautionary language" required by the safe harbor provision of the PSLRA,[254] and expressed concern that classifying some risk factors as generic could potentially disqualify this disclosure as "meaningful cautionary language" in securities class action lawsuits and potentially increase the litigation risk to registrants.[255] This commenter also asserted that if registrants are required to disclose generic risk factors at the end of the risk factor section, they may caption most or all as specific risk factors or curtail their forward-looking disclosure in MD&A due to higher litigation risks.

A few commenters expressed concern that it could be difficult for registrants to differentiate risks as "specific" or "general."[256] These commenters recommended that if we were to adopt this revision, the final amendments would have to be clearer as to what qualifies as a "General Risk Factor" in order to enable registrants to apply the rule consistently and avoid mischaracterization of risks.

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252 *See*, *e.g.*, letters from AGA and EEI and Society.

253 *See* letter from Society.

254 Pub. L. 104-67, 109 Stat. 737 (1995) codified as amended in scattered sections of 15 U.S.C.

255 *See* letter from Huang.

256 *See*, *e.g.*, letters from AGA and EEI and Society.

In the Proposing Release, we also requested comment on whether Item 105 should be amended to require registrants to prioritize the order in which they discuss their risk factors so that the more significant risks to the registrant are discussed first. Several commenters supported requiring registrants to prioritize the risk factors to discuss more significant risks first.[257] One commenter opposed requiring registrants to prioritize risk factors in this manner.[258] This commenter noted that many risk factors deal with evolving or uncertain circumstances that are unknown or difficult to quantify, and requiring registrants to evaluate and rank often equally significant and evolving risk factors will add burden, increase costs, take time and effort from other efforts, and create liability concerns based on how the factors are prioritized.

In addition, we requested comment on whether we should require registrants to explain how generic, boilerplate risk factors are material to their investors, and what, if anything, management does to address these risks. One commenter, suggesting that this would lead to more useful disclosure for investors, supported such a requirement.[259] Another commenter recommended that we require risk factor disclosure to be specific to the registrant and exclude generic statements that apply to all or most registrants.[260]

c. Final Amendment

After considering the public comments, we are adopting the amendment as proposed. Amended Item 105 will require registrants to organize their risk factor disclosure under relevant headings, in addition to the subcaptions that are currently required. The final amendments,

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257 *See*, *e.g.*, letters from CII, BCI and CCMC.

258 *See* letter from Society.

259 *See* letter from PRI.

260 *See* letter from CFA Institute.

except as described below, do not specify risk factor headings that registrants should use. As noted above, many registrants already organize their risk factor disclosure through groupings of related risk factors and the use of headings. We believe that requiring this type of organization for all registrants will improve the readability and usefulness of this disclosure. In addition, the final amendments will require registrants to present risks that could apply generally to any company or offering of securities at the end of the risk factor section under the caption "General Risk Factors." We are not adopting a requirement for registrants to explain how generic, boilerplate risk factors are material and how management addresses these risks, as suggested by one commenter.[261] We believe such disclosures would be largely redundant to the current requirement under Item 105 that registrants explain how a risk affects it or the securities being offered. For similar reasons, we do not believe that additional clarification is necessary regarding the types of risks that would constitute a general risk factor, as suggested by some commenters.[262] Because the existing rule requires registrants to explain how a risk affects them, we believe registrants should be well positioned to determine the particular nature of a risk. With respect to one commenter's concern that grouping some risk factors under a "General Risk Factor" sub-heading could potentially disqualify this disclosure from certain statutory safe harbor protections and subject registrants to potential litigation, we note that the final amendment is solely meant to improve the organization and the effectiveness of risk factor disclosures and does not limit the ability of a registrant to include appropriate cautionary language with respect to any forward-looking statements. In our view, if a registrant includes one or more risk factors under the "General Risk Factor" caption, that fact alone should not

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261 *See* letter from PRI.

262 *See*, *e.g.*, letters from AGA and EEI and Society.

affect the availability of the PSLRA safe harbor. Nevertheless, we encourage registrants to tailor their risk factor disclosures to emphasize the specific relationship of the risk to the registrant or the offering and therefore avoid the need to include the risk under the general risk heading.

We continue to believe that the final amendment will help to address the lengthy and generic nature of the risk factor disclosure presented by many registrants. We agree with commenters that stated that the amendments would make risk factor disclosure more user-friendly and improve the readability of this information.[263]

The final amendments will not require registrants to prioritize the order in which they discuss their risk factors. Although we recognize that such prioritization could be useful to users of the disclosure in certain circumstances, consistent with our goal to make the item more principles based, we believe the amendments should afford registrants flexibility to determine the order to most effectively present the material risks that make an investment in the registrant or offering speculative or risky. Accordingly, if a registrant believes it is useful or important to emphasize the relative importance of certain risks, it is free to write those risk factors and other disclosures in such a way that their relative importance is apparent. Retaining this flexibility should also help address concerns expressed by some commenters that it could be difficult to evaluate and rank often equally significant and evolving risk factors.

III. OTHER MATTERS

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid

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263 *See*, *e.g.*, letters from CII, Better Markets, Society, Nareit, Chevron, and Nasdaq.

provision or application.

Pursuant to the Congressional Review Act,[264] the Office of Information and Regulatory Affairs has designated these amendments not a "major rule," as defined by 5 U.S.C. 804(2).

IV. ECONOMIC ANALYSIS

This section analyzes the expected economic effects of the final amendments relative to the current baseline, which consists of both the regulatory framework of disclosure requirements in existence today and the current use of such disclosure by investors. As discussed above, we are adopting amendments to modernize and simplify the description of business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosure requirements in Regulation S-K.[265] An important objective of the final amendments is to revise Items 101(a), 101(c), and 105 to be more principles-based. Overall, investors and registrants may benefit from the principles-based approach if the existing prescriptive requirements result in disclosure that is not material to an investment decision and is costly to provide. We acknowledge that emphasizing a principles-based approach and granting registrants more flexibility to determine

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264 5 U.S.C. 801 *et seq*.

265 While Items 101, 103 and 105 have not undergone significant revisions in over thirty years, many characteristics of the registrants that provide these disclosures have changed substantially over this time period. For example, in the calendar year of 1988, the largest 500 U.S. companies in Standard & Poor's Compustat Daily Updates database had an average market capitalization of $2.42 billion, foreign income of $219.63 million, and ratio of intangible assets to market capitalization of 7.26%. The largest 100 companies had an average market capitalization of $8.75 billion, foreign income of $601.07 million, and ratio of intangible assets to market capitalization of 5.94%. In the calendar year of 2019, the largest 500 companies had an average market capitalization of $54.98 billion, foreign income of $1.47 billion, and ratio of intangible assets to market capitalization of 22.71%. The largest 100 companies had an average market capitalization of 180.78 billion, foreign income of $4.99 billion, and ratio of intangible assets to market capitalization of 22.89%. There is also significant turnover among the largest companies: approximately 40% of top 50 companies in 1988 were still in the top 50 companies in 2019. We believe that some of the final amendments (*e.g.*, requiring the disclosure of the material effects of compliance with material government regulations, including foreign government regulations) will provide investors with information consistent with the changing nature of these registrants. We note that in the Proposing Release we referenced data as of 6/30/1988, while the current release uses data as of 12/31/1988.

what and how much disclosure about a topic to provide could result in the elimination of some information to investors. However, we believe that the cost to investors of any such loss of information will be limited given that, under the principles-based approach reflected in the final amendments, registrants are required to provide disclosure about these topics if that disclosure is material to an understanding of the business.

We are sensitive to the costs and benefits of these amendments. The discussion below addresses the potential economic effects of the final amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation.[266] At the outset, we note that, where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the final amendments. In many cases, however, we are unable to quantify the economic effects because we lack information necessary to provide a reasonable estimate.[267] For example, we are unable to quantify, with precision, the costs to investors of having to rely on alternative information sources under each disclosure item and the potential information processing cost savings that may arise from the elimination of disclosures not material to an investment decision.

A. Baseline and Affected Parties

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266 Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

267 In response to our request for comment in the Proposing Release, no commenter provided us with data or analysis that quantified or would allow us to further quantify the economic effects of the amendments.

Our baseline includes the current disclosure requirements under Items 101, 103, and 105 of Regulation S-K, which apply to registration statements, periodic reports, and certain proxy statements filed with the Commission. Thus, the parties that are likely to be affected by the final amendments include investors and other users of registration statements, periodic reports and proxy statements, such as financial analysts, as well as registrants subject to Regulation S-K.

The final amendments affect both domestic registrants and foreign private issuers[268] that file on domestic forms[269] and foreign private issuers that file on foreign registration forms.[270] We estimate that approximately 6,987 registrants that file on domestic forms[271] and 469 foreign private issuers that file on foreign registration forms will be affected by the final amendments. Among the registrants that file on domestic forms, approximately 30 percent are large accelerated filers, 18.5 percent are accelerated filers, and 51.5 percent are non-accelerated filers.

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268 *See supra* note 12 for the definition of foreign private issuer.

269 The number of registrants that file on domestic forms is estimated as the number of unique registrants, identified by Central Index Key (CIK), that filed Form 10-K, or an amendment thereto, or both a Form 10-Q and a Form S-1, S-3, or S-4 with the Commission during calendar year 2019. We believe that these filers are representative of the registrants that will be primarily affected by the final amendments. For purposes of this economic analysis, these estimates do not include registrants that filed only a Securities Act registration statement during calendar year 2019, or only a Form 10-Q not preceded by a Securities Act registration statement, in order to avoid including entities, such as certain co-registrants of debt securities, which may not have an independent reporting obligation and therefore would not be affected by the amendments. We believe that most registrants that have filed a Securities Act registration statement or a Form 10-Q not preceded by a Securities Act registration statement, other than such co-registrants, would be captured by this estimate. The estimates for the percentages of smaller reporting companies, accelerated filers, large accelerated filers, and non-accelerated filers are based on the self-reported status provided by these registrants; the data was obtained by Commission staff using a computer program that analyzes SEC filings, with supplemental data from Ives Group Audit Analytics.

270 The number of affected registrants that file foreign forms is estimated as the number of unique companies, identified by Central Index Key (CIK), that filed Forms F-1, F-3, and F-4, an amendment thereto, or a post-effective amendment to one of those forms with the Commission during calendar year 2019. *See also supra* note 12.

271 This number includes fewer than 20 foreign registrants that file on domestic forms and approximately 100 business development companies.

In addition, we estimate that 43 percent of domestic registrants are smaller reporting companies and approximately 21.1 percent are emerging growth companies.[272]

B. Potential Costs and Benefits

In this section, we discuss the anticipated economic benefits and costs of the final amendments. We first analyze the overall economic effects of shifting toward a more principles-based approach to disclosure, which is one of the main objectives of the final amendments. We then discuss the potential costs and benefits of specific amendments.

1. Principles-Based versus Prescriptive Requirements

Prescriptive requirements employ bright-line, quantitative or other thresholds to identify when disclosure is required, or require registrants to disclose the same types of information. Principles-based requirements, on the other hand, provide registrants with the flexibility to determine (i) whether certain information is material, and (ii) how to disclose such information.

In this release, we are amending Items 101(a), 101(c), and 105 to be more clearly principles-based.[273] Principles-based requirements may result in more or less detail than prescriptive requirements. The economic effects of replacing a prescriptive requirement with a more principles-based disclosure standard based on materiality depend on a variety of factors,

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272 An "emerging growth company" is defined, in part, as an registrant that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. *See* Rule 405; Rule 12b-2; 15 U.S.C. 77b(a)(19); 15 U.S.C. 78c(a)(80); and *Inflation Adjustments and Other Technical Amendments under Titles I and II of the JOBS Act*, Release No. 33- 10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)]. We based the estimate of the percentage of emerging growth companies on whether a registrant claimed emerging growth company status, as derived from Ives Group Audit Analytics data.

273 Although Items 101(c) and Item 105 use a principles-based approach, based on comments received on prior initiatives, it appears that some registrants have interpreted these Items as imposing prescriptive requirements. *See supra* Sections II.B and II.D. Therefore, the final amendments emphasize the principles-based approach of these items.

including the preferences of investors, the compliance costs of producing the disclosure, and the nature of the information to be disclosed.

For certain existing disclosure requirements, shifting to a more principles-based approach could benefit registrants with no loss of investor protection because the current requirements may result in some disclosure that is not material to an investment decision and costly for registrants to provide. Elimination of disclosure that is not material could reduce compliance burdens and potentially benefit investors, to the extent it improves the readability and conciseness of the information provided and allows investors to focus on information that is material to an understanding of the registrant's business.[274] In addition, a principles-based approach may permit or encourage registrants to present more tailored information, which also may benefit investors.[275] Principles-based requirements generally would elicit disclosure that is

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274 *See* Alastair Lawrence, *Individual Investors and Financial Disclosure*, 56 J. Acct. & Econ., 130 (2013). Using data on trades and portfolio positions of 78,000 households, this article shows that individuals invest more in firms with clear and concise financial disclosures. This relation is reduced for high frequency trading, financially-literate, and speculative individual investors. The article also shows that individuals' returns increase with clearer and more concise disclosures, implying such disclosures reduce individuals' relative information disadvantage. A one standard deviation increase in disclosure readability and conciseness corresponds to return increases of 91 and 58 basis points, respectively. The article acknowledges that, given the changes in financial disclosure standards and the possible advances in individual investor sophistication, the extent to which these findings, which are based on historical data from the 1990s, would differ from those today is unknown. Recent advances in information processing technology, such as machine learning for textual analysis, may also affect the generalizability of these findings.

275 A number of academic studies have explored the use of prescriptive thresholds and materiality criteria. Many of these papers highlight a preference for principles-based materiality criteria. *See, e.g.* Eugene A. Imhoff Jr. and Jacob K. Thomas, *Economic consequences of accounting standards: The lease disclosure rule change*, 10.4 J. Acct. & Econ. 277 (1988) (providing evidence that management modifies existing lease agreements to avoid crossing bright-line rules for lease capitalization); Cheri L. Reither, *What are the best and the worst accounting standards?,* 12.3 Acct. Horizons 283 (1998) (documenting that due to the widespread abuse of bright-lines in rules for lease capitalization, SFAS No. 13 was voted the least favorite FASB standard by a group of accounting academics, regulators, and practitioners); Christopher P. Agoglia et al., *Principles-based versus rules-based accounting standards: The influence of standard precision and audit committee strength on financial reporting decisions*, 86 Acct. Rev. 747 (2011) (conducting experiments in which experienced financial statement preparers are placed in a lease classification decision context and finding that preparers applying principles-based accounting are less likely to make aggressive reporting decisions than preparers applying a more prescriptive standard and

more in line with the way the registrant's management and its board of directors monitor and assess the business and therefore (1) would be easier for registrants to prepare using existing metrics and reporting mechanisms and (2) would provide investors better insight into the decision-making process, current status, and prospects of the registrant.

On the other hand, shifting to a more principles-based approach may result in the elimination of previously prescriptive disclosure that is material to an investment decision if registrants misjudge what information is material to investors.[276] In this regard, to the extent that prescriptive requirements result in an improved mix of information, such requirements could benefit investors and may also benefit registrants by improving stock market liquidity and decreasing cost of capital.[277] Further, prescriptive standards could enhance the comparability and verifiability of information, but those benefits may be limited (or impose costs) if the specified metrics result in comparisons that are not appropriate due to differences between or among registrants.[278] We acknowledge, however, that differences between principles-based

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supporting the notion that a move toward principles-based accounting could result in better financial reporting); Usha Rodrigues and Mike Stegemoller, *An inconsistency in SEC disclosure requirements? The case of the "insignificant" private target,* 13 J. Corp. Fin. 251 (2007) (providing evidence, in the context of mergers and acquisitions, where prescriptive thresholds deviate from investor preferences). Studies highlighting a preference for prescriptive disclosure standards are discussed below. *See infra* note 14.

276 The presence of other controls, including corporate internal controls and board oversight, likely reduces the risk that registrants will misjudge what information is material.

277 *See, e.g.*, Christian Leuz and Peter Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research,* 54 J. ACCT. RES. 525 (2016) (surveying the empirical literature on the economic consequences of disclosure and discussing potential capital-market benefits from disclosure and reporting, such as improved market liquidity and decreased cost of capital).

278 *See* Mark W. Nelson, *Behavioral evidence on the effects of principles-and rules-based standards*, 17 ACCT. HORIZONS 91 (2003); and Katherine Schipper, *Principles-based accounting standards*, 17 ACCT. HORIZONS 61 (2003) (noting potential advantages of prescriptive accounting standards, including: increased comparability among firms, increased verifiability for auditors, and reduced litigation for firms). *See also* Randall Rentfro and Karen Hooks, *The effect of professional judgment on financial reporting comparability,* 1 J. ACCT. FIN. RES. 87 (2004) (finding that comparability in financial reporting may be reduced under principles-based standards, which rely more heavily on the exercise of professional judgment, but noting that comparability may improve as financial statement preparers become more

standards and prescriptive standards have often been studied in the financial reporting context. These differences may be narrower in the context of the final amendments due to the qualitative nature of the disclosures in Items 101(a), 101(c), and 105. Prescriptive requirements also may be easier to apply and therefore less costly for registrants as they involve fewer judgments than principles-based requirements.

In addition, some of the potential costs of shifting to a more principles-based approach could be mitigated by external disciplines, such as the Commission staff's filing review program and the registrant's engagement with investors.[279] In addition, registrants will remain subject to the antifraud provisions of the securities laws.[280] There also may be incentives for registrants to voluntarily disclose additional information if the benefits to registrants of reduced information asymmetry exceed the disclosure costs.

Differences between the principles-based and prescriptive approaches are likely to vary across registrants, investors, and disclosure topics. Despite potential costs associated with replacing prescriptive requirements with principles-based requirements, the shift is likely to reduce overall compliance costs because registrants will have the flexibility to determine whether certain information is material under the principles-based approach. To the extent the

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experienced and hold higher organizational rank); Andrew A. Acito et al., *The Materiality of Accounting Errors: Evidence from SEC Comment Letters*, 36 CONTEMP. ACCT. RES. 839 (2019) (studying managers' responses to SEC inquiries about the materiality of accounting errors and finding that managers are inconsistent in their application of certain qualitative considerations and may omit certain qualitative considerations from their analysis that weigh in favor of an error's materiality). In addition, while we did not solicit comment on the submission format of the Item 101, 103, and 105 disclosures in the proposal, some commenters stated that the disclosures would be more useful to investors if they were submitted in a machine-readable format, citing comparability and searchability as among the benefits of such a format. *See* letters from CFA Institute, Better Markets, the California State Teachers' Retirement System (CalSTRS), and XBRL US (with the latter two specifically recommending the Inline XBRL format). The submission format of the Item 101, 103, and 105 disclosures is outside the scope of this rulemaking.

279 Under Regulation FD, material information provided to any investor, for example, through investor outreach activities, would be required to be made publicly available. *See* 17 CFR 243.100 *et seq.*

280 *See, e.g.*, Exchange Act Rule 10b-5(b) [17 CFR 240.10b-5(b)].

principles-based approach reduces compliance costs, the cost reduction should be more beneficial to smaller registrants that are financially constrained. In addition, as noted above, prescriptive requirements may create information asymmetries if investors are left to rely on disclosure of measures that are not relevant to the way a registrant's management and board of directors are operating and assessing the business. Although eliminating information that is not material should benefit all investors, it could benefit retail investors more to the extent they are less likely to have the time and resources to devote to reviewing and evaluating disclosure. At the same time, smaller registrants with less established reporting histories may be the most at risk of persistent information asymmetries if the principles-based approach results in reduction or loss of information that is material to investors. In the event of reduction or loss of information that is material (the risk of which, as noted above, is offset by mitigants including corporate internal controls and the antifraud provisions of the securities laws), retail investors in these registrants may be more negatively affected than institutional investors because obtaining information from alternative sources could involve monetary costs, such as database subscriptions, or opportunity costs, such as time spent searching for alternative sources. Retail investors may not be able or willing to incur these costs.

Across different disclosure topics, the principles-based approach may be more appropriate for topics where the relevant information tends to vary greatly across companies, because, in these situations, the more standardized prescriptive requirements are less likely to elicit information that is tailored to a specific company. A principles-based approach may also be more appropriate for disclosures that are episodic in nature, because investors may derive relatively less value from comparisons of such disclosure for a given registrant over time. In addition, registrants may derive relatively less benefit from applying a standardized prescriptive

approach to episodic disclosures, which may be less amenable to routinized reporting than periodic disclosures of information that arise on a regular basis.

2. Benefits and Costs of Specific Amendments

We expect the final amendments will result in costs and benefits to registrants and investors, and we discuss those costs and benefits qualitatively, item by item, in this section. The changes to each item will affect the compliance burden for registrants in filing particular forms. Overall, we expect the net effect of the final amendments on a registrant's compliance burden to be limited. The quantitative estimates of changes in those burdens for purposes of the Paperwork Reduction Act are further discussed in Section V. As explained in the item-by-item discussion of the final amendments in this section, we expect certain aspects of the final amendments to increase compliance burdens and others to decrease the burdens. Taken together, we estimate that the final amendments are likely to result in a net decrease of between three and five burden hours per form for purposes of the Paperwork Reduction Act.[281]

i. General Development of Business (Item 101(a))

Item 101(a) requires a description of the general development of the registrant's business, such as the year in which the registrant was organized and the nature and results of any merger of the registrant or its significant subsidiaries. Some academic research has found that information required under Item 101(a) is relevant to firm value. For example, the registrant's age can, to some extent, predict its future growth rates[282] and corporate

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281 *See infra* Section V.B.

282 *See* David S. Evans, *The Relationship between Firm Growth, Size, and Age: Estimates for 100 Manufacturing Industries*, 35 J. INDUS. ECON. 567 (1987) (finding that firm growth decreases with both firm size and age). *See also* Costas Arkolakis et al., *Firm Learning and Growth*, 27 REV. ECON.

innovation.[283] Similarly, merger activities can affect shareholder value and predict future performance.[284] Given the relevance of such information to firm value, and thus investors, the effects of the final amendments to Item 101(a) on investors will depend on whether they result in more concise and material disclosures of business development information under Item 101(a).[285]

The final amendments will revise the requirements in Item 101(a) to be more clearly principles-based, requiring disclosure of information material to an understanding of the general development of the registrant's business. The shift to a more clearly principles-based approach for these requirements will give rise to the potential economic effects discussed in Section IV.B.1 above.

Currently, Item 101(a) requires registrants to describe their business development during the past five years, or such shorter period as the registrant may have engaged in business. The final amendments will eliminate the prescribed five-year timeframe for this disclosure. Eliminating this specific requirement will provide registrants with flexibility to choose a

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DYNAMICS 146 (2018) (developing a theoretical model showing that firm growth rates decrease with firm age and calibrating the model using plant-level data).

283 *See* Elena Huergo and Jordi Jaumandreu, *How Does Probability of Innovation Change with Firm Age?* 22 SMALL BUS. ECON. 193 (2004) (finding that, as a firm's age increases, the innovation rate diminishes and attributing this finding to the rapid innovation necessary for a firm to compete when entering a market); Alex Coad et al., *Innovation and Firm Growth: Does Firm Age Play a Role?*, 45 RES. POL'Y 387 (2016) (finding that young firms undertake riskier innovation and receive larger benefits from research and development).

284 *See* Sara B. Moeller et al., *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 J. FIN. 757 (2005) (finding that, although small gains were made in the 1980s, investors experienced negative gains from 1998 to 2001, and firms that announced acquisitions with large dollar losses performed poorly afterwards); *see also* Ran Duchin and Breno Schmidt, *Riding the Merger Wave: Uncertainty, Reduced Monitoring, and Bad Acquisitions*, 107 J. FIN. ECON. 69 (2013) (finding that the average long-term performance of acquisitions initiated during merger waves is significantly worse than those initiated at other times).

285 Investors may benefit from more concise disclosure that facilitates their ability to focus on information material to an investment decision. *See supra* note 274.

different timeframe that is more relevant in describing their business development to investors. For example, a long timeframe might be less appropriate for registrants operating in rapidly changing environments where historical information becomes irrelevant in a short period of time. Given that registrants will have the flexibility to determine the appropriate timeframe, this amendment is expected to reduce compliance costs. Investors may also benefit if the timeframe chosen by a registrant is more consistent with their preferences than the prescribed five-year timeframe, but may be burdened if the timeframe chosen by the registrant is less consistent with their preferences than the prescribed five-year timeframe.

Currently, Item 101(a) requires registrants to describe their business development in registration statements and annual reports. For filings subsequent to the initial registration statement, the final amendments to Item 101(a)(1) will allow registrants to provide only an update of this disclosure and incorporate by reference the previous discussion of the general development of its business included in the registrant's most recently filed registration statement or report containing that discussion. Together, the update and the incorporated disclosure will present a complete discussion of the general development of its business.[286] If duplicative disclosure distracts investors from other important information, the amendments may benefit investors by highlighting all of the material developments that have occurred since the most recent full discussion of the general development of the registrant's business. However, to the extent that historical information will be available through hyperlinking as

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[286] A registrant will be required to incorporate by reference the earlier disclosure into the updated filing. *See supra* Section II.A.2. We are also adopting a similar amendment to Item 101(h), which applies to smaller reporting companies.

opposed to being in the same filing, investors will have to spend more time to retrieve the information from another disclosure document.

Some commenters stated that the use of hyperlinks to update material developments would lead to a disjointed narrative and hamper readability.[287] Because the final amendments will allow only one hyperlink instead of multiple hyperlinks, we believe that any increase in retrieval costs for investors will be minimal. A few commenters objected to prohibiting the use of multiple hyperlinks.[288] We believe, however, that retrieval costs for investors may increase quickly with the number of hyperlinks because each additional hyperlink increases the risk of broken or inactive hyperlinks, and a disjointed narrative would not be reader-friendly.

While limiting registrants to only one hyperlink as opposed to multiple hyperlinks may make compliance efforts somewhat more burdensome, we do not believe this restriction will significantly change existing disclosure practices as the Commission's current rules prohibit incorporation by reference when it would render the disclosure unclear or confusing.[289] Moreover, registrants that select this option will benefit from the reduction in costs to disclose duplicative information. Finally, for those registrants who find this restriction too limiting, we believe that the costs of copying relevant disclosure from a previous filing, rather than incorporating it by reference, should be minimal.

The final amendments to Item 101(a) provide a non-exclusive list of topics that should be disclosed if material. Providing potential disclosure topics should help clarify the disclosure

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287 *See supra* note 37 and corresponding text.

288 *See id*.

289 *See* Securities Act Rule 411(e) and Exchange Act 12b-23(e).

requirements and avoid potential confusion among registrants. Besides the topics currently included under Item 101(a), the disclosure topics in the final amendments also add material changes to a registrant's previously disclosed business strategy. Several studies have found that business strategy is a critical determinant of corporate success[290] and an essential component of business model design,[291] so investors may benefit from any increase in the disclosure of material changes to previously disclosed business strategies. A number of commenters also supported the inclusion of material changes to business strategy as a non-exclusive disclosure example.[292]

Some commenters expressed concerns that this amendment could impose costs on filers if the disclosure of 'material changes" in business strategy reveals sensitive or proprietary corporate information.[293] One commenter suggested that a safe harbor provision should be added to avoid disclosure of sensitive information.[294] However, because the final amendments do not make the disclosure of business strategy mandatory if a registrant has not previously disclosed its business strategy and a registrant will have considerable flexibility to tailor its

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290 *See* Jay B. Barney, *Strategic Factor Markets: Expectations, Luck, and Business Strategy* 32 MGMT. SCI. 1231 (1986) (suggesting that strategies focusing on creating imperfectly competitive product markets may not generate superior performance if the cost of implementing such strategies is high, and that strategic choices should flow mainly from the analysis of its antecedent unique skills and capabilities, rather than from the analysis of its competitive environment). *See also* Thomas Ritter and Hans G. Gemunden, *The Impact Of A Company's Business Strategy on Its Technological Competence, Network Competence and Innovation Success,* 57(5) J. BUS. RES. 548 (2004) (finding that a company's innovation success is positively correlated with the strength of its technology-oriented business strategy).

291 *See* David J. Teece, *Business Models, Business Strategy and Innovation,* 43 LONG RANGE PLANNING 172 (2009) (examining the significance of business models and exploring their connections with business strategy, innovation management, and economic theory). *See also* Patrick Spieth et al., *Exploring the Linkage between Business Model (&) Innovation and the Strategy of the Firm*, 46 R&D MGMT. 403 (2016) (examining firm strategy-business model linkage and exploring the role of business model innovation as analytic perspective for identifying sources of firm performance).

292 *See supra* note 47.

293 *See* letters from UnitedHealth Group, Dunker, Society, DP&W and GM.

294 *See* letter from FEI.

business strategy disclosure, the costs of revealing proprietary information that could be harmful to registrants' competitive positions should be limited.

Overall, investors and registrants may benefit from the final amendments to Item 101(a) if the existing requirements elicit disclosure that is not material to an investment decision and/or is more costly to provide. However, providing registrants with additional flexibility to determine (i) whether certain information is material, and (ii) how to disclose such information may result in the reduction or loss of information in cases in which registrants no longer disclose information material to an investment decision.

ii. Narrative Description of Business (Item 101(c))

Item 101(c) requires a narrative description of the registrant's business. The current requirement identifies twelve specific items that must be disclosed to the extent material to an understanding of the registrant's business taken as a whole. We are revising the requirements in Item 101(c) to be more clearly principles based. The final amendments require a description of the business and set forth seven non-exclusive examples of information to disclose if material to an understanding of the business. These examples include some, but not all, of the current disclosure topics required under Item 101(c) as well as some additional topics. Emphasizing a principles-based approach to Item 101(c) will give rise to the potential economic effects discussed in Section I.B.1 above. In addition, eliminating more prescriptive disclosure topics (*e.g.*, dollar amount of backlog orders believed to be firm) may diminish comparability across firms.

The disclosure topics that are retained, with some changes, as examples under the final amendments are: (1) principal products produced and services rendered, and dependence on certain customers; (2) new products and competitive conditions; (3) sources and availability of

raw materials and intellectual property; (4) business subject to renegotiation or termination of government contracts; (5) seasonality of the business; and (6) the number of persons employed. As the information required under Item 101(c) can be relevant to firm value,[295] investors and registrants will likely benefit if the examples elicit information material to an investment decision while allowing registrants to tailor the disclosure to their specific circumstances.

The final amendments will expand the existing disclosure topic regarding the number of persons employed to encompass a description of the registrant's human capital resources. This disclosure topic will require, in addition to the number of persons employed, a description of any human capital measures or objectives that the registrant focuses on in managing the business, to the extent such disclosures are material to an understanding of the registrant's business. The rule also will provide non-exclusive examples of human capital measures and objectives, such as measures or objectives that address the attraction, development, and retention of personnel.

In one meta-analysis, which reviewed 66 studies, the authors found that besides the number of employees, other human capital characteristics, including education, experience, and training, have positive effects on firm performance.[296] Another study found that turnover rates

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295 For example, some academic research has found that the introduction of a new product increases long-term financial performance of the company and firm value. *See* Dominique Hanssens et al., *New Products, Sales Promotions, and Firm Value: The Case of the Automobile Industry*, 68 J. MARKETING 142 (2004); *see also* Amil Petrin, *Quantifying the Benefits of New Products: The Case of the Minivan*, 110 J. POL. ECON. 705 (2002). Similarly, some academic research has found that patents have a significant impact on firm-level productivity and market value. *See* Nicholas Bloom and John Van Reenen, *Patents, Real Options and Firm Performance*, 112 Econ. J. C97 (2002); Zvi Griliches, *Market Value, R&D and Patents*, 7 ECON. LETTERS 183 (1981).

296 *See* T. R. Crook et al., *Does human capital matter? A meta-analysis of the relationship between human capital and firm performance*, 96 J. APPLIED PSYCHOL. 443 (2011).

reflect human resource management practices.[297] These studies suggest that investors may benefit from additional information elicited by the human capital topic. Many commenters agreed that investors would benefit from such disclosure, but offered different suggestions for what that disclosure should include.[298] Registrants will incur incremental compliance costs to provide this additional information.[299] To the extent that some registrants already disclose such information, for them the incremental benefits and costs would likely be lower than if they were providing no such disclosure.[300] We recognize, however, that even for some registrants who are currently disclosing such information, the incremental compliance costs may not be trivial.

The final amendments also replace the requirement to disclose the material effects on the registrant of compliance with environmental laws with a disclosure topic that covers the material effects of compliance with material government regulations, including environmental laws. To the extent that information about compliance with government regulations affects firm value, investors may benefit from additional information about the effects of material government regulations. Registrants, however, will incur incremental compliance costs to provide this information. To the extent that many registrants already disclose such information, the incremental benefits and costs could be limited.

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297 *See* Mark A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and* Corporate *Financial Performance*, 38 ACAD. MGMT. J. 635 (1995).

298 *See supra* note 121.

299 *See* letters from UnitedHealth Group, Nasdaq, FCLTGlobal, SHRM, GM, and FEI.

300 *See* letters from ICEE, Hermes, CtW, ICGN, HCMC, CalPERS, NYSCRF, and NYC Comptroller.

Some of the disclosure requirements currently contained in Item 101(c) are not included as potential topics in the revised rule.[301] To the extent that the elimination of these topics results in a loss of material information, there may be costs to investors.[302] However, we believe that any such costs would be limited given that, under the principles-based approach, the list of disclosure topics will not be exhaustive and registrants still will be required to provide disclosure about such matters if they are material to an understanding of the business.

Additionally, in an effort to consolidate working capital disclosure in one location and to avoid duplicative disclosure, the final amendments eliminate working capital practices as a disclosure topic in Item 101(c), given that this information, when material, often is elicited by MD&A disclosure requirements.[303] If duplicative disclosure distracts investors from other important information, this amendment may benefit investors by reducing repetition and facilitating more efficient information processing. However, to the extent that information on working capital practices will no longer be available in the narrative description of business required by Item 101(c), investors may have to spend more time synthesizing this information from other locations. Registrants may marginally benefit from reduced compliance costs from the elimination of duplicative disclosure.

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301 The final amendments will no longer list the following topics: disclosure about new segments and dollar amount of backlog orders believed to be firm, in addition to working capital practices, which we discuss below.

302 An academic study shows that acquisition of new segments has significant effects on firm productivity. The study finds that firms diversifying into a new segment experience a net reduction in productivity. Specifically, while productivity of new plants increases, incumbent plants suffer. *See* Antoinette Schoar, *The Effect of Diversification on Firm Productivity*, 62 J. FIN. 2379 (2002). Another study shows that backlog orders can predict future earnings. *See* Siva Rajgopal et al., *Does the Market Fully Appreciate the Implications of Leading Indicators for Future Earnings? Evidence from Order Backlog*, 8 REV. ACCT. STUD. 461 (2003). Based on these studies, it is reasonable to expect that information on new segments and dollar amount of backlog orders believed to be firm could be material to investors in certain circumstances.

303 *See* letters from FEI and Chevron.

Overall, investors and registrants may benefit from the final amendments to Item 101(c) if the revised rules result in disclosure that is more likely to be material to an investment decision and avoid disclosure that is not material and/or is costly to provide.

iii. Legal Proceedings (Item 103)

Item 103 requires disclosure of material pending legal proceedings and other relevant information about the proceedings, such as the name of the court, the date instituted, and the principal parties involved. Given that involvement in legal proceedings can affect a firm's cash flows through multiple channels, including legal fees, the cost of executives being distracted from their main operational tasks, reputational costs, and settlement costs, information required under Item 103 is relevant to firm value.[304] Therefore, investors will benefit if the final amendments to Item 103 result in more effective disclosure of material legal proceedings information.

Currently, Item 103 and U.S. GAAP, which requires disclosure of certain loss contingencies, overlap in the requirement to disclose certain information associated with legal proceedings. As a result, in order to comply with Item 103, registrants commonly repeat disclosures that are already provided elsewhere in registration statements and periodic reports. The final amendments to Item 103 encourage the use of hyperlinks or cross-references to avoid

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304 Several studies also have found that the possibility of legal proceedings may affect corporate decisions, such as pricing of securities and management's information dissemination. *See, e.g.*, Michelle Lowry and Susan Shu, *Litigation Risk and IPO Underpricing*, 65 J. FIN. ECON. 309 (2002) (finding that firms with higher litigation risk underprice their IPOs by a greater amount as a form of insurance, and underpricing by a greater amount lowers expected litigation costs); and Douglas J. Skinner, *Why Firms Voluntarily Disclose Bad News?*, 32 J. ACCT. RES. 38 (1994) (suggesting that because shareholders are more likely to sue over earnings announcements with large negative returns, firms have an incentive to disclose bad earnings early in order to reduce the probability of being sued and the magnitude of damages); *see also* Joel F. Houston et al., *Litigation Risk and Voluntary Disclosure: Evidence from Legal Changes*, 94 ACCT. REV. 247 (2019) (finding a positive relation between the expectation of litigation and voluntary disclosure and suggesting that earnings forecast strategies are often designed to deter litigation)..

repetitive disclosure. If duplicative disclosure distracts investors from other important information, the final amendments may benefit investors by reducing repetition and facilitating more efficient information processing. However, to the extent that some information on legal proceedings will no longer be readily available under Item 103, investors may have to spend more time synthesizing this information from other locations. Nevertheless, we believe the increase in information processing cost for investors would be minimal. While registrants may incur minimal compliance costs if they choose to include hyperlinks, those costs generally would be less than the costs of disclosing duplicative information in a document.

Currently, Item 103 specifically requires disclosure of any proceedings under environmental laws to which a governmental authority is a party unless the registrant reasonably believes that the proceeding will result in monetary sanctions, exclusive of interest and costs, of less than $100,000. This bright-line threshold for environmental proceedings was adopted in 1982. The final amendment includes a modified disclosure threshold that increases the existing $100,000 threshold to $300,000 (to account for inflation), but also affords a registrant some flexibility. Specifically, the amendment will allow a registrant to select a different threshold, with an upper bound of the lesser of $1 million or one percent of its current assets, that it determines is reasonably designed to result in disclosure of material environmental proceedings. Research has found that environmental liabilities can influence certain corporate decisions related to managing environmental regulatory risk[305] and that some investors include

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305 *See* Dean Neu et al., *Managing Public Impressions: Environmental Disclosures in Annual Reports*, 23 ACCT. ORG. & SOC'Y 265 (1998) (using a matched-pair sample of publicly traded Canadian companies that have been subject to environmental fines and those that have not to analyze changes in pre-fine and post-fine environmental disclosure quality, and finding that environmental disclosure provides organizations with a method of managing potential discrediting events); *see also* Xin Chang et al., *Corporate Environmental Liabilities and Capital Structure* (2018), available at

environmental criteria in their investment strategies.[306] As discussed above, commenters' views were mixed on whether we should retain a bright-line disclosure threshold or move to a more principles-based approach.[307] Also as discussed above, environmental proceedings often can be complex from a factual and legal standpoint so a bright-line, quantitative threshold can help registrants by eliminating the need to make an assessment of whether a particular proceeding that exceeds the threshold is subject to disclosure on a principles basis. However, a single quantitative threshold that is set at a level that is designed to limit the need to make materiality judgments is likely to result in some disclosures, particularly for larger registrants that are not material. Alternatively, a materiality-based threshold would lower compliance costs for registrants by reducing the disclosure of proceedings that are not material, but also may increase the costs to registrants to assess whether the disclosure of environmental proceedings is appropriate. Because it involves a certain degree of judgment, there also may be costs associated with misapplication of a materiality-based standard. For example, depending on the facts and circumstances (including the size of a registrant) misapplication of such a standard may result in disclosure of proceedings that are not material, particularly when considered in

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https://ssrn.com/abstract=3200991 (documenting that firms with higher environmental liabilities maintain lower financial leverage ratios and suggesting that environmental liabilities and financial liabilities are substitutionary).

306 *See* Steve Schueth, *Socially Responsible Investing in the United States*, 43 J. BUS. ETHICS 189 (2003) (providing an overview of the concept and practice of socially and environmentally responsible investing, describing the investment strategies practiced in the U.S., offering explanations for its growth, and examining who chooses to invest in a socially and environmentally responsible manner). *See* also Laura Starks et al., *Corporate ESG profiles and investor horizons* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049943 (finding that investors behave more patiently toward environmentally-responsible firms as they sell less after negative earnings surprises or poor stock returns). However, investors may derive value from characteristics of investments that are unrelated to financial performance, and these studies do not directly address whether environmental disclosures provide material information to investors.

307 *See supra* notes 176 and 178.

relation to the registrant's total assets or revenues, or the non-disclosure of proceedings that are material.[308] The two-pronged approach that will be required under the final rule will benefit registrants and potentially lower their compliance costs since it includes a minimum quantitative threshold while also providing them with the flexibility to apply a more tailored disclosure threshold within a range that has an upper limit of $1 million. Under such an approach, registrants will continue to provide information on a bright-line basis using a threshold that is designed to capture at least all information that would be material to an investment or voting decision but will have the flexibility to use a disclosure threshold that is more indicative of materiality on a company-specific basis. Additionally, the two-pronged approach will reduce the risk of non-disclosure of material information, particularly for larger issuers, because disclosure will be required in all cases for any proceeding when the potential monetary sanctions exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis. We estimate that $1 million represents approximately 0.01% of the mean current assets (0.02% of the median current assets) of companies in the S&P 500.[309] Accordingly, we expect that many larger registrants will be subject to a maximum bright-line disclosure threshold of $1 million, representing substantially less than one percent of current assets. We believe this proportionately lower threshold, which is likely to result in the disclosure of information that is not material to an investment decision, is nevertheless appropriate, as assessing the materiality of governmental monetary sanctions, even in lower

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308 *See supra* note 187.

309 This analysis uses current asset data for fiscal year 2019 from Standard & Poor's Compustat Daily Updates database.

amounts, may be difficult and as a result, it may be more efficient for registrants and investors to bear the costs of some degree of over-disclosure.

Since the two-pronged approach we are adopting includes quantitative thresholds that are higher than the current threshold, registrants of all sizes should benefit from reduced compliance costs. For example, Table 1 below summarizes the number of registrants that have cases in the EPA's Enforcement and Compliance History Online Database over the period 2009-2019 and provides summary statistics on the size of the monetary sanctions, in dollar terms and as a percentage of registrants' current assets. For each year, the table shows the estimated number of registrants that incurred environmental proceedings with monetary sanctions exceeding (i) $100,000, (ii) $300,000 and (iii) the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis.

The increase in the disclosure threshold from $100,000 to $300,000 would have resulted on average in an upper bound decrease of 30% in the number of registrants that have to report such sanctions during the period under consideration, with the median ratio of sanctions to current assets of approximately 0.12%. The use of an alternative threshold that requires disclosure when sanctions exceed the lesser of $1 million or one percent of the current assets of the registrant results in an additional average upper bound decrease of 30% in the number of registrants that have to report such sanctions during the period under consideration, with the median ratio of sanctions to current assets of approximately 0.30%.

Based only on a financial assessment of the mean (and median) total sanctions as a percentage of current assets, we would not expect these changes to result in the non-disclosure of information that would be material to an investment or voting decision. The data in Table 1 also suggests that the $100,000 threshold likely resulted in the disclosure of a substantial

amount of non-material information. In addition, it further suggests that the new two-pronged approach is likely to continue to result in the disclosure of a substantial amount of non-material information, albeit less than is currently required.

Table 1. Statistics for SEC Registrant cases in EPA's Enforcement and Compliance History Online Database (ECHO)

YEAR	# of SEC Registrants[310]	# of Registrants incurring sanctions[311]	Registrants paying > $100K in total costs[312]	Registrants paying > $300K in total costs[313]	Registrants paying the lesser of $1 mil. or 1% of current assets in total costs [314]	Mean (median) total cost	Mean (median) total cost as % of Current Assets
2009	9731	75	19	15	10	$16,379,707 ($19,950)	1.2% (0%)
2010	9003	86	17	14	10	$26,920,867 ($17,500)	0.1% (0%)
2011	8680	81	30	19	14	$66,758,061 ($49,338)	2.0% (0%)

310 This column counts all unique CIKs with 10-Ks and 10-K/As made available on EDGAR for the calendar year. The subset of registrants that only report 10-Qs and 10-Q/As are excluded from this count. If CIKs are re-used by another registrant during the year, the CIK will only count once.

311 A registrant is counted once even if it has multiple ECHO cases that settle within a given year. The settlement date determines the year for a given case. The amounts from multiple cases are added together for each registrant per year to determine the number of registrants that exceeded the 100K and 300K thresholds in Table 1. Because the start date of an enforcement case is not always populated in ECHO (e.g., approximately 25% of the cases that we matched to SEC registrants for the period 2009-2019 were missing a start date), we only count a case in the year when a sanction/settlement agreement was imposed/negotiated. Thus, Table 1 may exclude registrants who had an ongoing case during the period 2009-2019 that was not settled in that period. Also, enforcement cases that name the subsidiary of a registrant as a respondent or defendant instead of the registrant itself are often excluded from our counts since we do not have information on registrant subsidiaries. Similarly, since ECHO contains registrants' names and not their CIK, we match registrants with ECHO by name. Differences in names between SEC filings and ECHO may have resulted in fewer matches. ECHO is available at https://echo.epa.gov/facilities/enforcement-case-search/results.

312 This number is based on the total cost for all penalties, Supplemental Environmental Projects, and compliance actions.

313 *Id.*

314 Data on current assets was retrieved from Compustat-CapitalIQ.

2012	8277	77	31	21	11	$882,259 ($56,490)	0.2% (0%)
2013	7944	61	18	14	12	$27,346,304 ($37,500)	18.2% (0%)
2014	7891	78	42	30	19	$30,219,344 ($113,096)	3.0% (0%)
2015	7802	71	32	18	12	$17,283,790 ($85,428)	4.9% (0%)
2016	7395	64	22	16	13	$41,799,497 ($41,743))	2.2% (0%)
2017	7095	56	24	18	11	$647,166 ($66,750)	0.1% (0%)
2018	6920	52	11	9	5	$6,037,039 ($11,027)	2.2% (0%)
2019	6793	45	19	10	8	$1,079,256 ($54,636)	0.1% (0%)
					Pooled sample estimates	$23,167,757 ($41,880)	2.9% (0%)

iv. Risk Factors (Item 105)

Item 105 requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky. Some academic research supports the notion that information currently required under Item 105 is important to investors. For example, there is evidence that risk factor disclosure by publicly traded firms is material in content.[315] There also is evidence suggesting that investors benefit from risk factor disclosures that are more

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315 *See* Todd Kravet, and Volkan Muslu, *Textual Risk Disclosures and Investors' Risk Perceptions,* 18 REV. ACCT. STUD. 1088 (2013) (finding that the increases in annual risk disclosures are associated with higher stock return volatility and trading volume around the filings). *See also* John L. Campbell et al., *The information content of mandatory risk factor disclosures in corporate filings*, 19 REV. ACCT. STUD. 396 (2014) (finding that the required disclosure of risk factors in Form 10-K filings affect market beta, stock return volatility, information asymmetry, and firm value, and that firms that face more risks disclose correspondingly more in the risk factor discussion); Allen Huang et al., *An Unintended Benefit of the Risk Factor Mandate of 2005* (2019), available at http://dx.doi.org/10.2139/ssrn.3219712 (finding that risk factor disclosure is associated with an improved information environment).

specific.[316] In measuring long-run returns to IPO stocks, some studies conclude that the returns are commensurate with the risk profiles of the individual firms.[317] Together, this research supports the notion that effective disclosures of risk factors can help investors better manage their risk exposure.

The amendments to Item 105 will require a bullet point summary of the principal risk factors that is no more than two pages in the forepart of the document when the risk factor section exceeds 15 pages. If lengthy risk factor disclosure contains information that is less meaningful to investors, such as generic risks that could apply to any investment in securities, a brief summary of the risk factors should benefit investors, especially those who have less time to review and analyze registrants' disclosure, by enabling them to make more efficient investment decisions. The potential benefit of a brief summary may be limited for some registrants if they cannot disclose all material risks in a two-page summary, although all material risk factors will still be required to appear in the risk factor section. The requirement to prepare a risk factor summary may increase the compliance costs. For example, one commenter stated that the proposed amendments may require registrants to rank risk factors, which would increase the compliance burden.[318] Other commenters expressed concern that the proposed

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316 *See* Ole Kristian Hope et al., *The Benefits of Specific Risk-Factor Disclosures*, 21 REV. ACCT. STUD. 1005 (2016) (finding that the market reaction to a Form 10-K filing is positively and significantly associated with specificity and suggesting that analysts are better able to assess fundamental risk when firms' risk-factor disclosures are more specific).

317 *See* Bjørn Eckbo and Øyvind Norli, *Liquidity Risk, Leverage, and Long-Run IPO Returns*, 11. J. CORP. FIN. 1 (2005) (constructing a portfolio of 6,000 IPO stocks and measuring their returns in order to compare them with individual risk factors). The model for risk estimation includes several quantitative measures, as well as simple characteristic-based risks of the type disclosed in Forms S-1 and 10-K. The results indicate that the returns are likely fully justified by the increased risk of the IPO firms.

318 *See* letter from Nareit.

amendments could create litigation risks.[319] Yet another commenter asserted that a risk factor summary could be especially burdensome for smaller and pre-IPO firms that deem a wide range of information at their stage of life cycle to be material, and thus may deter them from going public.[320]

While we are cognizant of potential compliance costs associated with the preparation of a risk factor summary, such an increase should be limited due to the requirement that the summary cannot exceed two pages. The use of a risk factor summary, when the full risk factor discussion exceeds 15 pages, should make the disclosure more user friendly and improve its readability.[321] The new threshold also could incentivize registrants to limit the length of their risk factor disclosure to no more than 15 pages. Based on current disclosure practices, we estimate that a 15-page threshold will affect approximately 40 percent of registrants.[322] If registrants shorten their risk factor disclosure to avoid triggering the summary disclosure requirement, the disclosure might become less detailed. However, registrants that are providing lengthy risk factor disclosure to reduce potential litigation risks might be less likely to shorten the disclosure simply to avoid providing the summary.[323] We do not believe that the compliance

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319 *See* letters from FEI and Nareit.

320 *See* letter from Society.

321 *See supra* note 205 and accompanying text.

322 To estimate the percentage of registrants that would be affected by a 15-page threshold, we extracted all Forms S-1, S-3, S-4, S-11, 1-A, 10, and 10-K filed with the Commission during calendar year 2018. This population consists of approximately 10,000 forms. We then excluded Forms 10-K filed by smaller reporting companies and asset-backed issuers as well as Forms 10 filed by smaller reporting companies because these registrants are not required to provide risk factor disclosure per Item 1A or Instruction J. Next, we constructed a random sample of 100 companies and calculated the length of their risk factor disclosure. The resulting page distribution had the mean of 15.26 and median of 13.5 pages. The 15-page threshold is around the 60th percentile of the distribution. Therefore, we estimate that this threshold will affect approximately 40 percent of registrants.

323 *See* letters from FEI, Nareit, and Society.

costs associated with the risk factor summary of up to two pages will be so large as to affect a company's decision whether to go public.[324]

The final amendments to Item 105 also replace the requirement to discuss the "most significant" risks with "material" risks. The economic effects of the final amendment depend on the preferences of investors. If the existing "most significant" standard elicits too much or too little information, investors may benefit from the materiality standard emphasized in the final rules. Focusing on the risks to which investors would attach the most importance should enable them to make more efficient investment decisions. Registrants may experience increased (decreased) compliance costs if the materiality standard results in more (less) expansive disclosure than the existing "most significant" standard.

In addition, the final amendments revise Item 105 to require registrants to organize their risk factor disclosure under relevant headings, with generic risk factors, if disclosed, appearing at the end of the risk factor section under the caption "General Risk Factors." Some academic research has found that different types of registrants disclose different types of risk factors and certain types of risk factors are more correlated with stock return volatilities and systematic risks.[325] Therefore, well-organized risk factor disclosure that gives greater prominence to material risks could benefit investors, especially those who have less time to review and analyze registrants' disclosure, by enabling them to make more efficient investment decisions.

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324 *See supra* note 220 and accompanying text (discussing commenters' concerns about litigation risk).

325 *See* Ryan D. Israelsen, *Tell It Like It Is: Disclosed Risks and Factor Portfolios* (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504522 (using textual analysis techniques to extract a broad set of disclosed risk factors from firms' SEC filings to examine characteristics of the firms most likely to make each type of disclosure, and investigating the relation between firms' risk disclosures and their stock return volatilities and factor loadings).

Registrants may incur additional costs to organize their risk factor disclosure. To the extent that some registrants already organize their risk factor disclosure through groupings of related risk factors and the use of headings, the compliance costs will be limited.[326]

C. Anticipated Effects on Efficiency, Competition, and Capital Formation

As discussed above, the final amendments may improve capital allocation efficiency by enabling investors to make more efficient investment decisions. For example, the final amendments may reduce search costs for certain investors by eliminating information that is not material to those investors. Given that certain investors may have less time to review and analyze registrants' disclosure,[327] elimination of such information may facilitate more efficient investment decision making. In addition, permitting registrants to omit disclosure of information when it is not material may reduce registrant compliance costs, allowing registrants to deploy resources towards more productive uses and thus encouraging capital formation. The reduction in compliance costs might be particularly beneficial for smaller and younger registrants that are resource-constrained.[328]

However, in cases in which registrants misjudge what information is material, a principles-based disclosure framework relying on registrants' determinations of the importance of information to investors could result in increased information asymmetries between

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326 *See* letters from Nasdaq and Society.

327 *See* David Hirshleifer and Siew Hong Teoh, *Limited attention, information disclosure, and financial reporting*, 36 J. ACCT. & ECON. 337 (2003) (developing a theoretical model where investors have limited attention and processing power and showing that, with partially attentive investors, the means of presenting information may have an impact on stock price reactions, mis-valuation, long-run abnormal returns, and corporate decisions).

328 We note, however, that, except for the elimination of the provision that requires smaller reporting companies to describe the development of their business during the last three years, smaller reporting companies that elect to provide the alternative business disclosure under Item 101(h) will continue to have mostly prescriptive requirements under the final amendments.

registrants and investors. Such asymmetries may increase the cost of capital, reduce capital formation, and hamper efficient allocation of capital across companies. Overall, to the extent that the final amendments will eliminate disclosure that is not considered to be material, we believe these effects will be limited. Moreover, we expect this risk to be offset by mitigants, including corporate internal controls and the antifraud provisions of the securities laws.

D. Alternatives

We are amending Items 101(a), 101(c), and 105 to be more clearly principles-based. As an alternative, we considered modifying these requirements using prescriptive standards. Several commenters expressed support for more prescriptive standards.[329] For example, some commenters advocated for additional specific disclosures about environmental and foreign regulatory risks, the types and composition of employees, and business strategy.[330] A prescriptive standard could elicit additional specific disclosures, may be easier for registrants to apply, and could enhance the comparability and verifiability of information. However, not all of these disclosures will be relevant at the same level of detail for all registrants. Given that the optimal levels of disclosure for business description and risk factors, in particular, are likely to vary greatly across registrants, a more flexible principles-based approach is more likely to elicit the appropriate disclosures for these items. In addition, a prescriptive approach to a particular area of disclosure where the specified metric does not capture or does not fully capture the information likely to be material to an investment decision about a particular registrant or comparable registrants may lead investors to disproportionately rely on that metric for the registrant or as a comparative tool with respect to other registrants.

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329 *See* letters from ICGN, Public Citizen, Letter Type A, and AFL-CIO.

330 *See, e.g.*, letter from PRI.

The final amendments to Item 101(a) will include a non-exclusive list of the types of information that a registrant may need to disclose. We could have included a new disclosure topic that would require, if material to an understanding of the general development of the business, disclosure of transactions and events that affect or may affect the company's operations. Given that existing MD&A disclosure requirements likely elicit similar information, including this disclosure topic could result in duplicative disclosures that would increase compliance costs for registrants without significantly improving the overall mix of information available to investors.

The final amendments to Item 101(c) will require disclosure of human capital measures or objectives, including disclosure of the number of persons employed, to the extent material to an understanding of the registrant's business. One alternative to this disclosure topic would be to remove any reference to disclosure of the number of persons employed. This alternative would be consistent with the general principles-based approach of the final amendments that eschews specificity in favor of encouraging registrants to consider the particular types of information that would be material to an understanding of their business.[331] However, such an alternative could have deprived investors of disclosure that provides them with valuable information that can be used in assessing productivity growth, compensation measures, and capital allocation.[332] Moreover, disclosure of this metric would allow investors to readily compare different registrants and assess their cost of capital and future corporate

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331 In addition, some commenters consider that a focus on the employee number is outdated, arbitrary, and of limited use. *See supra* note 152.

332 *See supra* note 150.

performance.[333] Therefore, retaining a specific reference to the number of employees in this disclosure topic may help registrants provide information that is material to an understanding of their business.

The final amendments also adjust for inflation the bright-line threshold for environmental proceedings in Item 103 from $100,000 to $300,000 and allow registrants to elect to use a different threshold, with an upper bound of the lesser of $1,000,000 or one percent of its current assets. As an alternative to this amendment, we considered applying only a materiality standard. On the one hand, a materiality standard might elicit disclosure that is more relevant to a registrant's operations. For example, the same dollar amount of environmental fines might have a significant impact on the cash flows of a small registrant but a marginal impact on the cash flows of a large registrant. On the other hand, some environmental proceedings can be factually and legally complex, so a bright-line threshold may provide an easy-to-apply benchmark for registrants that use it when determining whether a particular environmental proceeding should be disclosed.[334] Furthermore, the imposition of fines and sanctions may be important information for investors in assessing a registrant's overall compliance efforts, even if, depending on the size of a registrant, such fines or sanctions may be construed as not material when considered in relation to the registrant's total assets or revenues. Another alternative would be to adopt a lower or higher bright-line threshold than the one

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333 *See* Frederico Belo et al., Labour Hiring, Investment, and Stock Return Predictability in the Cross Section, 122J. POLIT. ECON. 129 (2014) (finding that annual growth in employee count is associated with low cost of capital). *See also* Qin Li et al., *Employee Turnover and Firm Performance: Large-Sample Archival Evidence* (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3505626 (documenting that employee turnover is negatively associated with future financial performance).

334 *See supra* note 177 and accompanying text.

proposed. The optimal threshold depends on the preference of investors. For example, a lower bright-line threshold might be more appropriate if investors use information about environmental proceedings smaller than $300,000 to inform investment decisions.

As another alternative, we considered making similar amendments to the corresponding disclosure requirements applicable to foreign private issuers[335] and smaller reporting companies.[336] For example, we considered making the business disclosure requirements under Form 20-F, which are largely prescriptive, more principles-based, similar to those we are adopting for domestic registrants. Although current rules provide certain accommodations specific to these types of registrants (e.g., scaled disclosures), they are generally more prescriptive. Amending these requirements to make them more principles-based would enable such registrants to realize the same expected benefits as other registrants by permitting them to tailor their disclosure to fit their own particular circumstances and reduce the amount of disclosure that is not material. However, such an alternative also could impose unique costs for these registrants. For example, such an approach could reduce the ability of foreign private registrants to use a single disclosure document that would be accepted in multiple jurisdictions. Similarly, a principles-based approach that requires more judgment may make it more difficult for smaller registrants with limited resources and less established reporting histories to meet their disclosure obligations and could increase the risk of persistent information asymmetries. For these reasons, and because we received limited feedback on these points, we are not

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335 Business disclosure for foreign private issuers is governed by Part I of Form 20-F, and not by Item 101 of Regulation S-K. *See supra* note 23. The Commission amended Form 20-F in 1999 to conform it in large part to the non-financial disclosure standards endorsed by IOSCO. *See supra* note 12 and accompanying text.

336 *See supra* note 19.

adopting either of these alternatives.

V. PAPERWORK REDUCTION ACT

A. Summary of the Collections of Information

Certain provisions of our rules, schedules, and forms that would be affected by the rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[337] The Commission published a notice requesting comment on revisions to these collections of information requirements in the Proposing Release and has submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[338] The hours and costs associated with preparing, filing, and sending the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the collections of information are: [339]

- "Form S-1" (OMB Control No. 3235-0065);
- "Form S-3" (OMB Control No. 3235-0073;
- "Form S-4" (OMB Control No. 3235-0324);
- "Form S-11" (OMB Control No. 3235-0067);

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337 44 U.S.C. 3501 *et seq*.

338 44 U.S.C. 3507(d) and 5 CFR 1320.11.

339 The paperwork burden for Regulation S-K is imposed through the forms that are subject to the requirements in this regulation and is reflected in the analysis of those forms.

- "Form F-1" (OMB Control No. 3235-0258);
- "Form F-3" (OMB Control No. 3235-0256);
- "Form F-4" (OMB Control No. 3235-0325);
- "Form SF-1" (OMB Control No. 3235-0707);
- "Form SF-3" (OMB Control No. 3235-0690);
- "Form 10" (OMB Control No. 3235-0064);
- "Form 10-K" (OMB Control No. 3235-0063);
- "Form 10-Q" (OMB Control No. 3235-0070);
- "Schedule 14A" (OMB Control No. 3235-0059); and
- "Schedule 14C" (OMB Control No. 3235-0057)

The regulations, schedules, and forms listed above were adopted under the Securities Act and/or the Exchange Act. These regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic and current reports, distribution reports, and proxy and information statements filed by registrants to help investors make informed investment and voting decisions.

A description of the amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the proposed amendments can be found in Section IV above.

B. Summary of Comment Letters

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive such estimates. We did not receive any comments that directly addressed the PRA analysis of the proposed amendments. Several

commenters, however, did provide responses to certain requests for comment that have informed some of our PRA estimates. In this regard, several commenters stated that the proposals would eliminate or reduce disclosure of redundant and unnecessary information and give registrants the flexibility to focus on information that is material.[340] These effects should also reduce the compliance burdens.

C. Summary of the Impact on Collections of Information

As discussed in more detail in the Proposing Release,[341] we derived the burden hour estimates by estimating change in paperwork burden as a result of the amendments. As discussed in Section II, we have made some changes to the proposed amendments as a result of comments received. While certain of these changes could further reduce burdens on registrants, such as not adopting as a disclosure topic under Item 101(a)(1) transactions and events that affect or may affect the company's operations, or providing a modified disclosure threshold for environmental proceedings, others may incrementally increase those burdens relative to the proposals. Considered together, we do not expect these changes to impact our assessment of the compliance burdens of the final rule amendments for purposes of the PRA. Accordingly, we have not revised the estimates of the impact on the per hour burden for the affected forms discussed in the Proposing Release. We have, however, added Schedule 14C as an affected form, which increases the totals in PRA Tables 3 and 4.

PRA Table 1 summarizes the estimated impact of the final amendments on the paperwork burdens associated with the affected forms listed above.

PRA Table 1. Estimated Paperwork Burden Effects of the Final Amendments

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340 *See*, *e.g.*, letters from Society, Nasdaq, Dunker, DP&W and FEI.

341 *See* Section VIII of the Proposing Release.

Final Amendments and Effects	Affected Forms	Estimated Net Effect*
Item 101(a) and Item 101(h): • More principles-based disclosure requirement, elimination of timeframe, and, for registration statements subsequent to the initial registration statement, permitting registrants to provide an update and incorporate by reference to the most recently filed full disclosure that, together with the update, would present a complete discussion of the general development of a registrant's business, would decrease the paperwork burden by reducing repetitive and immaterial information about a registrant's business development. Estimated burden decrease: 3 hours per form; and, for Schedules 14A and 14C, 0.3 hour per schedule.** • Addition of material changes to business strategy as a disclosure topic expected to increase the paperwork burden for some registrants, although such increase should be minimal, as many registrants already provide this disclosure. Estimated burden increase: 1 hour per form; and, for Schedules 14A and 14C, 0.1 hour per schedule.**	• Forms S-1, S-4, 10, 10-K • Schedules 14A, 14C	• 2 hour net decrease in compliance burden per form • 0.2 hour net decrease in compliance burden per schedule
Item 101(c): • More principles-based disclosure requirement is expected to decrease the paperwork burden. Estimated burden decrease: 3 hours per form; and, for Schedules 14A and 14C, 0.3 hour per schedule.** • Addition of human capital resources/measures and objectives as a disclosure topic expected to increase the paperwork burden. Estimated burden increase: 5 hours per form; and, for Schedules 14A and 14C, 0.5 hour per schedule.** • Addition of material government (and not just environmental) regulations as a disclosure topic expected to increase the paperwork burden for some registrants, although such increase is expected to be minimal as many registrants already provide such disclosure. Estimated burden increase: 1 hour per form; and, for Schedules 14A and 14C, 0.1 hour per schedule.**	• Forms S-1, S-4, 10, 10-K • Schedules 14A, 14C	• 3 hour net increase in compliance burden per form • 0.3 hour net increase in compliance burden per schedule
Item 103: • Expressly provide for the use of cross-references or hyperlinks is expected to decrease the paperwork burden by discouraging repetitive disclosure. Estimated burden decrease: 1 hour per form/schedule. • Raising the disclosure threshold for governmental environmental proceedings also is estimated to decrease the paperwork burden by reducing disclosure of immaterial proceedings. Estimated burden decrease: 2 hours per form/schedule.	Forms S-1, S-4, S-11, 10, 10-K, 10-Q, Schedules 14A, 14C	3 hour net decrease in compliance burden per form / schedule
Item 105:		

• Summary risk factor disclosure provision could increase the paperwork burden for some registrants, although such increase is expected to be minimal as the summary would consist of a bulleted list of no more than two pages. Estimated burden increase: 1 hour per form, except no increase for Form S-11,*** and 0.67 hour increase per form for Forms 10 and 10-K.± • Summary risk factor disclosure provision could decrease the paperwork burden for other registrants to extent that it incentivizes registrants to provide streamlined risk factor disclosure focusing on the most salient risks. Estimated burden decrease: 4 hours per form, except no decrease for Form S-11,*** and 2.67 hour decrease per form for Forms 10 and 10-K, .± • "General Risk Factors" heading provision could marginally increase the paperwork burden. Estimated burden increase: 0.5 hour per form, except 0.33 hour increase per form for Forms 10 and 10-K].± • Substitution of "material" risks for "most significant" risks could marginally decrease the paperwork burden. Estimated burden decrease: 0.5 hours per form, except 0.33 hour decrease per form for Forms 10 and 10-K.±	• Forms S-1, S-3, S-4, F-1, F-3, F-4, SF-1, SF-3 • Form S-11 • Forms 10, 10-K	• 3 hour net decrease in compliance burden per form • no change in compliance burden • 2 hour net decrease in compliance burden per form
Total	• Forms S-1, S-4 • Forms S-3, S-11, F-1, F-3, F-4, SF-1, SF-3, and 10-Q • Form 10, 10-K • Schedules 14A and 14C	• 5 hour net decrease per form • 3 hour net decrease per form • 4 hour net decrease per form • 2.9 hour net decrease per schedule

*Estimated effect expressed as increase or decrease of burden hours *on average* and derived from staff review of samples of relevant sections of the affected forms.

**The lower estimated average incremental burden for Schedules 14A and 14C reflects the Commission staff estimate that annually no more than 10% of these filings include Item 101 disclosures.

***Because Form S-11 already has a summary risk factor disclosure requirement, the amendments to Item 105 are not expected to affect the compliance burden for Form S-11 registrants.

± The lower estimated average incremental burden for Forms 10 and 10-K reflects the approximate number of these forms filed by smaller reporting companies which are not required to provide Item 105 risk factor disclosure.

D. Burden and Cost Estimates of the Amendments

Below we estimate the incremental change in paperwork burdens as a result of the final amendments. These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the size and nature of their business. We do not believe that the amendments will change the number of responses to the existing collections of information; rather, we estimate that the amendments will reduce the burdens per response.

The burden reduction estimates were calculated by multiplying the number of responses by the estimated average reduction in the amount of time it would take a registrant to prepare and review the disclosures required under the amendments. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. The table below sets forth the percentage estimates we typically use for the burden allocation for each form. We also estimate that the average cost of retaining outside professionals is $400 per hour.[342]

PRA Table 2. Standard Estimated Burden Allocation for Specified Forms and Schedules.

Form / Schedule Type	Internal	Outside Professionals
Forms 10-K and 10-Q Schedules 14A and 14C	75%	25%
Forms S-1, S-3, S-4, S-11, F-1, F-3, F-4, SF-1, SF-3, and 10	25%	75%

The table below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the final amendments.

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342 We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing documents with the Commission.

PRA Table 3. Calculation of the Incremental Change in Burden Estimates of Current Responses Resulting from the Final Amendments

Form	Number of Estimated Affected Responses (A)[343]	Estimated Burden Hour Reduction /Affected Response (B)	Total Incremental Reduction in Burden Hours (C) = (A) x (B)[344]	Estimated Reduction in Internal Burden Hours (D) = (C) x (Allocation %)	Estimated Reduction in Outside Professional Hours (E) = (C) x (Allocation %)	Total Reduction in Outside Professional Costs (F) = (E) x $400
S-1	901	5	4,505	1,126	3,379	$1,351,600
S-3	1,657	3	4,971	1,243	3,729	$1,491,600
S-4	551	5	2,755	689	2,066	$826,400
S-11	64	3	192	48	144	$57,600
F-1	63	3	189	47	142	$56,800
F-3	112	3	336	84	252	$100,800
F-4	39	3	117	29	88	$35,200
SF-1	6	3	18	5	14	$5,600
SF-3	71	3	213	53	160	$64,000
10	216	4	864	216	648	$259,200
10-K	8,137	4	32,548	24,411	8,137	$3,254,800
10-Q	22,907	3	68,721	51,541	17,180	$6,872,000
Sch. 14A	5,586	2.9	16,199	12,149	4,050	$1,620,000
Sch. 14C	569	2.9	1,650	1,238	412	$164,800
Total				92,879	81,739	$16,160,400

The following table summarizes the requested paperwork burden, including the estimated total reporting burdens and costs, under the final amendments.

PRA Table 4. Requested Paperwork Burden under the Final Amendments

	Current Burden			Program Change			Requested Change in Burden		
Form	Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Number of Affected Responses (D)	Reduction in Company Hours (E)	Reduction in Professional Costs (F)	Annual Responses (G) = (A)	Burden Hours (H) = (B) + (E)	Cost Burden (I) = (C) + (F)
S-1	901	147,208	$180,319,975	901	1,126	$1,351,600	901	146,082	$178,968,375
S-3	1,657	193,626	$236,198,036	1,657	1,243	$1,491,600	1,657	192,383	$234,706,436

343 The number of estimated affected responses is based on the number of responses in the Commission's current OMB PRA filing inventory. The OMB PRA filing inventory represents a three-year average.

344 The numbers in Columns (C), (D) and (E) have been rounded to the nearest whole number.

S-4	551	562,465	$677,378,579	551	689	$826,400	551	561,776	$676,552,179
S-11	64	12,214	$14,925,768	64	48	$57,600	64	12,166	$14,868,168
F-1	63	26,692	$32,275,375	63	47	$56,800	63	26,645	$32,218,575
F-3	112	4,441	$5,703,600	112	84	$100,800	112	4,357	$5,602,800
F-4	39	14,049	$17,073,825	39	29	$35,200	39	14,020	$17,038,625
SF-1	6	2,076	$2,491,200	6	5	$5,600	6	2,071	$2,485,600
SF-3	71	24,552	$29,463,322	71	53	$64,000	71	24,499	$29,399,322
10	216	11,855	$14,091,488	216	216	$259,200	216	11,639	$13,832,288
10-K	8,137	14,198,780	$1,895,224,719	8,137	24,411	$3,254,800	8,137	14,174,369	$1,891,969,919
10-Q	22,907	3,253,411	$432,290,354	22,907	51,541	$6,872,000	22,907	3,201,870	$425,418,354
Sch. 14A	5,586	551,101	$73,480,012	5,586	12,149	$1,620,000	5,586	538,952	$71,860,012
Sch. 14C	569	56,356	$7,514,944	569	1,238	$164,800	569	55,118	$7,350,144

VI. REGULATORY FLEXIBILITY ACT CERTIFICATION

The Regulatory Flexibility Act ("RFA")[345] requires an agency in promulgating rules, to consider the impact of those rules on small entities. The Commission certified in the Proposing Release, pursuant to Section 605(b) of the RFA,[346] that the proposed amendments to Items 101, 103, and 105 of Regulation S-K and related conforming amendments would not, if adopted, have a significant economic impact on a substantial number of small entities. The Commission solicited comments on its certification and received no comments.

The final amendments to Items 101, 103, and 105 will affect all small entities that file documents that must include disclosure required by these Items. However, we believe that the impact on small entities will not be significant. The primary effects of the final amendments will be to: (1) increase a registrant's flexibility to provide disclosure regarding its business, including its general business development, so that it can tailor its disclosure to its particular circumstances; (2) eliminate or reduce disclosure about matters that are not material to an

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345 5 U.S.C. 601 *et seq.*

346 5 U.S.C. 605(b). Section 605 of the RFA allows an agency to certify a rule is not expected to have a significant economic impact on a substantial number of small entities.

understanding of the business or to a registrant's legal proceedings; and (3) encourage risk factor disclosure that is shorter and concerns only material risks. We expect the final amendments will reduce the paperwork burden for all registrants, including small entities.[347] Although, we anticipate that the economic impact of the reduction in the paperwork burden will be modest, the reduction in the burden will be beneficial to all registrants, including small entities. Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the final amendments to Items 101, 103, and 105 of Regulation S-K will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

VII. STATUTORY AUTHORITY

The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3, 12, 13, 15, and 23(a) of the Exchange Act, as amended.

List of Subjects in 17 CFR Parts 229, 239, and 240

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

In accordance with the foregoing, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 229--STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K

1. The authority citation for part 229 continues to read as follows:

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347 *See* Section V.D.

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78*l*, 78m, 78n, 78n-1, 78*o*, 78u-5, 78w, 78*ll*, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 *et seq*.; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111-203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112-106, 126 Stat. 310 (2012).

2. Amend §229.101 by:

a. Revising paragraphs (a) introductory text and (a)(1);

b. Redesignating paragraph (a)(2) as paragraph (a)(3);

c. Adding new paragraph (a)(2); and

d. Revising paragraph (c) and paragraph (h) introductory text.

The revisions and addition read as follows:

§229.101 (Item 101) Description of business.

(a) *General development of business.* Describe the general development of the business of the registrant, its subsidiaries, and any predecessor(s).

(1) In describing developments, only information material to an understanding of the general development of the business is required. Disclosure may include, but should not be limited to, the following topics:

(i) Any material changes to a previously disclosed business strategy;

(ii) The nature and effects of any material bankruptcy, receivership, or any similar proceeding with respect to the registrant or any of its significant subsidiaries;

(iii) The nature and effects of any material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; and

(iv) The acquisition or disposition of any material amount of assets otherwise than in

the ordinary course of business.

(2) Notwithstanding the provisions of § 230.411(b) or § 240.12b-23(a) of this chapter, as applicable, a registrant may only forgo providing a full discussion of the general development of its business for a filing other than an initial registration statement if it provides an update to the general development of its business, disclosing all of the material developments that have occurred since the most recent registration statement or report that includes a full discussion of the general development of its business. In addition, the registrant must incorporate by reference, and include one active hyperlink to one registration statement or report that includes, the full discussion of the general development of the registrant's business.

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(c) *Description of business*. (1) Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements. When describing each segment, only information material to an understanding of the business taken as a whole is required. Disclosure may include, but should not be limited to, the information specified in paragraphs (c)(1)(i) through (v) of this section.

(i) Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families or customers, including governmental customers;

(ii) Status of development efforts for new or enhanced products, trends in market demand and competitive conditions;

(iii) Resources material to a registrant's business, such as:

(A) Sources and availability of raw materials; and

(B) The duration and effect of all patents, trademarks, licenses, franchises, and concessions held;

(iv) A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government; and

(v) The extent to which the business is or may be seasonal.

(2) Discuss the information specified in paragraphs (c)(2)(i) and (ii) of this section with respect to, and to the extent material to an understanding of, the registrant's business taken as a whole, except that, if the information is material to a particular segment, you should additionally identify that segment.

(i) The material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period; and

(ii) A description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel).

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(h) *Smaller reporting companies.* A smaller reporting company, as defined by §229.10(f)(1), may satisfy its obligations under this Item by describing the development of its

business pursuant to this paragraph (h). In describing developments under paragraphs (h)(1) through (3), information should be provided for the period of time that is material to an understanding of the general development of the business. Notwithstanding the provisions of § 230.411(b) or § 240.12b-23(a) of this chapter as applicable, a smaller reporting company may only forgo providing a full discussion of the general development of its business for a filing other than an initial registration statement if it provides an update to the general development of its business disclosing all of the material developments that have occurred since the most recent registration statement or report that includes a full discussion of the general development of its business. In addition, the smaller reporting company must incorporate by reference, and include one active hyperlink to one registration statement or report that includes, the full discussion of the general development of the registrant's business. If the smaller reporting company has not been in business for three years, provide the same information for predecessor(s) of the smaller reporting company if there are any. This business development description should include:

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3. Revise § 229.103 to read as follows:

§229.103 (Item 103) Legal proceedings.

(a) Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities. Information may be provided by hyperlink or cross-reference to legal proceedings disclosure

elsewhere in the document, such as in Management's Discussion & Analysis (MD&A), Risk Factors and notes to the financial statements.

(b) No information need be given under this section for proceedings:

(1) That involve negligence or other claims or actions if the business ordinarily results in such claims or actions, unless the claim or action departs from the normal kind of such claims or actions; or

(2) That involve primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same legal or factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

(c) Notwithstanding paragraph (b) of this section, disclosure under this section shall include, but shall not be limited to:

(1) Any material bankruptcy, receivership, or similar proceeding with respect to the registrant or any of its significant subsidiaries;

(2) Any material proceedings to which any director, officer or affiliate of the registrant, any owner of record or beneficially of more than five percent of any class of voting securities of the registrant, or any associate of any such director, officer, affiliate of the registrant, or security holder is a party adverse to the registrant or any of its subsidiaries or has a material interest adverse to the registrant or any of its subsidiaries;

(3) Administrative or judicial proceedings (including proceedings which present in large degree the same issues) arising under any Federal, State, or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for

the purpose of protecting the environment. Such proceedings shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if:

(i) Such proceeding is material to the business or financial condition of the registrant;

(ii) Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or

(iii) A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $300,000 or, at the election of the registrant, such other threshold that (A) the registrant determines is reasonably designed to result in disclosure of any such proceeding that is material to the business or financial condition is disclosed, (B) the registrant discloses (including any change thereto) in each annual and quarterly report, and (C) does not exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis; provided, however, that such proceedings that are similar in nature may be grouped and described generically.

4. Revise § 229.105 to read as follows:

§ 229.105 (Item 105) Risk factors.

(a) Where appropriate, provide under the caption "Risk Factors" a discussion of the material factors that make an investment in the registrant or offering speculative or risky. This discussion must be organized logically with relevant headings and each risk factor should be set forth under a subcaption that adequately describes the risk. The presentation of risks that could

apply generically to any registrant or any offering is discouraged, but to the extent generic risk factors are presented, disclose them at the end of the risk factor section under the caption "General Risk Factors."

(b) Concisely explain how each risk affects the registrant or the securities being offered. If the discussion is longer than 15 pages, include in the forepart of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the registrant or offering speculative or risky. If the risk factor discussion is included in a registration statement, it must immediately follow the summary section required by § 229.503 (Item 503 of Regulation S-K). If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on Rule 430A (§ 230.430A of this chapter). The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

5. The authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78*l*, 78m,78n, 78*o*(d), 78*o*-7 note, 78u-5, 78w(a), 78*ll*, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37; and sec. 107, Pub. L. 112-106, 126 Stat. 312, unless otherwise noted.

* * * * *

6. Amend Form S-4 (referenced in § 239.25) by revising paragraph (b)(3)(i) of Item 12

under Part I, Section B ("Information About the Registrant") to read as follows:

Note: The text of Form S-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

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PART I

INFORMATION REQUIRED IN THE PROSPECTUS

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B. INFORMATION ABOUT THE REGISTRANT

* * * * *

Item 12. Information with Respect to S-3 Registrants.

* * * * *

(b) * * *

(3) Furnish the information required by the following:

(i) Item 101(c)(1)(i) of Regulation S-K (§ 229.101(c)(1)(i) of this chapter), industry segments, key products or services;

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss,

77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l,* 78m, 78n, 78n-1, 78*o,* 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78*ll,* 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.;* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub. L. 112-106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

8. Amend § 240.14a-101 by revising paragraph (a) of Item 7 of Schedule 14A to read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 7. Directors and executive officers. * * *

(a) The information required by Item 103(c)(2) of Regulation S-K (§229.103(c)(2) of this chapter) with respect to directors and executive officers.

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By the Commission.

Dated: August 26, 2020

Vanessa A. Countryman,

Secretary.