## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR 229, 239, and 240

**[Release Nos. 33–10668; 34–86614; File No. S7–11–19]**

**RIN 3235–AL78**

## Modernization of Regulation S–K Items 101, 103, and 105

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission (''Commission'') is proposing for public comment 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 proposed amendments are intended to update our rules to account for developments since their adoption or last amendment, to improve these disclosures for investors, and to simplify compliance efforts for registrants. Specifically, the proposed amendments are intended to improve the readability of disclosure documents, as well as discourage repetition and disclosure of information that is not material.

**DATES:** Comments should be received on or before October 22, 2019.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–11–19 on the subject line.

*Paper Comments*

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–11–19. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on our internet website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in our Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

**FOR FURTHER INFORMATION CONTACT:** Sandra Hunter Berkheimer or Elliot Staffin, 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:** We are proposing to amend 17 CFR 229.101 (''Item 101''), 17 CFR 229.103 (''Item 103''), and 17 CFR 229.105 (''Item 105'') of 17 CFR 229.10 *et seq.* (''Regulation S–K'') under the Securities Act of 1933 (the ''Securities Act'') and the Securities Exchange Act of 1934 (the ''Exchange Act'').

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## I. Introduction and Background

We are proposing amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosure requirements in Regulation S–K. We are proposing amendments to these items to improve these disclosures for investors and to simplify compliance for registrants.[1]

Pursuant to Section 108 of the Jumpstart Our Business Startups Act (''JOBS Act''),[2] the Commission staff prepared the *Report on Review of Disclosure Requirements in Regulation S–K* (''S–K Study''),[3] 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 presented, where this information is disclosed, and how we can better leverage technology as part of these efforts (collectively, the ''Disclosure Effectiveness Initiative'').[4] The overall objective of the Disclosure Effectiveness Initiative is to improve our disclosure regime for both investors and registrants.

[1] The proposed amendments are also consistent with and further promote the objectives of the Fixing America's Surface Transportation Act (''FAST Act''). *See* Public Law 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). In the *Report on Modernization and Simplification of Regulation S–K,* the staff recommended that the Commission consider combining the description of material physical properties required in Item 102 with the description of business in Item 101(c). *See Report on Modernization and Simplification of Regulation S–K* (Nov. 23, 2016), available at *https://www.sec.gov/reportspubs/sec-fast-act-report-2016.pdf.* The Commission considered the staff recommendation, but did not propose to combine Item 102 with Item 101. *See FAST Act Modernization and Simplification of Regulation S–K,* Release No. 33–10425 ([Oct. 11, 2017) [82 FR 50988 (Nov. 2, 2017)]. Instead, the Commission adopted amendments to Item 102 to emphasize the materiality standard applicable to that disclosure, while preserving the industry-specific instructions to that Item. *See FAST Act Modernization and Simplification of Regulation S–K,* Release No. 33–10618 (Mar. 20, 2019) [84 FR 12674 (April 2, 2019)] (''FAST Act Adopting Release''). We believe that, in light of our proposed amendments to Item 101, combining the two items would not improve registrants' business disclosure or simplify compliance.

[2] Public Law 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.

[3] *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'').

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

In connection with the S–K Study and the launch of the Disclosure Effectiveness Initiative, the Commission staff received public input on how to improve registrant disclosures.[5] In a separate Concept Release issued in 2016,[6] the Commission staff revisited the business and financial disclosure requirements in Regulation S–K and requested public comment on whether they 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, we considered input from comment letters we received in response to these disclosure modernization efforts.[7] 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.

Regulation S–K was adopted in 1977 to foster uniform and integrated disclosure for registration statements under both the Securities Act and the Exchange Act, and other Exchange Act filings, including periodic and current reports.[8] In 1982, the Commission expanded and reorganized Regulation S–K to be the central repository for its non-financial statement disclosure requirements.[9] The Commission's goals in adopting integrated disclosure were to revise or eliminate overlapping or unnecessary disclosure requirements wherever possible, thereby reducing burdens on registrants and enhancing readability without affecting the provision of information material to an investment decision.[10]

The Commission adopted line-item requirements in Regulation S–K to elicit specific disclosure within broad categories of information material to an investment decision. Some of these requirements provide registrants with the flexibility to determine the disclosure that is material to an investment decision.[11] These disclosure requirements are often referred to as ''principles-based'' because they articulate a disclosure concept rather than a specific line-item requirement.[12] Principles-based rules rely on a registrant's management to evaluate the significance of information in the context of the registrant's overall business and financial circumstances and to determine whether disclosure is necessary.[13] As the Commission stated in the Concept Release, emphasizing principles-based disclosure may allow a registrant to more effectively tailor its disclosure to provide the information about its specific business and financial condition that is material to an investment decision and in turn may reduce the amount of disclosure that may be irrelevant, outdated or immaterial.[14]

In contrast, some line-item requirements in Regulation S–K employ bright-line, quantitative thresholds to specify when disclosure is required, or require all registrants to disclose the same type of information. These requirements are sometimes referred to as ''prescriptive'' disclosure requirements because they do not rely on management's judgment to determine when disclosure is required. The benefits of prescriptive disclosure requirements can include comparability, consistency, and ease in determining when information must be disclosed.[15]

The Concept Release sought input on whether our disclosure requirements should be more principles-based, prescriptive, or a combination of both. Many commenters supported a more principles-based approach [16] while

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[5] In connection with the S–K Study, we received public comments on regulatory initiatives to be undertaken in response to the JOBS Act. *See* Comments on SEC Regulatory Initiatives Under the JOBS Act: Title I—Review of Regulation S–K, available at *http://www.sec.gov/comments/jobs-title-i/reviewreg-sk/reviewreg-sk.shtml.* To facilitate public input on the Disclosure Effectiveness Initiative, members of the public were invited to submit comments. *See* Request for Public Comment, available at *http://www.sec.gov/spotlight/disclosure-effectiveness.shtml.* Public comments received to date on the topic of Disclosure Effectiveness are available on our website. *See* Comments on Disclosure Effectiveness, available at *https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.* We refer to these letters throughout as ''Disclosure Effectiveness'' letters.

[6] *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'').

[7] Unless otherwise indicated, comments cited in this release are to the public comments on the Concept Release, *supra* note 6, which are available at *https://www.sec.gov/comments/s7-06-16/s70616.htm.*

[8] The Commission adopted the initial version of Regulation S–K following issuance of the report by the Advisory Committee on Corporate Disclosure led by former Commissioner A.A. Sommer, Jr., which recommended adoption of a single integrated disclosure system. *See Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission,* Cmte. Print 95–29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess (Nov. 3, 1977) (''Report of the Advisory Committee''), available at *http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf.* This version of Regulation S–K included only two disclosure requirements—a description of business and a description of properties. *See* Concept Release, *supra* note 6, and accompanying text.

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

[10] *See id.*

[11] On several occasions, the Commission has reiterated that its requirements seek disclosure of information material to an investment decision. *See, e.g., Commission Guidance Regarding Disclosure Related to Climate Change,* Release No. 33–9106 (Feb. 8, 2010) [75 FR 6290 (Feb. 8, 2010)] (''Climate Change Release'') at 6292–6293 (reiterating that information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or, put another way, if the information would alter the total mix of available information); *Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers,* Release No. 33–7558 (July 29, 1998) [63 FR 41394 (Aug. 4, 1998)] at 41395 (stating that our disclosure framework requires companies to disclose material information that enables investors to make informed investment decisions).

[12] *See Executive Compensation and Related Person Disclosure,* Release No. 33–8732A (Aug. 29, 2006) [71 FR 53157 (Sept. 8, 2006)] (''As described in the Proposing Release and as adopted, the Compensation Discussion and Analysis requirement is principles-based, in that it identifies the disclosure concept and provides several illustrative examples.'').

[13] *See* Report of the Advisory Committee, *supra* note 8 (''Although the initial materiality determination is management's, this judgment is, of course, subject to challenge or question by the Commission or in the courts.'').

[14] *See* Concept Release, *supra* note 6.

[15] *See id.* For a discussion of the potential economic effects of switching from a prescriptive to a more principles-based disclosure requirement, including a potential loss of comparability, *see infra* Sections IV.B.1 and 2 and IV.D.

[16] *See* letters from R.G. Associates, Inc. (July 6, 2016) (''RGA''), American Bankers Association (July 15, 2016), Deloitte & Touche LLP (July 15, 2016) (''Deloitte''), New York State Society of Certified Public Accountants (July 19, 2016) (''NYSSCPA''), U.S. Chamber of Commerce (July 20, 2016) (''Chamber''), BDO USA LLP (July 20, 2016) (''BDO''), Corporate Governance Coalition for Investor Value (July 20, 2016) (''CGCIV''), International Integrated Reporting Council (July 20, 2016) (''IIRC''), Railpen Investments (July 21, 2016) (''Railpen''), National Association of Manufacturers (July 21, 2016) (''NAM''), American Chemistry Council (July 19, 2016) (''ACC''), The American Petroleum Institute (July 21, 2018) (''API''), Business Roundtable (July 21, 2016), UnitedHealth Group, Inc. (July 21, 2016) (''United Health''), Center for Audit Quality (July 21, 2016) (''CAQ''), Securities Industry and Financial Markets Association (July 21, 2016) (''SIFMA''), Ernst & Young LLP (July 21, 2016) (''E&Y''), PNC Financial Services Group (July 21, 2016) (''PNC''), Edison Electric Institute and American Gas Association (July 21, 2016) (''EEI and AGA''), Grant Thornton LLP (July 21, 2016) (''Grant''), KPMG LLP (July 21, 2016) (''KPMG''), PricewaterhouseCoopers LLP (July 21, 2016) (''PWC''), Cornerstone Capital Inc. (July 21, 2016) (''Cornerstone''), Crowe Horwath LLP (July 21, 2016) (''Crowe''), America Gas Association (July 21, 2016) (''AGA''), Prologis, Inc. (July 21, 2016) (''Prologis''), National Association of Real Estate Investment Trusts (July 21, 2016) (''NAREIT''), Allstate Insurance Company (July 21, 2016) (''Allstate''), Davis Polk & Wardwell LLP (July 22, 2016) (''Davis''), Chevron Corporation (July 22, 2016) (''Chevron''), Fenwick West LLP (Aug. 1,

Continued

other commenters supported some combination of both principles-based and prescriptive rules.[17]

We are proposing amendments to Items 101, 103, and 105 [18] in light of the many changes that have occurred in our capital markets and the domestic and global economy in the more than 30 years since their adoption, including changes in the mix of businesses that participate in our public markets, changes in the way businesses operate, which may affect the relevance of current disclosure requirements, changes in technology (in particular the availability of information), and changes such as inflation that have occurred simply with the passage of time.[19] For example, Item 101 mandates certain disclosures that may be outdated while Item 103 includes a dollar threshold for proceedings related to environmental protection laws that was set in 1982.[20] Further, numerous commenters cited the risk factor disclosure requirements as needing improvement.[21] We believe that modernizing these disclosure items would result in improved disclosure, tailored to reflect registrants' particular circumstances, and reduce disclosure costs and burdens.

For each of the disclosure requirements addressed in this release, we considered the merits and drawbacks of pursuing a principles-based versus prescriptive approach. We also considered each requirement as a component of a broader framework that will achieve the disclosure objectives of the Securities Act and the Exchange Act in the most effective and efficient manner. As discussed in greater detail in Section II below, we propose to revise Items 101(a) (description of the general development of the business), 101(c) (narrative description of the business), and 105 (risk factors) to emphasize a principles-based approach because the current disclosure requirements may not reflect what is material to every business, and, as past developments have demonstrated, disclosure requirements, and in particular prescriptive disclosure requirements, can become outdated in these areas. We believe this approach would elicit more relevant disclosures about these items. In contrast, we are proposing a more prescriptive approach for Item 103 because that requirement depends less on the specific characteristics of individual registrants.

Our proposed amendments would: [22]

- Revise Item 101(a) to be largely principles-based, requiring:
  - Disclosure of information material [23] to an understanding of the general development of the business and eliminating a prescribed timeframe for this disclosure; and
  - In filings made after a registrant's initial filing, only an update of the general development of the business with a focus on material developments in the reporting period with a hyperlink to the registrant's most recent filing (*e.g.,* initial registration statement or more recent filing if one exists) that, together with the update, would contain the full discussion of the general development of the registrant's business.
- Revise Item 101(c) to:
  - Clarify and expand its principles-based approach, with disclosure topics drawn from a subset of the topics currently contained in Item 101(c);
  - Include, as a disclosure topic, human capital resources, including 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; and
  - Refocus the regulatory compliance requirement by including material government regulations, not just environmental laws, as a topic.
- Revise Item 103 to:
  - Expressly state that the required information may be provided by including hyperlinks or cross-references to legal proceedings disclosure located elsewhere in the document in an effort to encourage registrants to avoid duplicative disclosure; and
  - Revise the $100,000 threshold for disclosure of environmental proceedings to which the government is a party to $300,000 to adjust for inflation.
- Revise Item 105 to:
  - Require summary risk factor disclosure if the risk factor section exceeds 15 pages;
  - Refine the principles-based approach of Item 105 by changing the disclosure standard from the ''most significant'' factors to the ''material'' factors; and
  - Require risk factors to be organized under relevant headings, 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.[24]

2016) (''Fenwick''), Reardon Firm (Aug. 3, 2016) (''Reardon''), National Investor Relations Institute (Aug. 4, 2016) (''NIRI''), Sullivan & Cromwell LLP (Aug. 9, 2016), Exxon Mobil Corporation (Aug. 9, 2016), FedEx Corporation (July 21, 2016) (''FedEx''), Institute of Management Accountants (July 29, 2016), Shearman & Sterling LLP (Aug. 31, 2016) (''Shearman''), Nasdaq, Inc. (Sept. 16, 2016) (''Nasdaq''), Northrop Grumman Corporation (Sept. 27, 2016), General Motors Company (Sept. 30, 2016) (''General Motors'') and Financial Executives International (Oct. 3, 2016) (''Financial Executives International'').

[17] *See* letters from Council of Institutional Investors (July 8, 2016) (''CII''), Railpen, New York State Comptroller (July 21, 2016) (''NYSC''), California State Teachers' Retirement System (July 21, 2016) (''CalSTRS''), Pension Investment Association of Canada (July 17, 2016), Medical Benefits Trust (July 15, 2016) (''Medical Benefits Trust''), Principles for Responsible Investment (July 19, 2016) (''PRI''), Legal & General Investment Management (July 20, 2016) (''LGIM''), Walden Asset Management (July 19, 2016) (''Walden''), SEC Investor Advisory Committee (June 15, 2016) (''IAC''), AFLAC (July 19, 2016) (''AFLAC''), Domini Social Investments LLC (July 21, 2016) (''Domini Social''), NYC Comptroller (July 21, 2016) (''NYC Comptroller''), AFL–CIO (July 21, 2016) (''AFL–CIO''), California Public Employees' Retirement System (July 21, 2016) (''CalPERS''), British Columbia Investment Management Corporation (July 21, 2016), Stephen Percoco (July 24, 2016) (''S. Percoco''), Americans for Financial Reform (Aug. 10, 2016) (''Americans for Financial Reform'') and CFA Institute (Oct. 6, 2016) (''CFA Institute''). Four commenters supported a combination that emphasized a principles-based approach (Walden, AFLAC, Ball Corporation (July 19, 2016) (''Ball Corporation'') and S. Percoco) and seven commenters supported a combination that emphasized a prescriptive approach (IAC, NYC Comptroller, American Federation of State, County and Municipal Employees (July 21, 2016) (''AFSCME''), Maryland State Bar Association (July 21, 2016) (''Maryland Bar Securities Committee''), AFL–CIO, Americans for Financial Reform and CFA Institute).

[18] The Commission recently rescinded Item 503(c) of Regulation S–K and replaced it with new Item 105 of Regulation S–K. *See* FAST Act Adopting Release, *supra* note 1.

[19] *See infra* note 279 (noting that while Items 101, 103, and 105 have not undergone significant revisions in over 30 years, many characteristics of the registrants have changed substantially over this time period).

[20] *See id.*

[21] *See, e.g.,* letters from CAQ, AFLAC, Chamber, FedEx, CGCIV, NAM, ACC, SIFMA, E&Y, EEI and AGA, Wilson Sonsini Goodrich & Rosati (July 21, 2016) (''Wilson Sonsini''), NAREIT, Davis, Fenwick, NIRI, Shearman, PWC, General Motors, and Financial Executives International.

[22] We are also proposing amendments to Item 101(h) of Regulation S–K [17 CFR 229.101(h)], which permits a smaller reporting company to fulfill its disclosure obligations under Item 101, including with respect to its business development, by providing the disclosure specified under paragraph (h). ''Smaller reporting company'' is defined in 17 CFR 229.10(f) 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: (i) Had a public float of less than $250 million; or (ii) had annual revenues of less than $100 million and either: (A) No public float; or (B) a public float of less than $700 million. Business development companies, which are a type of investment company, are not eligible to be smaller reporting companies. *See, e.g., Smaller Reporting Company Regulatory Relief and Simplification,* Release No. 33–8819 [(July 5, 2007) [72 FR 39670 (July 19, 2007)], at 39674.

[23] 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. *See supra* note 14 and accompanying text.

[24] The proposed amendments to Items 101 and 103 will affect only domestic registrants and

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

## II. Description of the Proposed Amendments

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

Item 101(a) of Regulation S–K 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.[25] 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.[26]

The Concept Release solicited input on whether the disclosure provided under this Item continues to be useful and how this Item might be improved.[27] A number of commenters recommended eliminating or streamlining the requirements in Item 101(a).[28] Several of these commenters recommended limiting Item 101(a) disclosure to material developments,[29] and a few commenters supported executive summaries and layering techniques for the business section.[30]

In light of the feedback received, we are proposing amendments to Item 101(a)(1) that would provide more flexibility to tailor disclosures to the unique circumstances of each registrant, which in turn could result in improved disclosures for investors. In addition, for filings other than initial registration statements, we are proposing to require only material updates to this disclosure.

#### 1. Eliminate Prescribed Timeframe

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.[31] A requirement to provide a brief outline of the general development of the business for the preceding five years was included in the earliest form requirements for registration statements and annual reports,[32] and 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.[33]

The Concept Release solicited comments on whether the current five-year timeframe for this disclosure is appropriate, or whether a shorter or longer timeframe should be considered.[34] Several commenters recommended reducing the five-year timeframe for disclosure to a two- or three-year timeframe, or permitting well-established companies to provide the information through other means (such as a filer information page on the company's website) with updates only required every three years or more frequently if there has been a substantial change.[35] One of these commenters suggested linking the timeframe to the two years presented in the financial statements to allow users to focus on material events in the current period.[36] Some of these commenters noted that this information does not change significantly from year to year and indicated that repeating these disclosures each year, especially for well-established companies, provides limited value to investors and may potentially obscure or distract from more important information included in the document.[37]

We do not think it is necessary to prescribe a timeframe for which registrants should provide disclosure regarding the general development of their business. The currently required five-year timeframe may not elicit the most relevant disclosure for every registrant. 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 decision, while others may conclude that the material aspects of their business development can be described over a shorter timeframe. We are proposing to revise Item 101(a) to eliminate the five-year disclosure timeframe and require registrants to focus on the information material to an understanding of the development of their business, irrespective of a specific timeframe. For similar reasons, we are also proposing to revise Item 101(h) to eliminate the provision that currently requires smaller reporting companies to describe the development of their business during the last three years.[38] We believe that these proposed revisions would result in disclosure of information that is material to investors' understanding of the development of a registrant's business while reducing outdated and irrelevant disclosure.

#### 2. Require Only Updated Disclosure in Subsequent Filings

Currently registrants are required to provide disclosure regarding the general development of the business in

''foreign private issuers'' that have elected to file on domestic forms. This is because 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. Instead of Items 101 and 103, the foreign private issuer forms refer to Part I of Form 20–F. *See, e.g.,* Item 4.a. of Form F–1. In contrast, the proposed 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. 17 CFR 230.405. *See also* 17 CFR 240.3b–4(c).

[25] 17 CFR 229.101(a). Item 101(a) states that information shall be disclosed for earlier periods if material to an understanding of the general development of the business.

[26] 17 CFR 229.101(a).

[27] *See* Concept Release, *supra* note 6, at 23932.

[28] *See* letters from Allstate, Chamber, FedEx, CGCIV, EEI and AGA, Fenwick, NAREIT, NIRI, NYSSCPA, PNC, SIFMA, Davis, General Motors, and Financial Executives International.

[29] *See* letters from NAREIT, PNC, SIFMA, and Fenwick.

[30] *See* letters from Deloitte and CAQ.

[31] 17 CFR 229.101(a).

[32] *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 3 at 32, n. 88.

[33] *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)].

[34] *See* Concept Release, *supra* note 6.

[35] *See* letters from Allstate, NYSSCPA, and EEI and AGA.

[36] *See* letter from Allstate.

[37] *See* letters from EEI and AGA.

[38] We are proposing only to eliminate the required timeframe in Item 101(h). We are, however, proposing to retain 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.

registration statements and annual reports.[39] The Concept Release sought comment on whether to allow registrants to omit this disclosure from filings other than the initial Securities or Exchange Act registration statement filed by the registrant and instead disclose only material changes in subsequent reports.[40]

Several commenters recommended revising the requirement to distinguish between new and established registrants, stating that much of the disclosure required under this Item is redundant for registrants already subject to the reporting requirements.[41] Many of these commenters supported limiting the full disclosure required by Item 101(a) to the initial filing and only requiring disclosure of material changes in subsequent filings,[42] with a few of these commenters supporting the use of cross-references or hyperlinks to either the prior full disclosure or the relevant Form 8–K [43] reports of material developments.[44] A few commenters opposed limiting the full disclosure required by Items 101(a) and 101(c) to initial filings with follow-up disclosure of material changes in subsequent filings based on the belief that such a revision would require investors to search through multiple filings in a time-consuming attempt to understand the current state of a registrant's business development and operations.[45]

We propose to retain the requirement for registrants to describe the general development of the business in initial registration statements under the Securities Act and Exchange Act.[46] For filings subsequent to a registrant's initial registration statement, we propose revising Item 101(a)(1) to require an update of this disclosure, with a focus on material developments, if any, in the reporting period, including if the business strategy has changed.[47] We also propose to require that, pursuant to § 230.411 or § 240.12b–23, a registrant incorporate by reference, and include an active hyperlink [48] to, the most recently filed disclosure that, together with the update, would present a full discussion of the general development of its business.[49] Under this approach, a reader would have access to a full discussion by reviewing the updated disclosure and one hyperlinked disclosure.[50] As noted by one commenter, registrants often repeat information from year-to-year in annual reports on Form 10–K,[51] with this disclosure changing very little from filing to filing.[52] This commenter also observed that there is no need for registrants to include this disclosure in both registration statements and annual reports as investors can easily access information about the general development of business through company websites or the Commission's EDGAR system, which was not the case when Regulation S–K was first adopted.[53] Because repetitive information may obscure more important information, we believe the proposed amendments would help focus investor attention on material developments in the reporting period. By also requiring that a registrant use one hyperlink to connect the updated disclosure with the previous disclosure, which together would result in a full discussion of its general business development, the amendment as proposed would help limit any burdensome effect on investors caused by this discussion being located in more than one document.[54]

3. Include Material Changes to Business Strategy as Potential Disclosure Topic

We are proposing to amend Item 101(a)(1) to be more principles-based by providing a non-exclusive list of the types of information that a registrant may need to disclose, and by requiring disclosure of a topic only to the extent such information is material to an understanding of the general development of a registrant's business.[55] We believe that such an approach would elicit material disclosure for investors while also providing the flexibility to tailor the disclosure to reflect the circumstances of each registrant.

Three of the four matters that we are proposing to list as disclosure topics are currently covered in Item 101(a)(1):

- Material bankruptcy, receivership, or any similar proceeding;
- The nature and effects of any material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; and
- The acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business.

We are also proposing to include as a listed disclosure topic, to the extent material to an understanding of the registrant's business, transactions and events that affect or may affect the company's operations, including material changes to a registrant's previously disclosed business strategy. Item 101(a) does not currently require disclosure of material changes to a registrant's previously disclosed business strategy. The Concept Release solicited input on whether Item 101(a) should be revised to require the disclosure of a registrant's business strategy; whether investors would find such disclosure important or useful and, if so, whether this requirement should be included in Management's Discussion and Analysis (''MD&A'');[56] and whether ''business strategy'' should be defined.[57] Commenters were divided on whether disclosure of a registrant's business strategy should be a requirement.[58] Most of the commenters

[39] *See* 17 CFR 229.101(a).

[40] *See* Concept Release, *supra* note 6.

[41] *See* letters from Chamber, FedEx, CGCIV, EEI and AGA, PNC, and SIFMA.

[42] *See* letters from SIFMA, PNC, Allstate, and Fenwick.

[43] 17 CFR 249.308.

[44] *See* letters from SIFMA and PNC.

[45] *See* letter from Maryland Bar Securities Committee; *see also* letter from RGA (stating that it is not always possible to fully understand a registrant's business if its business development must be ascertained from a variety of sources).

[46] Although, as discussed below, we propose to amend Item 101(a)(1), we are retaining Item 101(a)(2) and redesignating it as Item 101(a)(3).

[47] Registrants are currently permitted to provide Item 101(a) disclosure by incorporating by reference some or all of the required disclosure from a previous filing pursuant to Securities Act Rule 411 (17 CFR 230.411) or Exchange Act Rule 12b–23 (17 CFR 240.12b–23). Therefore, our proposal to require only an update of the Item 101(a)(1) disclosure in a filing made subsequent to a registrant's initial registration statement is a clarification of our existing rules rather than a substantive change.

[48] The SEC Investor Advisory Committee has recommended the use of hyperlinks to reduce redundant disclosure in SEC filings. *See* letter from IAC.

[49] The Commission recently revised Rules 411 and 12b–23 to require the inclusion of an active hyperlink to information incorporated into a registration statement or report by reference if such information is publicly available on the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR''). *See* FAST Act Adopting Release, *supra* note 1 at 12694–12695.

[50] Alternatively, a registrant may elect to provide a complete discussion of its business development, including material updates, in which case no hyperlink would be required.

[51] 17 CFR 249.310.

[52] *See* letter from PNC.

[53] *See id.*

[54] For similar reasons, we are proposing 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 proposed Item 101(a)(2), including the proposed hyperlink requirement. *See* the proposed amendment of Item 101(h).

[55] Proposed Item 101(a) refers to materiality in the introductory language of paragraph (a)(1). While materiality is repeated in three of the four listed topics that follow, this is not intended to create a second or different analysis regarding materiality for any such topic.

[56] Item 303(a) [17 CFR 229.303(a)].

[57] *See* Concept Release, *supra* note 6.

[58] Several commenters supported requiring disclosure of a registrant's business strategy. *See, e.g.,* letters from IIRC, NEI Investments (July 21, 2016), NYSSCPA, PRI, S. Percoco, AFL–CIO and International Corporate Accountability Roundtable (July 19, 2016). Other commenters opposed requiring disclosure of a registrant's business strategy. *See* letters from Allstate, Fenwick,

that opposed a mandatory business strategy disclosure requirement did so on the grounds that because a registrant's business strategy could be proprietary, its disclosure could cause competitive harm.[59]

Many registrants currently include disclosure regarding their business strategy in their initial registration statements. We believe that information regarding material changes to a previously disclosed business strategy may be material information for investors. We are therefore proposing to include material changes to a registrant's previously disclosed business strategy as a listed disclosure topic under Item 101(a). However, if a registrant has not previously disclosed its business strategy, we are not proposing to make the disclosure of that strategy mandatory in a Commission filing because of the concerns raised by commenters that such a requirement could force registrants to disclose proprietary information that could be harmful to their competitive position.[60]

To the extent that other matters beyond those listed in the amended item are material to an understanding of the general development of a registrant's business, the registrant would be required to disclose those matters as well.

Request for Comment

1. Is a prescribed timeframe for disclosure regarding the general development of a registrant's business necessary or desirable? If we should retain a prescribed timeframe, is the current five-year timeframe appropriate, or should it be longer or shorter?

2. Alternatively, should we require a more detailed discussion of a registrant's general development of business on a periodic basis, such as every three years, and summary disclosure in other years? If so, would three years be an appropriate period, or should it be shorter or longer?

3. For filings other than initial registration statements, should we no longer require a full discussion of the general development of the registrant's business, and require instead an update to the general development of the business disclosure with a focus on material developments in the reporting period, as proposed?

4. When only updated business disclosure is provided in a filing, should we require the incorporation by reference of, and active hyperlink to, the most recently filed disclosure that, together with the update, would present a full discussion of the general development of a registrant's business, as proposed? Would such an approach, which would enable a reader to review the updated disclosure and one hyperlinked disclosure, facilitate an investor's understanding of the general development of a registrant's business?

5. Would registrants find it difficult to apply the proposed principles-based requirements? How could we alleviate any expected difficulties?

6. Would principles-based requirements for Item 101(a) effectively facilitate the provision of information that is material to an investment decision? If not, how might Item 101(a) be further improved?

7. Should we provide a list of topics that may be material to an understanding of a registrant's business development, as proposed? Are the proposed topics (transactions and events that affect or may affect the company's operations, including material changes to a previously disclosed business strategy; bankruptcy, receivership, or any similar proceeding; the nature and effects of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; and the acquisition or disposition of a material amount of assets other than in the ordinary course of business) appropriate? Should we exclude any of our proposed topics? Are there other topics that should be added (*e.g.,* material changes in the mode of conducting the business)? Should we require disclosure of any or all of the proposed topics in all circumstances?

8. Should we make disclosure of business strategy mandatory in Commission filings? If so, how should ''business strategy'' be defined and what can we do to address concerns about confidentiality?

9. Should we revise Item 101(h) to eliminate the provision that currently requires smaller reporting companies to describe the development of their business during the last three years, as proposed? Is a prescribed timeframe for such disclosure necessary or desirable? If we should retain a prescribed timeframe, is the current three-year timeframe appropriate, or should it be longer or shorter?

10. We are proposing to retain the current requirement in Item 101(h) that if a smaller reporting company has not been in business for three years, it must provide the same information for predecessor(s) of the smaller reporting company if there are any. Should we eliminate or adjust this predecessor disclosure requirement for smaller reporting companies? A registrant that is not a smaller reporting company must also provide information about its predecessors in certain circumstances under current Item 101(a)(2). Should we eliminate the predecessor disclosure obligations for those registrants?

11. Should we permit certain registrants to provide the general business development disclosure by other means (*e.g.,* by a filer information page on the company's website)? If so, which registrants? Should we limit the use of such alternative means to well-known seasoned issuers? Are there concerns raised by the posting of the disclosure on a company's website (*e.g.,* regarding how long the company must retain the business development disclosure, when it must update the disclosure, and liability issues)? If so, how should those concerns be resolved?

*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:[61]

(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;

Maryland Bar Securities Committee and CFA Institute, although CFA Institute supported voluntary disclosure of a registrant's business strategy.

[59] *See* letters from Allstate, Fenwick, and Maryland Bar Securities Committee.

[60] *See, e.g.,* letter from Fenwick.

[61] 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; where material, the segments to which these matters are significant also must be identified.

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

(10) Competitive conditions;

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

(12) Number of employees.[62]

The earliest forms of registration statements and annual reports required a brief outline of the general character of the business done and intended to be done by a registrant.[63] Many of the enumerated disclosure requirements in Item 101(c) were adopted in 1973.[64] The 1973 adopting release noted that, in making investment decisions, venture capitalists and underwriters typically obtained specific information from companies about their competitive position and methods of competition in their respective industries and, accordingly, the new requirements were expected to provide similar information to the investing public.[65] At the same time, the Commission also added requirements for the disclosure of the amount of backlog orders, the sources and availability of raw materials essential to the business, the number of employees and working capital practices.[66]

In the S–K Study, the staff recommended reviewing the description of business for continuing relevance in light of changes that have occurred in the way businesses operate, which may make other disclosures relevant that are not expressly addressed under the current requirements.[67] The Concept Release sought comment on whether Item 101(c) continues to provide useful information to investors and how the Item's requirements may be improved.[68] In particular, the Concept Release sought comment on the impact of listing the then thirteen requirements and whether the prescriptive items result in disclosure of information that is not important to some registrants.[69]

A number of commenters recommended revising Item 101(c) to make it more principles-based.[70] A few commenters recommended emphasizing that the sub-items enumerated in Item 101(c) are examples only,[71] while another commenter recommended revising the Item to specify that registrants should consider whether information that does not fall into the enumerated examples should nonetheless be disclosed.[72] Some commenters recommended retaining the Item as it currently stands.[73]

Because the 12 items may not be relevant to all registrants, they can elicit disclosure that is not material to a particular registrant. For the most part, Item 101(c) currently provides that a registrant must disclose the enumerated items to the extent material to an understanding of the registrant's business taken as a whole. Based on the comments received that were critical of this provision,[74] it appears, however, that many registrants may interpret Item 101(c) as requiring disclosure of each enumerated item, even if it is not material. We believe that shifting to an updated and more principles-based disclosure framework for Item 101(c) would encourage registrants to exercise judgment in evaluating what disclosure to provide, which would result in disclosure more appropriately tailored to a registrant's specific facts and circumstances.

The Concept Release further sought comment on whether any of the current requirements in Item 101(c) should be presented in a different context, such as MD&A or risk factors.[75] A number of commenters provided recommendations on the requirement to disclose working capital practices.[76] Several of these commenters stated that working capital practices might be better addressed in MD&A,[77] while one commenter suggested eliminating this disclosure from Item 101(c) because it is typically addressed in MD&A.[78] In addition to being explicitly identified as a disclosure item in Item 101(c) for all registrants, Instruction 5 to Item 303(a) states that a discussion of working capital may be appropriate in MD&A for certain registrants.[79] In an effort to consolidate working capital disclosure in one location and to avoid duplicative disclosure, we do not propose to include working capital practices as a possible topic in Item 101(c) with the expectation that working capital would be discussed in a registrant's MD&A, to the extent material.

To facilitate application of our principles-based revisions to Item 101, we propose to include in Item 101(c) the non-exclusive list of disclosure topics discussed below.[80] We believe that the proposed topics would likely be material to many registrants and, thus, would facilitate the disclosure of information material to an investment decision while providing flexibility to tailor disclosure to the specific circumstances of each registrant. The proposed topics would not be line-item requirements, but to the extent that a topic is material to an understanding of a registrant's business, disclosure would be required.[81]

Under our proposal, the revised rule would not explicitly reference some of the disclosure requirements currently contained in Item 101(c). In addition to working capital practices, the proposed amendments would no longer list the following topics: Disclosure about new segments and dollar amount of backlog orders believed to be firm. Nevertheless, under the proposed principles-based approach, registrants still would have to provide disclosure about these topics, as well as any other topics regarding the registrants' business, if they are material to an understanding of their business.

The proposal retains Item 101(c)'s distinction between disclosure topics

[62] The Commission recently 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).

[63] *See, e.g.,* Item 5 of Form A–2 adopted in 1935, which required registrants to outline briefly ''the general character of the business done and intended to be done by the registrant and its subsidiaries.'' *See* Release No. 33–276 (Jan. 14, 1935) [not published in the **Federal Register**]. Additionally, Items 3 through 5 of Form A–1, adopted in 1933, required registrants to briefly describe ''the character of business done or intended to be done,'' disclose a list of states where the issuer owned property and was qualified to do business, and 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**].

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

[65] *See id.*

[66] *See id.*

[67] *See* S–K Study, *supra* note 3, at 99–100.

[68] *See* Concept Release, *supra* note 6.

[69] *See id.*

[70] *See* letters from Chamber, FedEx, CGCIV, BDO, United Health, CAQ, SIFMA, E&Y, Grant, PWC, Allstate, Davis, Fenwick, General Motors, Financial Executives International, and CFA Institute.

[71] *See* letters from SIFMA and Allstate.

[72] *See* letter from SIFMA.

[73] *See* letters from RGA, CalSTRS and S. Percoco.

[74] *See supra* note 70.

[75] *See* Concept Release, *supra* note 6.

[76] *See* letters from Chamber, FedEx, CGCIV, and Fenwick.

[77] *See* letters from Chamber, FedEx, and CGCIV.

[78] *See* letter from Fenwick.

[79] Instruction 5 to Item 303(a) (''For example, a discussion of working capital may be appropriate for certain manufacturing, industrial or related operations but might be inappropriate for a bank or public utility.'').

[80] We are not proposing to amend the more prescriptive alternative disclosure standards regarding business development, description of business, and other information specified under 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.

[81] Similar to Item 101(a), proposed Item 101(c) refers to materiality in the introductory language of paragraphs (c)(1) and (2). While materiality is repeated in some of the listed topics that follow, this is not intended to create a second or different analysis regarding materiality for any such topic.

for which segment disclosure should be the primary focus, and those for which the focus should be on the registrant's business taken as a whole. The proposal clarifies, however, that, for any listed topic, disclosure is required only to the extent that it is material to an understanding of the registrant's business taken as a whole.

Similar to current Item 101(c), most of the listed disclosure topics would fall into the category for which segment disclosure would be required to the extent the topic is material to an understanding of the registrant's business taken as a whole.[82] We believe that, for the topic regarding the material effects of compliance with government regulation, including environmental regulation, and the topic regarding human capital resources, the appropriate primary focus should be with respect to the registrant's business taken as a whole. Similar to the current rule, however, if the information elicited regarding these two topics is material to a particular segment, the registrant would additionally be required to identify that segment.[83]

1. Revenue-Generating Activities, Products and/or Services, and any Dependence on Key Products, Services, Product Families, or Customers, Including Governmental Customers

While we recognize that the twelve enumerated items in Item 101(c) may not be relevant across all industries or businesses, 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, would generally be material to an investment decision. We agree with the commenter who stated 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.[84] As such, we propose to retain as a listed disclosure topic information regarding revenue-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.[85]

2. Status of Development Efforts for New or Enhanced Products, Trends in Market Demand and Competitive Conditions

We continue to believe that disclosure regarding development efforts for new or enhanced products, and trends in market demand and competition would generally be material to an investment decision. In response to the Concept Release, several commenters suggested additional disclosure related to competitive conditions. One commenter recommended requiring disclosure of the registrant's competitive landscape, noting that companies not only compete within their industry but also with entities external to their industry segment.[86] Another commenter supported greater disclosure of a registrant's competitive position and especially the market share of its products, competitive landscape and industry trends shaping the nature of competition.[87] Rather than prescribe additional disclosures for this topic that must be provided in all circumstances, we believe that a principles-based approach that allows flexibility for registrants to disclose this information to the extent it is material to an understanding of their business would better accommodate the variety of competitive conditions that registrants may face.[88]

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, 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.[89]

As discussed in greater detail below, we propose modernizing these disclosure requirements to refocus registrants' disclosure on all resources material to their business. We believe that this approach would elicit more informative disclosure tailored to the specific circumstances of each company or its industry. To facilitate application, we propose including (a) raw materials, and (b) patents, trademarks, licenses, franchises and concessions held, as examples of resources that may be material to a registrant's business.

a. Raw Materials

Item 101(c)(1)(iii) currently requires disclosure of the sources and availability of raw materials.[90] In response to the Concept Release's solicitation of feedback,[91] we received several comment letters that specifically addressed the requirement to disclose the sources and availability of raw materials.[92] Two commenters recommended retaining this requirement.[93] One of these commenters specified that the disclosure requirement should be retained with a materiality overlay,[94] while the other commenter stated that disclosure should only be required if raw materials are difficult to obtain.[95] One commenter stated that, where material, registrants generally discuss the specific sub-items in Item 101(c), including sources and availability of raw materials, in the business narrative or elsewhere, including MD&A.[96]

We propose retaining sources and availability of raw materials as a listed disclosure topic in Item 101(c)[97] because, while not applicable to all registrants, raw materials are fundamental to businesses that depend on them. Although some registrants include disclosure regarding raw materials elsewhere in disclosure documents (such as in MD&A), this disclosure often has a different focus.[98]

[82] *See* proposed Item 101(c)(1).

[83] *See* proposed Item 101(c)(2).

[84] *See* letter from E&Y.

[85] *See* proposed Item 101(c)(1)(i). Form S–4 refers to the current version of Item 101(c)(1)(i), which pertained to a registrant's principal products or services, but also refers to Items 101(b) and (d), which pertain, respectively, to certain financial information about business segments and geographic areas. *See* paragraph (b)(3)(i) of Item 12 under Part I, Section B of Form S–4. The Commission recently eliminated Items 101(b) and (d) as business disclosure requirements because much of the disclosure was duplicative of disclosure in the registrant's financial statements. *See* DUSTR Adopting Release, *supra* note 62, at 50168–50169. Because proposed Item 101(c)(1)(i) would continue to pertain to a registrant's products or services, we are proposing to retain this Item 101 provision in Form S–4, but remove Items 101(b) and (d) from that Form to reflect their elimination from Regulation S–K. The same paragraph of Form S–4 also includes descriptions of disclosure items included under Items 101(b), (c)(1)(i), or (d). We are proposing to remove the descriptor that pertains to Item 101(d) (''foreign and domestic operations and export sales''), but retain the descriptor ''industry segments'' since that descriptor would continue to apply to Item 101(c)(1)(i). We are proposing to substitute the descriptor ''key products or services'' for ''classes of similar products or services'' because the proposed amendment to Item 101(c)(1)(i) would include the former but would eliminate the latter as a listed disclosure topic under Item 101(c)(1)(i).

[86] *See* letter from CFA Institute.

[87] *See* letter from S. Percoco.

[88] *See* proposed Item 101(c)(1)(ii).

[89] 17 CFR 229.101(c)(1)(iii) and (iv).

[90] 17 CFR 229.101(c)(1)(iii).

[91] *See* Concept Release, *supra* note 6.

[92] *See* letters from Chamber, FedEx, CGCIV, Davis, Fenwick, and NYSSCPA.

[93] *See* letters from Fenwick and NYSSCPA.

[94] *See* letter from Fenwick.

[95] *See* letter from NYSSCPA.

[96] *See* letter from Davis.

[97] *See* proposed Item 101(c)(1)(iii)(A).

[98] For example, a discussion of raw materials in a registrant's MD&A may focus more narrowly on

Continued

Further, our proposal to shift Item 101(c) to a more principles-based approach would help clarify that disclosure regarding sources and availability of raw materials by registrants is required only when material to their business.

b. The Duration and Effect of all Patents, Trademarks, Licenses, Franchises, and Concessions Held

Item 101(c)(1)(iv) requires disclosure of the importance, 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.[99] The Concept Release solicited input on whether to maintain, expand or revise the current scope of this Item and requested comment on the competitive costs of this disclosure.[100] It also sought comment on whether to limit this disclosure requirement to certain industries.[101]

Numerous commenters supported maintaining the current scope of Item 101(c)(1)(iv),[102] while several commenters opposed expanding this Item based on competitive concerns.[103] Item 101(c)(1)(iv) currently does not refer to disclosure of copyrights or trade secrets and many commenters expressed concern that requiring such disclosure would impose substantial costs and be unduly burdensome by requiring registrants to systematically identify and catalog such intellectual property.[104] Further, several commenters suggested that because trade secret protection is contingent on the owner taking reasonable measures to keep the information secret, any revision to this Item to require disclosure of ''intellectual property'' would, by definition, include trade secrets and endanger these assets.[105] In addition, some commenters opposed establishing different intellectual property requirements by industry [106] and some commenters supported maintaining the current materiality threshold for disclosure.[107]

Conversely, a number of commenters recommended generally expanding the scope of Item 101(c)(1)(iv).[108] In this regard, some commenters stated that a more complete record of a public company's intellectual property is useful to the public, shareholders, researchers, and the financial markets generally.[109] One of these commenters recommended expanding the requirement to include detailed intellectual property information for both material and immaterial intellectual property with the caveat that immaterial intellectual property should be required only if the information is readily available to report and within the knowledge of the company.[110] Another commenter, in recommending expansion of this requirement, noted that intellectual property assets are a major driver of value in corporations, and asserted that more open disclosure would allow shareholders to better assess the value of corporate intellectual property assets and monitor directors' stewardship of these assets.[111]

Another commenter recommended including copyrights under this item and requiring detailed tabular disclosure by asset type.[112] This commenter also opposed establishing different disclosure requirements by industry.[113]

A broad range of industries directly and indirectly benefit from intellectual property [114] and intellectual property has become increasingly important to business performance.[115] Certain industries produce or use significant amounts of intellectual property or rely more heavily on these rights.[116] Accordingly, some registrants provide detailed disclosure in response to Item 101(c)(1)(iv), although disclosure varies among registrants and across industries.

In the biotechnology and pharmaceutical industries, registrants that provide detailed patent disclosure often disclose the jurisdiction in which the patent was filed, year of expiration, type of patent (*e.g.,* composition of matter, method of use, method of delivery or method of manufacturing), products or technologies to which the patent relates and how the patent was acquired (*e.g.,* licensed from another entity or owned and filed by the registrant). Some registrants in these industries aggregate patent disclosure by groups of patents, potentially making disclosure about individual material patents difficult to discern. As registrants in the biotechnology and pharmaceutical industries regularly sell one or more patented products that generate substantial revenue, disclosure of ''patent cliffs,'' [117] which may result

the effect that spending on, or budgeting for, raw materials may have on a registrant's liquidity and capital resources, whereas Item 101(c)(1) attempts to elicit broader disclosure concerning activities involving raw materials, including identifying and procuring sources for those raw materials, that may be material to an understanding of the registrant's business as a whole.

[99] 17 CFR 229.101(c)(1)(iv).

[100] *See* Concept Release, *supra* note 6.

[101] *See id.*

[102] *See* letters from 36 Organizations with an Interest in Trade Secret Protection (Aug. 8, 2016) (''36 Organizations''), Association of American Publishers (July 21, 2016), American Intellectual Property Law Association (Aug. 9, 2016) (''American IP Law Association''), Chamber, FedEx, Intellectual Property Owners Association (July 15, 2016) (''IP Owners Association''), S. Percoco, NAM, NYSSCPA, the Software Association, the Entertainment Software Association and the Software Information Industry Association (July 21, 2016) (''Software Associations''), Financial Services Roundtable (July 21, 2016), General Motors, and Financial Executives International.

[103] *See* letters from 36 Organizations (focusing only on trade secrets), American IP Law Association; Chamber, FedEx, Financial Services Roundtable (focusing only on trade secrets), IP Owners Association, NAM, Association of American Publishers (focusing only on copyrights), General Motors, Financial Executives International, and Software Associations.

[104] *See, e.g.,* letters from 36 Organizations, American IP Law Association, Chamber, FedEx, IP Owners Association, NAM, and Association of American Publishers.

[105] *See* letters from 36 Organizations, American IP Law Association, Chamber, FedEx, Financial Services Roundtable, IP Owners Association, and NAM.

[106] *See* letters from IP Owners Association, NYSSCPA, Software Associations, and American IP Law Association.

[107] *See* letters from American IP Law Association, IP Owners Association, NAM, ACC and NYSSCPA.

[108] *See* letters from Black Stone IP, LLC (May 19, 2016), IIRC, Colleen V. Chien et al. (July 22, 2016) (''IP Professors''), Prof. Denoncourt (July 31, 2016), and CFA Institute.

[109] *See* letters from IP Professors and Prof. Denoncourt.

[110] *See* letter from IP Professors.

[111] *See* letter from Prof. Denoncourt.

[112] *See* letter from CFA Institute.

[113] *See id.*

[114] *See* Economics and Statistics Administration and United States Patent and Trademark Office, *Intellectual Property and the U.S. Economy: Industries in Focus* (Mar. 2012) at iv, available at *http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf* (''Intellectual Property Report'').

[115] *See, e.g.,* Kelvin W. Willoughby, *What impact does intellectual property have on the business performance of technology firms?,* Int. J. Intellectual Property Management, Vol. 6, No. 4 (2013).

[116] *See* Intellectual Property Report, *supra* note 114. This report identifies seventy-five industries as ''IP-intensive.'' In this report, patents, trademarks and copyrights were the categories of intellectual property assessed. The methodology for designating each of these subcategories as ''IP-intensive'' is outlined further in this report. For patent intensive industries, the report utilized the North American Industry Classification System (NAICS) codes and identified, as the four most patent-intensive industries, those industries classified in computer and electronic product manufacturing (NAICS 334). This three-digit NAICS industry includes computer and peripheral equipment; communications equipment; other computer and electronic products; semiconductor and other electronic components; and navigational, measuring, electro-medical, and control instruments.

[117] The term ''patent cliff'' as used in the biotechnology and pharmaceutical industry refers to a future loss of patent protection and consequential loss of revenue. These potential future losses are known to registrants far in advance of their onset. When they occur, they often precipitate material adverse financial effects. *See, e.g.,* Andrew Jack, *Pharma tries to avoid falling off 'patent cliff,'* Financial Times, May 6, 2012 and Cliffhanger, Economist, Dec. 3, 2011. *See also* Ed Silverman, *Big Pharma Faces Some Big Patent Losses, but Pipelines are Improving,* Wall St. J.: L. Blog, available at *http://blogs.wsj.com/pharmalot/2015/02/09/big-pharma-faces-some-big-patent-losses-but-pipelines-are-improving/.*

in material adverse financial effects, may be required in the risk factors section or MD&A.[118]

In the information technologies and services industry, registrants protect their intellectual property through the use of patents, trademarks, copyrights, trade secrets, licenses, and confidentiality agreements.[119] Registrants with large portfolios of intellectual property often disclose that their products, services, and technologies are not dependent on any specific patent, trademark, copyright, trade secret, or license. As a result, these registrants often provide only high-level discussions of their intellectual property portfolios, which include general statements of a registrant's development, use, and protection of its intellectual property. Registrants with smaller intellectual property portfolios tend to provide slightly more detailed discussions, including, for example, disclosure of the total number of issued patents, a range of years during which those patents expire and the total number of pending patent applications.

In general, registrants in the information technologies and services industry use copyrights to protect against the unauthorized copying of software programs [120] and trade secrets to protect proprietary and confidential information that derives its value from continued secrecy.[121] Since Item 101(c)(1)(iv) does not require disclosure about copyrights or trade secrets, registrants currently make disclosure about such matters voluntarily.

We propose to retain as a listed disclosure topic the importance, 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.[122] In response to concerns expressed by commenters on the Concept Release, however, we are not proposing to expand this topic to include copyrights and trade secrets. In addition to competitive concerns, commenters noted 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.[123]

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

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.[124]

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.[125] At any given time in the performance of a government contract, an estimate of its profitability is often 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.[126]

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 investigations may result in the forfeiture or suspension of payments and civil or criminal penalties. We are proposing to retain renegotiation or termination of government contracts as a listed disclosure topic [127] because we continue to believe that, when material to a business, disclosure of this information is important for investors.

5. The Extent to Which the Business Is or May Be Seasonal

Item 101(c)(1)(v) requires disclosure of the extent to which the business of the segment is or may be seasonal to the extent material to an understanding of the registrant's business taken as a whole.[128] The Commission recently considered whether to delete Item 101(c)(1)(v).[129] While the Commission initially proposed deleting this Item,[130] noting that both Regulation S–K [131] and U.S. GAAP [132] require disclosures about seasonality in interim periods,[133] the Commission ultimately decided 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,[134] and retain Item 101(c)(1)(v). The Commission based its decision to retain this Item on a concern about the potential loss of information in the fourth quarter about the extent to which the business of a registrant or its segment(s) is or may be seasonal

[118] *See generally* ''*Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations,*'' Release No. 33–8350 (Dec. 19, 2003) [68 FR 75056 (Dec. 29, 2003)], available at *https://www.sec.gov/rules/interp/33-8350.htm.*

[119] *See* Bruce Abramson, *Promoting Innovation in the Software Industry: A First Principles Approach to Intellectual Property Reform,* 8 B.U. J. Sci. & Tech. L. 75 (2002) (discussing the software industry's use of intellectual property law).

[120] *See* Dennis S. Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust,* 9 Cornell J.L. & Pub. Pol'y 161, 172 (1999) (discussing the dependence of software technology companies on copyright).

[121] *See* Raymond T. Nimmer & Patricia Ann Krauthaus, *Software Copyright: Sliding Scales and Abstracted Expression,* 32 Hous. L. Rev. 317, 325 (1995) (distinguishing among the software industry's use of trade secret law, patent law and copyright law).

[122] *See* proposed Item 101(c)(1)(iii)(B).

[123] *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). *But see also* letters from International Integrated Reporting Council (July 20, 2016) and CFA Institute (Oct. 6, 2016) (supporting the inclusion of copyrights under Item 101(c)).

[124] 17 CFR 229.101(c)(1)(ix).

[125] *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)].

[126] *See id.*

[127] *See* proposed Item 101(c)(1)(iv).

[128] 17 CFR 229.101(c)(1)(v).

[129] *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.* We refer to these letters throughout as ''DUSTR'' letters.

[130] *See* DUSTR Proposing Release, *supra* note 129.

[131] Instruction 5 to Item 303(b) of Regulation S–K [17 CFR 229.303(b)] required a discussion of any seasonal aspects of a registrant's business where the effect is material.

[132] ASC 270–10–45–11.

[133] *See* DUSTR Proposing Release, *supra* note 129.

[134] The Commission decided to delete Instruction 5 to Item 303(b) because of its belief that 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 62, at 50169.

because U.S. GAAP may not elicit this disclosure.[135]

In light of the Commission's recent evaluation of this disclosure item, we propose including as a disclosure topic in Item 101(c) the extent to which the business is or may be seasonal.[136]

6. Compliance With Material Government Regulations, Including Environmental Regulations

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.[137]

The Concept Release solicited input on whether to increase or reduce the disclosure required by this Item and whether this disclosure is important to investors.[138] It also sought comment on whether to require this disclosure in a different format.[139] Some commenters supported retaining Item 101(c)(1)(xii).[140] A few of these commenters stated that this disclosure would increase in importance given trends toward an enhanced regulatory approach to environmental protection.[141] Several commenters supported retaining the Item but opposed expanding it to include additional requirements.[142] Other commenters supported expanding this Item.[143] A few of these commenters supported requiring more detailed disclosure of environmental fines, violations, and litigation (*e.g.,* whether these are rare or recurring).[144] One commenter recommended including this requirement in a broader category of government regulations.[145]

Pursuant to the National Environmental Policy Act of 1969 (''NEPA''),[146] 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).[147] Subsequent litigation [148] 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.[149] 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 fiscal years, and for any further periods that are deemed material.[150]

While 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). The Concept Release sought comment on whether to require registrants to disclose government regulations material to their business given that many registrants already voluntarily provide such information.[151] In addition, it sought input on whether to require disclosure of foreign regulations applicable to the operation of the registrant's business.[152] A few commenters supported a specific requirement to disclose government regulations [153] while one commenter opposed such a requirement, stating that it would not provide significant additional information.[154] Some commenters supported requiring disclosure of foreign regulatory risks.[155] Two commenters specified that this requirement should be limited to foreign regulations material to the registrant's business.[156] One commenter opposed a requirement to discuss foreign regulations that affect a registrant's business and, instead, recommended revising Item 103 to require disclosure of any foreign tax audits or actions with negative findings, stating this would be less costly and time consuming than a requirement to disclose foreign regulations.[157]

Although not required by Item 101(c), many registrants currently discuss government regulations relevant to their business, often in the form of a list. Healthcare and insurance providers regularly disclose their collection, use and protection of individually-identifiable information and compliance with the Health Insurance Portability and Accountability Act of 1996,[158] as well as the impact of the Patient Protection and Affordable Care Act [159] on their business. Biotechnology or medical device companies often disclose the status of and process for FDA approval of significant new drugs or medical devices. Public utilities typically discuss regulation by various Federal, state, and local authorities and include information about state ratemaking procedures, which determine the rates utilities charge and the return on invested capital.

Registrants in the financial services industry regularly describe Federal and state regulation as well as supervision by the Federal Reserve Board, while registrants with a material amount of U.S. government contracts disclose the laws and regulations for government contracts. Registrants with tax strategies involving foreign jurisdictions typically disclose that they are subject to income taxes in both the U.S. and numerous foreign jurisdictions, and that future changes to U.S. and non-U.S. tax law could adversely affect their anticipated financial position and results. Some

[135] *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.

[136] *See* proposed Item 101(c)(1)(v).

[137] 17 CFR 229.101(c)(1)(xii).

[138] *See* Concept Release, *supra* note 6.

[139] *See id.*

[140] *See* letters from PRI, the Carbon Tracker Initiative (July 20, 2016), S. Percoco, Chamber, FedEx, CGCIV, NIRI, and CFA Institute.

[141] *See, e.g.,* letters from PRI and the Carbon Tracker Initiative.

[142] *See* letters from Chamber, FedEx, CGCIV, and NIRI.

[143] *See* letters from CalPERS, DHC Consulting, Impax Asset Management Limited (July 19, 2016) (''Impax''), Good Jobs First, Domini Social, and GRI.

[144] *See* letters from Impax, Domini Social and Good Jobs First.

[145] *See* letter from Fenwick.

[146] Public Law 91–190, 42 U.S.C. 4321–4347 (Jan. 1, 1970) (''NEPA'').

[147] *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'').

[148] *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 (DC 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).

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

[150] *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.

[151] *See* Concept Release, *supra* note 6.

[152] *See id.*

[153] *See* letters from Fenwick and S. Percoco.

[154] *See* letter from NYSSCPA.

[155] *See* letters from IAC, NYSSCPA, and SIFMA.

[156] *See* letters from NYSSCPA and SIFMA.

[157] *See* letter from E. Bean.

[158] Public Law 104–191, 110 Stat. 1936 (1996).

[159] Public Law 111–148, 124 Stat. 119 (2010).

registrants disclose the impact of tax treaties between the U.S. and one or more foreign jurisdictions on their business.

Consistent with the current practice of many registrants, as observed by the staff in its review of filings, we propose including the material effects of compliance with material government regulations, not just environmental laws, as a listed disclosure topic in Item 101(c).[160] This disclosure topic would focus on the material effects that compliance with material governmental regulations, both foreign and domestic, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. We believe that this more principles-based approach would help provide investors with the information material to an investment decision about a registrant's compliance with the government regulations that materially affect the registrant's business so that investors may achieve a more complete understanding of the registrant's business. This approach would also enable each registrant to tailor its disclosure regarding its compliance with those governmental regulations that are of particular importance to the registrant. Finally, the proposed approach would codify what has become common practice regarding government regulation disclosure.

While we propose to retain the requirement that a registrant disclose material estimated capital expenditures for environmental control facilities for the current fiscal year and any other subsequent period that the registrant deems material,[161] we are not proposing to require the disclosure of additional specific expenditures related to environmental compliance, as some commenters have suggested.[162] We believe that a more principles-based approach would permit a registrant to tailor its disclosure by focusing on the effects of environmental compliance that are material to its particular business. This proposed approach would also benefit investors by helping to reduce or eliminate boilerplate or other disclosure concerning the effects of environmental compliance that may not be material to an understanding of the business of a particular registrant.

7. Human Capital Disclosure

Item 101(c)(1)(xiii) currently requires disclosure of the number of persons employed by the registrant.[163] The Concept Release solicited input on this disclosure requirement; [164] in particular, we requested feedback on:

- Whether this disclosure is important to investors;
- Whether to require or permit registrants to provide a range of its number of employees or independent contractors;
- Whether disclosure regarding anticipated material changes in the number of employees would be useful to investors; and
- Whether to require registrants to provide disclosure distinguishing among their total employees such as by full-time and part-time or seasonal employees; employees and independent contractors; or domestic or foreign employees.[165]

Many commenters recommended retaining and expanding the requirement to disclose the number of persons employed by the registrant,[166] with some asserting that disclosure of the exact number of employees would help investors understand the risks of potential material labor and human rights violations and that, for contractors or subcontractors, disclosing a range of these workers would be acceptable if sufficiently narrow and accompanied by disclosure explaining why the exact number is unavailable.[167] Conversely, a number of commenters questioned the utility of requiring registrants to disclose the number of persons employed by the registrant.[168] Several of these commenters opposed expanding the requirement,[169] while another commenter stated that this disclosure is typically immaterial and any change in the number of employees that materially affects the registrant's results of operations would be disclosed in MD&A.[170]

With respect to whether anticipated material changes in the number of employees would be useful to investors, several commenters supported disclosure of employee turnover.[171] Numerous commenters further recommended requiring registrants to distinguish among their total employees.[172] Most of these commenters recommended requiring this disclosure for both registrants and their suppliers, and specified inclusion

[160] *See* proposed Item 101(c)(2)(i). We note that, despite the repetition of materiality within this topic in relation to both effects of compliance and government regulations, we do not foresee any circumstances whereby a registrant could determine there are material effects from compliance with a government regulation, but that the government regulation itself is not material to the registrant's business taken as a whole.

[161] Current Item 101(c)(i)(xii) requires the disclosure of material estimated capital expenditures for environmental control facilities for the remainder of a registrant's current fiscal year and its succeeding fiscal year as well as for such further periods as the registrant may deem material. In order to simplify the disclosure, and in keeping with our more principles-based approach, we are proposing to revise Item 101(c) to require such environmental control facilities expenditures disclosure for the registrant's current fiscal year and any other subsequent period deemed material by the registrant. *See* proposed Item 101(c)(2)(i).

[162] *See, e.g.,* letters from DHC Consulting, Domini Social, and Impax. Our proposed approach is consistent with the views of several commenters that supported the retention of Item 101(c)'s environmental compliance disclosure provision while opposing its expansion. *See supra* note 142.

[163] 17 CFR 229.101(c)(1)(xiii).

[164] In addition, there has been congressional interest in the topic of modernizing human capital disclosures by registrants. *See, e.g.,* letter from Sen. Mark R. Warner (July 19, 2018) (''Sen. Warner'').

[165] *See* Concept Release, *supra* note 6.

[166] *See* letters from RGA, E. Bean (July 6, 2016), CII, Railpen, NYSC, Interfaith Center on Corporate Responsibility (July 14, 2016) (''ICCR''), US SIF Foundation (July 14, 2016) (''US SIF''), Dana Investment Advisors (July 15, 2016) (''Dana Investment''), Douglas Hileman Consulting LLC (July 15, 2016) (''DHC Consulting''), Sisters of Charity of Saint Elizabeth (July 18, 2016) (''Sisters of Charity''), Christian Church Foundation (July 18, 2016) (''CCF''), Park Foundation (July 19, 2016) (''Park''), OIP Trust (July 19, 2016) (''OIP''), Priests of the Sacred Heart (July 20, 2016) (''Sacred Heart''), Sister Schools of St. Francis (July 20, 2016) (''S.S. St. Francis''), Friends Fiduciary Corporation (July 20, 2016) (''Friends''), LGIM, Everence Financial and the Praxis Mutual Funds (July 20, 2016) (''Everence''), Sister Schools of Notre Dame (July 21, 2016) (''SSND''), Provincial of the School Sisters of St. Francis of St. Joseph Convent (July 20, 2016) (''SSSF-Wisconsin''), As You Sow (July 21, 2016), CAQ, GRI (July 21, 2016), Domini Social, E&Y, CalSTRS, Hermes Investment Management (July 21, 2016), NYC Comptroller, Good Jobs First (July 21, 2016), Maryland Bar Securities Committee, Tri-State Coalition for Responsible Investment (July 21, 2016) (''TSCRI''), Addenda Capital (July 21, 2016), AFSCME, AFL–CIO, Bloomberg (July 21, 2016), Oxfam America (July 21, 2016), Presbyterian Church U.S.A. (July 21, 2016) (''PC USA''), Allstate, Cornerstone, Christian Brothers Investment Services (July 21, 2016) (''CBIS''), S. Percoco, Responsible Sourcing Network (July 21, 2016) and CalPERS.

[167] *See* letters from US SIF and US SIF Foundation (July 14, 2016) (''US SIF''), ICCR, Dana Investment, Sisters of Charity, CCF, Park, OIP, Sacred Heart, S.S. St. Francis, Friends, Everence, SSND, SSSF-Wisconsin, As You Sow, TSCRI, PC USA and CBIS.

[168] *See* letters from Chamber, FedEx, CGCIV, and Fenwick.

[169] *See* letters from Chamber, FedEx, and CGCIV.

[170] *See* letter from Fenwick. Another commenter stated that this information is immaterial, does not provide information about the size or scope of the business, and does not provide any clarity to the overall strategy of the company. *See* letter from United Health. Further, one commenter asserted that disclosures that comply with the current prescriptive requirement may not provide investors with the most appropriate information.

[171] *See* letters from DHC Consulting, LGIM, Railpen, CalPERS, AFL–CIO, NYC Comptroller, AFSCME, CAQ, Domini Social, E&Y, Hermes Investment Management, and Cornerstone.

[172] *See* letters from ICCR, Dana Investment, DHC Consulting, Sisters of Charity, CCF, Park, OIP, Sacred Heart, S.S. St. Francis, Friends, Everence, SSND, SSSF-Wisconsin, As You Sow, TSCRI, PC USA, CBIS, GRI, US SIF, Railpen, CalPERS, AFL–CIO, CAQ, Domini Social, CalSTRS, Good Jobs First, Maryland Bar Securities Committee, Bloomberg, and NYC Comptroller.

of migrant, contract, or temporary workers.[173]

The Concept Release also solicited feedback on additional line-item disclosure requirements about a registrant's business that would improve the quality and consistency of disclosure, and specifically sought input on whether to require additional information about a registrant's employees or employment practices.[174] A number of commenters advocated for greater human capital disclosure,[175] with a variety of commenters recommending various specific disclosure topics, including:

- Worker recruitment, employment practices, and hiring practices;[176]
- Employee benefits and grievance mechanisms; [177]
- ''Employee engagement'' or investment in employee training; [178]
- Workplace health and safety; [179]
- Strategies and goals related to human capital management and legal or regulatory proceedings related to employee management; [180]
- Whether employees are covered by collective bargaining agreements; [181] and
- Employee compensation or incentive structures.[182]

We also 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 performance (the ''Human Capital Rulemaking Petition'').[183] Many of the comment letters received in support of the Human Capital Rulemaking Petition asserted the importance of human capital management in assessing the potential value and performance of a company over the long term.[184] Further, a number of commenters asserted that companies with poor management of human capital may face operational, legal, and reputational risks while, in contrast, companies with strong human capital management may develop a competitive advantage.[185] While the Human Capital Rulemaking Petition did not include specific recommendations for disclosure requirements related to human capital management, it included categories of information that it characterized as fundamental to furthering investors' understanding of how well a company is managing its human capital.[186]

Item 101(c)(1)(xiii) dates back to a time when companies relied significantly on plant, property, and equipment to drive value. At that time, a prescriptive requirement to disclose the number of employees may have been an effective means to elicit information material to an investment decision. Today, intangible assets represent an essential resource for many companies.[187] Because human capital may represent an important resource and driver of performance for certain companies, and as part of our efforts to modernize disclosure, we propose to amend Item 101(c) to refocus registrants' human capital resources disclosures.[188] Specifically, we propose replacing the current requirement to disclose the number of employees with a requirement to disclose 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. We recognize that the exact measures or objectives included in a registrant's human capital resource disclosure may change over time and may depend on the industry. The proposed amendment provides 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.

In assessing the best way to approach disclosure regarding human capital, we were mindful that each industry, and even each company within a specific industry, has its own human capital considerations, and that those considerations may evolve over time. In light of this fact, and with the principle of materiality in mind, it is our view that prescribing fixed, specific line item disclosures in this area for all registrants would not result in the most meaningful disclosure.[189] Instead, we believe that investors would be better served by understanding how each company looks at its human capital and, in particular, where management focuses its attention in this space. The intent of the proposed requirement is to elicit, to the extent material to an understanding of the registrant's business, disclosures regarding human capital that allow investors to better understand and evaluate this company resource and to

[173] *See* letters from ICCR, Dana Investment, DHC Consulting, Sisters of Charity, CCF, Park, OIP, Sacred Heart, S.S. St. Francis, Friends, Everence, SSND, SSSF-Wisconsin, As You Sow, TSCRI, PC USA, CBIS, GRI, and Good Jobs First.

[174] *See* Concept Release, *supra* note 6.

[175] *See, e.g.,* letters from M. Ferguson (July 7, 2016), Norges Bank Investment Management (July 15, 2016), P. Linzmeyer (July 19, 2016), LGIM, Railpen, Hermes Investment Management, NYC Comptroller, Addenda Capital, AFSCME, Working IDEAL (July 21, 2016), AFL–CIO, National Partnership for Women & Families (Aug. 8, 2016), and Rockefeller & Co., Inc. (July 21, 2016), and Sen. Warner.

[176] *See* letters from ICCR, Dana Investment, Sisters of Charity, CCF, Park, OIP, Sacred Heart, S.S. St. Francis, Friends, Everence, SSND, SSSF-Wisconsin, As You Sow, TSCRI, CalPERS, PC USA, CBIS, and Domini Social.

[177] *See* letters from ICCR, Dana Investment, Sisters of Charity, CCF, Park, OIP, Sacred Heart, S.S. St. Francis, Friends, Everence, SSND, SSSF-Wisconsin, As You Sow, TSCRI, PC USA, and CBIS.

[178] *See* letters from LGIM, Railpen, CalPERS, AFL–CIO, NYC Comptroller, AFSCME, Addenda Capital and Hermes Investment Management. *See also* letter from Joseph V. Carcello, Chair, Investor as Owner Subcommittee, on behalf of Subcommittee members, of the SEC's Investor Advisory Committee (November 22, 2016) (in response to FAST Act—SEC Required Study on Modernization and Simplification of Regulation S–K).

[179] *See* letters from LGIM, Railpen, CalPERS, NYC Comptroller, AFSCME, AFL–CIO, and US SIF.

[180] *See* letters from AFL–CIO and Domini Social.

[181] *See* letter from Good Jobs First.

[182] *See* letters from NYC Comptroller, AFL–CIO, CalPERS, and Domini Social.

[183] *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), available at *https://www.sec.gov/rules/petitions/2017/petn4-711.pdf* and related comments available at *https://www.sec.gov/comments/4-711/4-711.htm.* We refer to these letters throughout as ''Human Capital Rulemaking Petition'' letters.

[184] *See, e.g.,* letters from British Columbia Municipal Pension Board of Trustees (Sept. 29, 2017) [Human Capital Rulemaking Petition letter], CalPERS and CalSTRS (July 10, 2017) (''CalPERS and CalSTRS 1'') [Human Capital Rulemaking Petition letter], Center for Safety and Health Sustainability (June 15, 2018) (''Center for Safety'') [Human Capital Rulemaking Petition letter], David F. Larcker (Dec. 15, 2017) [Human Capital Rulemaking Petition letter], League of Allies (Apr. 25, 2018) [Human Capital Rulemaking Petition letter], and AFL–CIO (Sept. 22, 2017) [Human Capital Rulemaking Petition letter].

[185] *See* letters from Australian Council of Superannuation Investors (Nov. 20, 2017) [Human Capital Rulemaking Petition letter], British Columbia Municipal Pension Board of Trustees, CalPERS and CalSTRS 1, and Center for Safety.

[186] *See* Human Capital Rulemaking Petition, *supra* note 183 (suggesting that the key categories of information are: Workforce demographics; workforce stability; workforce composition; workforce skills and capabilities; workforce culture and empowerment; workforce health and safety; workforce productivity; human rights commitments and their implementation; workforce compensation and incentives).

[187] *See infra* note 279.

[188] *See* proposed Item 101(c)(2)(ii).

[189] The Investor Advisory Committee recently recommended that the SEC take measures to improve the disclosure of a registrant's human capital management, and suggested that ''any 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* (March 28, 2019), available at *https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf.*

see through the eyes of management how this resource is managed.

Request for Comment

12. Should we shift to a more principles-based approach for Item 101(c), as proposed? Would registrants find it difficult to apply the principles-based requirements?

13. Would the proposed principles-based requirements elicit information that is material to an investment decision? If not, how might Item 101(c) be further improved? Are there any additional disclosure topics that we should include in Item 101(c) to facilitate disclosure? Alternatively, should we exclude any of our proposed disclosure topics?

14. Should we instead require disclosure of any or all of the topics addressed in our proposed examples? If so, which topics? Should we require other types of business information? If so, what information?

15. Should we retain Item 101(c)'s distinction between disclosure topics for which segment disclosure should be the primary focus, and those for which the focus should be on the registrant's business taken as a whole, as proposed? If so, is our allocation of the listed disclosure topics into the two categories appropriate?

16. We are proposing to amend Item 101(c) to include as a listed disclosure topic the status of development efforts for new or enhanced products, trends in market demand and competitive conditions. Would the disclosure elicited in response to this amendment overlap with the disclosure provided in response to our proposed amendment to Item 101(a) to include material changes to business strategy as a disclosure topic? If so, should business strategy changes be included as a listed disclosure topic in Item 101(c) instead of Item 101(a)?

17. Currently, the duration and effect of copyright and trade secret protection is not included within the scope of Item 101(c) disclosure. Should we include it as a listed disclosure topic that could be provided?

18. Is backlog typically discussed in MD&A or is it better suited for disclosure under Item 101(c) to the extent material? Similarly, is working capital typically sufficiently disclosed in MD&A or is it better addressed under Item 101(c)?

19. Should the extent to which the business is or may be seasonal be included as a listed disclosure topic, as proposed? Alternatively, should we require this disclosure in all circumstances? We note that fourth quarter disclosure about the extent to which the business of a registrant or its segment(s) is or may be seasonal may not be elicited by U.S. GAAP. We further note that there is no longer a separate seasonality instruction to MD&A. Do these considerations support the continued inclusion of seasonal aspects of a registrant's business, to the extent material to the understanding of a registrant's business, as a listed disclosure topic?

20. Should we include as a listed disclosure topic the material effects of compliance with material government regulations, as proposed, or should we focus more narrowly on compliance with environmental regulations, as currently required under Item 101(c)? Would the proposed more principles-based approach to governmental regulatory compliance disclosure elicit the appropriate level of disclosure about environmental and foreign regulatory risks? If not, are there more specific disclosures that we should require? Should we continue to include material estimated capital expenditures for environmental control facilities as a disclosure topic under Item 101(c)?

21. Should disclosure regarding human capital resources, including any material human capital measures or objectives that management focuses on in managing the business, be included under Item 101(c) as a listed disclosure topic, as proposed? Should we define human capital? If so, how?

22. With respect to human capital resource disclosure, should we provide non-exclusive examples of the types of measures or objectives that management may focus on in managing the business, such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the attraction, development, and retention of personnel, as proposed? Would providing specific examples potentially result in disclosure that is immaterial and not tailored to a registrant's specific business? Would not including such examples result in a failure to elicit information that is material and in some cases comparable across different issuers?

23. With respect to human capital resource disclosure, should we include other non-exclusive examples of measures or objectives that may be material, such as the number and types of employees, including the number of full-time, part-time, seasonal and temporary workers, to the extent disclosure of such information would be material to an understanding of the registrant's business? Could other examples include, depending on the nature of the registrant's business and workforce: Measures with respect to the stability of the workforce, such as voluntary and involuntary turnover rates; measures regarding average hours of training per employee per year; information regarding human capital trends, such as competitive conditions and internal rates of hiring and promotion; measures regarding worker productivity; and the progress that management has made with respect to any objectives it has set regarding its human capital resources? Would providing specific examples potentially result in disclosure that is immaterial and not tailored to a registrant's specific business? Would not including such examples result in a failure to elicit information that is material and in some cases comparable across different issuers?

24. Should we retain an explicit requirement for registrants to disclose the number of their employees? Alternatively, should we permit registrants to disclose a range of the number of its employees and/or a range for certain types of employees?

25. Foreign private issuers that file registration statements on Forms F–1, F–3, and F–4 are not subject to Item 101 and instead must meet the business disclosure requirements of Form 20–F. Should we amend Form 20–F to require the disclosure of human capital resources, including any human capital measures or objectives that management focuses on in managing the business, to the extent material to an understanding of the registrant's business? Would such disclosure present a significant challenge to foreign private issuers to the extent that it is not required in other jurisdictions? Are there other proposed Item 101 disclosure topics that we should require in Form 20–F?

26. The Commission revised Form 20–F in 1999 to conform in large part to the international disclosure standards endorsed by the International Organization of Securities Commissions (''IOSCO'') for the non-financial statement portions of a disclosure document, which have served as the basis for the disclosure requirements in several foreign jurisdictions.[190] One of the objectives of the IOSCO standards was to facilitate the cross-border flow of securities and capital by promoting the use of a single disclosure document that would be accepted in multiple jurisdictions.[191] If we revise Form 20–F to include any of the proposed Item 101 amendments, would such revision reduce the ability of foreign private

[190] *See International Disclosure Standards,* Release No. 33–7745 (September 28, 1999) [64 FR 53900 (Oct. 5, 1999)].

[191] *See id.* at 53901.

issuers to use a single document in multiple jurisdictions?

27. The disclosure requirements regarding a foreign private issuer's business under Form 20–F are largely prescriptive. Would amending Form 20–F to make the business disclosure more principles-based represent a more significant change, or impose a greater challenge, for foreign private issuer registrants than the proposed Item 101 amendments would for domestic registrants? Would the benefits of making Form 20–F more principles-based nevertheless justify such an amendment?

28. Much of the disclosure required under Item 101(h) for smaller reporting companies is prescriptive. Should we retain this prescriptive approach or adopt a more principles-based approach, similar to the proposed amendments to Items 101(a) and (c), under Item 101(h)? Would smaller reporting companies find it difficult to apply a principles-based approach? Should we consider changes to any of the listed disclosure items in Item 101(h)(1) through (6)?

29. We are proposing to amend Form S–4 to conform it to changes made to Item 101 pursuant to the DUSTR Adopting Release as well as to the proposed revisions to Item 101(c) discussed above.[192] Are the proposed revisions to Form S–4 appropriate?

*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.[193] Item 103 also requires disclosure of the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto and a description of the factual basis alleged to underlie the proceeding and the relief sought.[194] Similar information is to be included for such proceedings known to be contemplated by governmental authorities.[195]

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 of parties to the litigation, as part of Form A–1 in 1933.[196] In 1935, the Commission included in Form A–2 a requirement for a brief description of material, pending legal proceedings and proceedings by governmental authorities, where such proceedings depart from the ordinary routine litigation incidental to the kind of business conducted by the registrant or its subsidiaries.[197] The requirement was later expanded in Form S–1 [198] to include: (1) A requirement to identify the court or agency, the date instituted, and the names of the principal parties; (2) 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; and (3) an exemption for disclosure of proceedings involving claims of less than 15 percent of the registrant's consolidated current assets.[199]

As discussed in greater detail below, in connection with NEPA,[200] the legal proceedings disclosure requirement was expanded to require additional disclosure about environmental matters.[201] At the same time a requirement to disclose the factual basis of proceedings and the nature of relief sought was added, and the disclosure threshold was reduced from 15 percent to 10 percent.[202] In 1978, the requirement was also moved from the forms to Item 5 of Regulation S–K.[203]

In the DUSTR Proposing Release, the Commission solicited comments about whether to retain, modify, eliminate, or refer the Item 103 disclosure requirements to the Financial Accounting Standards Board (''FASB'') for potential incorporation into U.S. GAAP.[204] Many commenters opposed the integration of Item 103 into U.S. GAAP.[205] A number of commenters [206] stated that the objectives of Item 103 and U.S. GAAP differ,[207] and some of these commenters [208] indicated that a better articulation of objectives may be warranted. Commenters further expressed concern that the integration could lead to increased disclosure of immaterial items and may eliminate the safe-harbor protections currently afforded to forward-looking statements related to legal proceedings under Regulation S–K.[209]

Some commenters recommended the deletion of Item 103 altogether or, at a minimum, some of the disclosure requirements contained therein.[210] For example, one of these commenters asserted that U.S. GAAP, together with Items 303 and the former 503(c) (now Item 105) of Regulation S–K, elicits the appropriate level of disclosure of material legal proceedings to inform investment and voting decisions of a reasonable investor.[211]

In response to concerns expressed by commenters, the Commission decided to retain the disclosure requirements in Item 103 without amendment and without referral to the FASB for potential incorporation into U.S. GAAP, indicating that further consideration was warranted with respect to the implications of potential changes to these requirements.[212]

In light of 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 are proposing the following amendments.[213]

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[192] *See supra* note 85.

[193] 17 CFR 229.103.

[194] *See id.*

[195] *See id.*

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

[197] *See* Form A–2, Item 40, adopted in Release No. 33–276 (Jan. 14, 1935) [not published in the **Federal Register**].

[198] 17 CFR 239.11.

[199] *See Application for Registration of Securities,* Release No. 33–3584 (Oct. 21, 1955) [20 FR 8284]. *See also Forms for Registration Statements; Notice of Proposed Rulemaking,* Release No. 33–3540 (Apr. 26, 1955) [20 FR 2965].

[200] *See* NEPA, *supra* note 146.

[201] *See* Environmental Disclosure Adopting Release, *supra* note 147.

[202] *See id.*

[203] *See Integrated Reporting Requirements: Directors and Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management,* Release No. 33–5949 (July 28, 1978) [43 FR 34402].

[204] *See* DUSTR Proposing Release, *supra* note 129 at 51633.

[205] *See, e.g.,* letters from Center for Audit Quality (Oct. 3, 2016) (''CAQ 1'') [DUSTR letter], Corporate Governance Coalition for Investor Value (Oct. 27, 2016) (''CGCIV 1'') [DUSTR letter], Davis Polk & Wardwell LLP (Nov. 2, 2016) (''Davis 1'') [DUSTR letter], FedEx Corporation (Nov. 2, 2016) (''FedEx 1'') [DUSTR letter], Shearman & Sterling LLP (Dec. 1, 2016) (''Shearman 1'') [DUSTR letter], and U.S. Chamber of Commerce (Oct. 27, 2016) (''Chamber 1'') [DUSTR letter].

[206] *See, e.g.,* letters from CAQ 1 and NAREIT (Oct. 28, 2016) (''NAREIT 1'') [DUSTR letter].

[207] Item 103 is intended to provide a description of material pending legal proceedings, while U.S. GAAP is designed to provide information consistent with the accounting model for loss contingencies.

[208] *See, e.g.,* letters from CAQ 1 and Davis 1.

[209] *See* letters from CGCIV 1, Davis 1, FedEx 1, NAREIT 1, Shearman 1, and Chamber 1.

[210] *See* letters from Davis 1, Edison Electric Institute and American Gas Association Accounting Advisory Council (Nov. 2, 2016) (''EEI and AGA 1'') [DUSTR letter] and Grant Thornton LLP (Nov. 1, 2016) [DUSTR letter].

[211] *See* letter from Davis 1.

[212] *See* DUSTR Adopting Release, *supra* note 62.

[213] In addition to the proposed amendments discussed below, we also are proposing to reorganize Item 103 to incorporate the contents of the current instructions into the text of Item 103 and to eliminate the instructions.

1. Expressly Provide for the use of Hyperlinks or Cross-References To Avoid Repetitive Disclosure

Although Item 103 of Regulation S–K and U.S. GAAP differ in certain respects, they also have overlapping disclosure requirements.[214] Thus, in order to comply with Item 103, registrants commonly repeat some or all of the disclosures that are provided elsewhere in the document, such as, for example, in the notes to the financial statements under U.S. GAAP, the MD&A, and the Risk Factors sections.

In an effort to encourage registrants to avoid duplicative disclosure, we propose to revise Item 103 to expressly state that some or all of the required information may be provided by including hyperlinks or cross-references to legal proceedings disclosure located elsewhere in the document.

2. Update the Disclosure Threshold for Environmental Proceedings in Which the Government Is a Party

Instruction 5.C. to Item 103 specifically requires disclosure of 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.[215]

Pursuant to NEPA, Congress required all Federal agencies to include consideration of the environment in regulatory action.[216] The Commission's initial action in the environmental area came in 1971 when an interpretive release was issued alerting registrants to the potential disclosure obligations that could arise from material environmental litigation and the material effects of compliance with environmental laws.[217] After an assessment of the disclosure elicited under this release, the Commission determined that more specific disclosure standards were necessary and the Commission adopted amendments to certain registration and reporting forms in 1973.[218] The amendments required disclosure of (1) 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, and (2) any material pending or contemplated administrative or judicial proceedings involving Federal, state or local environmental laws, as well as *any* environmental proceeding by a governmental authority.[219] While these amendments called for disclosure of all environmental proceedings involving governmental authorities, the Commission recognized that a complete description of each such proceeding might cause disclosure documents to be excessively detailed without a commensurate benefit to investors.[220] Therefore, the Commission also adopted at that time a provision which allowed registrants to group similar governmental proceedings and to describe them generally.[221]

As noted earlier,[222] in 1975 the Commission initiated public proceedings[223] to elicit comments on whether further rulemaking in the environmental area was appropriate. The Commission solicited comments on a number of issues affecting environmental disclosure, such as the relevance of those disclosures to informed voting decisions.[224] The request for comments resulted in certain staff recommendations, as set forth in the 1979 Staff Report on Corporate Accountability, concerning the Commission's environmental disclosure provisions.[225] The Staff Report concluded that disclosure of *all* environmental proceedings to which a governmental authority is a party resulted in lengthy disclosures which obscured more significant environmental proceedings.[226] The Staff Report stated that ''more focused disclosure could be more beneficial to investors and shareholders'' and recommended that the disclosure requirement be amended to allow for a materiality threshold, instead of requiring disclosure of all such proceedings.[227]

Consistent with the Staff Report,[228] the Commission added environmental disclosure thresholds (including Instruction 5.C.) to current Item 103 in 1982.[229] The 1982 amendments included new subparts A, B, and C to Instruction 5 of Item 103, with subpart C permitting registrants not to disclose environmental proceedings to which the government is a party if the registrant reasonably believes that monetary sanctions resulting from the proceedings will be less than $100,000.[230] The 1981 proposing release for these amendments indicated that the $100,000 threshold was based in part on actual fines assessed in environmental proceedings at the time.[231] In that release, the Commission stated its belief that disclosure of fines by governmental authorities may be of particular importance in assessing a registrant's environmental compliance problems, and that a disclosure threshold based on governmental fines may be more indicative of possible illegality and conduct contrary to public policy than other measures.[232]

Since the current requirements in Instruction 5.C. to Item 103 were adopted in 1982, the Commission has explored ways in which environmental disclosures could be improved for investors while not unduly burdening registrants. For example, the 1996 Report of the Task Force on Disclosure Simplification recommended replacing the $100,000 threshold with a general materiality standard or, alternatively, recommended raising the dollar threshold that triggers disclosure.[233] The Task Force made this recommendation noting that in some circumstances the ''one size fits all'' approach may result in the disclosure of information about environmental proceedings not material to an

[214] *See supra* note 207 and *infra* note 235.

[215] 17 CFR 229.103.

[216] *See* NEPA, *supra* note 146.

[217] *See Disclosures Pertaining to Matters Involving the Environment and Civil Rights,* Release No. 33–5170 (July 19, 1971) [36 FR 13989 (July 29, 1971)] (''The Commission's requirements for describing a registrant's business on the forms and rules under the Securities and Exchange Act call for disclosure, if material, when compliance with statutory requirements . . . may materially affect the earning power of the business, or cause material changes in registrant's business done or intended to be done. Further, the Commission's disclosure requirements relating to legal proceedings call for disclosure, where material, of proceedings arising . . . under statutes, Federal, state or local, regulating the discharge of materials into the environment, or otherwise specifically relating to the protection of the environment . . . .'').

[218] *See* Environmental Disclosure Adopting Release, *supra* note 147.

[219] *See id.*

[220] *See id.*

[221] *See id.*

[222] *See supra* notes 148 and 149 and accompanying text.

[223] *See* Release No. 33–5569 (Feb. 11, 1975) [40 FR 7013 (Feb. 18, 1975)]. As previously noted, as a result of these proceedings, the Commission amended its forms in 1976 to specifically require disclosure of any material estimated capital expenditures for environmental control facilities for the remainder of the registrant's current fiscal year and its succeeding fiscal year, and for any further periods that are deemed material. *See* Release No. 33–5704, *supra* note 150.

[224] See Release No. 33–5569, *supra* note 223, at 7015.

[225] *See* Staff Report, *supra* note 148, at 250–86.

[226] *See id.*

[227] *See id.*

[228] *See id.*

[229] *See* 1982 Integrated Disclosure Adopting Release, *supra* note 9.

[230] *See id.*

[231] *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)].

[232] *See id.*

[233] *See Report of the Task Force on Disclosure Simplification* (Mar. 5, 1996), available at *https://www.sec.gov/news/studies/smpl.htm.*

investment decision.[234] However, the recommended changes were not proposed.

Although the DUSTR Proposing Release did not specifically seek comment on the bright-line $100,000 threshold in Instruction 5.C. to Item 103,[235] some commenters expressed opposition to 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.[236] These commenters expressed concern about using a materiality standard for disclosure because it may reduce the information made available to investors or diminish comparability of registrants.[237]

Other commenters supported eliminating the bright-line thresholds and generally supported a more principles-based disclosure framework.[238] These commenters also asserted that materiality is a better disclosure standard because certain of the existing bright-line thresholds result in disclosure that may not be material to investors, may obscure material information and may be costly to provide.[239]

We continue to believe that a disclosure threshold based on the imposition of a governmental fine is appropriate because such a fine may be important for investors in assessing a registrant's environmental compliance.[240] A disclosure threshold based on imposition of a governmental fine also provides a useful benchmark for registrants when determining whether a particular environmental proceeding, which can be factually and legally complex, should be disclosed. Such a disclosure threshold also promotes comparability among registrants in the disclosure of environmental proceedings. For these reasons, we propose to retain a disclosure threshold for environmental proceedings based on the imposition of a governmental fine.

However, as the $100,000 disclosure threshold for environmental proceedings in which the government is a party has not been changed since it was adopted in 1982, we propose to increase this threshold to $300,000 to adjust it for inflation. Using the May 1981 date of the proposing release in which the $100,000 threshold was first mentioned and using the Consumer Price Index (CPI) Inflation Calculator, we estimate that the threshold would be $285,180.40 as of May 2019.[241] For ease of reference, we propose rounding this amount up to $300,000. This increase would reflect an inflation adjustment to modernize this disclosure requirement.

Request for Comment

30. Would our proposed revisions to Item 103 improve disclosures required by the item? Are there different or additional revisions we should consider to improve Item 103 disclosure?

31. Should we expressly provide for the use of hyperlinks or cross-references, as proposed? Would the use of multiple hyperlinks be cumbersome for investors? Are there alternative recommendations that would more effectively decrease duplicative disclosure?

32. Should we adjust the $100,000 threshold for environmental proceedings in which the government is a party in Item 103 for inflation, as proposed? Should this threshold be adjusted for inflation periodically, such as every three years or some other interval? Does CPI inflation provide an appropriate adjustment factor for environmental proceedings? If not, what adjustment factor should we use?

33. Should we instead adopt an alternative threshold for environmental proceedings disclosure? If so, what threshold should we use, and what data or sources should provide the basis for the alternative threshold? Should we raise the dollar threshold above the proposed $300,000 threshold, *e.g.,* to $500,000, $750,000, or $1,000,000, and if so, what would be the basis for that increase? Are there alternative approaches (*e.g.,* a materiality threshold) that would work better than a bright-line dollar threshold? If so, describe the approach and explain why it would be preferable to our proposal.

34. Form 20–F requires a foreign private issuer to provide information on any legal or arbitration proceedings, including governmental proceedings pending or known to be contemplated, which may have, or have had in the recent past, significant effects on the company's financial position or profitability.[242] Similar to the proposed amendment to Item 103, should we amend Form 20–F to expressly state that some or all of the required information about legal proceedings may be provided by including hyperlinks or cross-references to legal proceedings disclosure located elsewhere? Should we amend Form 20–F to clarify that a foreign private issuer is only required to disclose material legal proceedings? Would either amendment reduce a foreign private issuer's ability to use a single disclosure document in multiple jurisdictions?

*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.[243] The principles-based requirement further directs registrants to explain how each risk affects the registrant or the securities being offered, discourages 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.[244]

The Concept Release solicited comments on how to improve risk factor disclosure and sought feedback on several potential approaches aimed at facilitating more meaningful disclosure.[245] Comments received were

[234] *See id.*

[235] The DUSTR Proposing Release more generally discussed the overlap in disclosure that could result from compliance with the requirements under Item 103 and U.S. GAAP, which requires the disclosure of loss contingencies (*see* ASC 450–20), and noted the differences between the two sets of requirements. *See* DUSTR Proposing Release, *supra* note 129, at 51633–51634. Following a discussion of those differences, the Commission solicited comment on whether inclusion of the Item 103 disclosures in the audited financial statements would create significant burdens for issuers and auditors. *See* DUSTR Proposing Release, *supra* note 129 at 51635. Because of the concerns expressed by the many commenters that opposed the integration of Item 103 into U.S. GAAP, the Commission did not amend the Item 103 disclosure requirements. *See* DUSTR Adopting Release, *supra* note 62, at 50174.

[236] *See, e.g.,* letters from AFL–CIO (Oct. 31, 2016) [DUSTR letter], CalPERS (Nov. 2, 2016) [DUSTR letter], CFA Institute (Dec. 7, 2016) [DUSTR letter], Public Citizen (Oct. 18, 2016) [DUSTR letter], and R.G. Associates, Inc. (Nov. 2, 2016) [DUSTR letter].

[237] *See id.*

[238] *See, e.g.,* letters from CAQ 1, CGCIV 1, Chamber 1, The Clearing House Association L.L.C. (Oct. 28, 2016) (''Clearing House''), Davis 1, and Financial Executives International (Oct. 27, 2016) [DUSTR letters].

[239] *See, e.g.,* letters from CAQ 1, CGCIV 1, Clearing House, Davis 1, Deloitte & Touche LLP (Oct. 5, 2016) [DUSTR letter], EEI and AGA 1, NAREIT 1, Shearman 1, and Chamber 1.

[240] *See supra* note 232 and accompanying text.

[241] *See* CPI Inflation Calculator, available at *https://data.bls.gov/cgi-bin/cpicalc.pl.* The calculator uses the Consumer Price Index for All Urban Consumers (CPI–U) U.S. city average series for all items, not seasonally adjusted.

[242] *See* Form 20–F, Item 8.A.7.

[243] 17 CFR 229.105. As previously noted, in the FAST Act Adopting Release the Commission rescinded Item 503(c) of Regulation S–K and replaced it with new Item 105 of Regulation S–K. *See supra* note 1. 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]. *See* Item 1A of Form 10, Form 10–K, and Form 10–Q.

[244] *See id.*

[245] *See* Concept Release, *supra* note 6. The potential approaches discussed included, for example, requiring that each risk factor be

wide-ranging and no consensus emerged. Numerous commenters supported a flexible or principles-based requirement.[246] Several commenters recommended integrating risk factor disclosures with other non-risk and risk-related disclosures.[247] Some commenters recommended further guidance on risk factor disclosure to illustrate what registrants should do to meet the Item's disclosure objectives.[248] Other commenters supported retaining the current approach to risk factors and opposed any changes to the current risk factor guidance and disclosure.[249]

The revisions that we are proposing to Item 105 are intended 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 varies, studies show that risk factor disclosures have increased in recent years.[250] 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 10 percent, and that this increase in risk factor word count may not be associated with better disclosure.[251]

A contributing factor to the increased length of risk factor disclosure appears to be the inclusion of generic, boilerplate risks that could apply to any offering or registrant. Although Item 105 instructs registrants not to present risks that could apply to any registrant, and despite Commission and staff guidance stating that risk factors should be focused on the ''most significant'' risks and should not be boilerplate,[252] 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 are proposing the following three amendments to the Item 105 risk factor disclosure requirement.

1. Require Summary Risk Factor Disclosure if the Risk Factor Section Exceeds 15 Pages

As a way of addressing the length of risk factor disclosure, the Commission has previously considered requiring a page limit for risk factor disclosure.[253] However, the Commission has not adopted such a requirement to date in light of comments received in response to prior initiatives. For example, while the Concept Release did not seek specific feedback on reducing or limiting the length of risk factor disclosure, several commenters nonetheless opposed a page limit.[254] Commenters attributed the growing length of risk factor disclosure to the risk of litigation associated with failing to disclose risks if events turn negative.[255] Commenters also stated that many companies will continue to disclose generic risks unless assured that litigation will not result from the failure to do so.[256] Similar comments were received in response to the general solicitation of comment on the Disclosure Effectiveness Initiative.[257]

The Concept Release sought input on whether to require summary risk factor disclosure in addition to complete risk factor disclosure and whether highlighting information in a summary would help investors better understand a registrant's risks.[258] Several commenters opposed summary risk factor disclosure, stating that a summary would not add value and would result in repetition of disclosure.[259] Further, some commenters noted that registrants provide headings before each specific risk factor, which effectively act as a summary.[260] Some commenters

accompanied by a specific discussion of how the registrant is addressing the risk, requiring registrants to discuss the probability of occurrence and the effect on performance of each risk factor and requiring registrants to describe their assessment of risks.

[246] *See* letters from CAQ, AFLAC, Chamber, FedEx, CGCIV, NAM, ACC, SIFMA, E&Y, EEI and AGA, Wilson Sonsini, NAREIT, Davis, Fenwick, NIRI, Shearman, PWC, General Motors, and Financial Executives International.

[247] *See* letters from PNC, SIFMA, CalPERS, the Carbon Tracker Initiative, Medical Benefits Trust, E&Y, and BDO.

[248] *See* letters from NYSSCPA, General Motors, and Financial Executives International.

[249] *See* letters from Ball Corporation, API, and Chevron.

[250] *See* PricewaterhouseCoopers LLP, *Stay Informed, 2012 Financial Reporting Survey: Energy industry current trends in SEC reporting,* Feb. 2013, available at *http://www.pwc.com/en_GX/gx/oil-gas-energy/publications/pdfs/pwc-sec-financial-reporting-energy.pdf* (''2012 PWC Report''). This report reviewed financial reporting trends of 87 registrants with market capitalizations of at least $1 billion that apply U.S. GAAP in the following subsectors of the energy industry: Downstream, drillers, independent oil and gas, major integrated oil and gas, midstream and oil field equipment and services. Based on this study, the average number of risk factors in the major integrated oil and gas sector was 12 while the average number of risk factors in the midstream sector was 51. In one sector, the maximum number of risk factors was 95. *See also* PricewaterhouseCoopers LLP, *Stay Informed: 2014 technology financial reporting trends,* Aug. 2014, available at *http://www.pwc.com/en_US/us/technology/publications/assets/pwc-2014-technology-financial-reporting-trends.pdf* (reviewing the annual and periodic filings of 135 registrants in the software and internet, computers and networking, and semiconductors sectors, and finding that over half of the registrants surveyed repeated all of their risk factors in their quarterly filings); and Travis Dyer, Mark Lang and Lorien Stice-Lawrence, *The Ever-Expanding 10–K: Why Are 10–Ks Getting So Much Longer (and Does It Matter)?,* The Columbia Law School Blue Sky Blog (May 5, 2016), available at *http://clsbluesky.law.columbia.edu/2016/05/05/the-ever-expanding-10-k-why-are-10-ks-getting-so-much-longer-and-does-it-matter/* (reporting the results of a study of Form 10–Ks filed between 1996 and 2013 and finding that the length of Form10–K has more than doubled in word length, with forward-looking risk factor disclosures being one of three substantial reasons for this increase, and contributing to Form 10–Ks becoming more redundant and complex).

[251] *See* Anne Beatty et al., *Sometimes Less is More: Evidence from Financial Constraints Risk Factor Disclosures,* Mar. 2015, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186589.* 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.

[252] *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.*

[253] 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.

[254] *See* letters from ACC, API, Chevron, CAQ, PNC, Wilson Sonsini, Maryland Bar Securities Committee, PWC, CalPERS, Four Twenty Seven, Fenwick, and NYSSCPA.

[255] *See* letters from Wilson Sonsini, Maryland State Bar, and PNC.

[256] *See id.*

[257] *See, e.g.,* letter from The Society of Corporate Secretaries and Governance Professionals (Sept. 10, 2014) [Disclosure Effectiveness letter] (referencing the Commission's proposal to limit the number of risk factors included in a filing in connection with the Commission's Plain English initiative and comments received in connection with that initiative, and quoting approvingly from the letter from the Committee on Securities Regulation of the Business Law Section of the New York State Bar Association (Mar. 21, 1997), available at *http://www.sec.gov/rules/proposed/s7397/gutman1.htm,* that ''no issuer should ever be put in the position of choosing significant material risks in order to satisfy a numerical limitation'').

[258] *See* Concept Release, *supra* note 6. Item 3(b) to Form S–11 includes such a requirement, stating that ''[w]here 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.'' *See* 17 CFR 239.18. 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.

[259] *See* letters from SIFMA, Fenwick, NIRI, and General Motors.

[260] *See* letters from SIFMA, Fenwick, and General Motors.

specified that a summary should be encouraged but not required.[261]

Given the increasing length of risk factor disclosure and after considering the comments received, we propose to amend Item 105 to require summary risk factor disclosure if the risk factor section exceeds 15 pages.[262] Lengthy risk factor disclosure and the inclusion of many general risks add to the complexity of disclosure documents, without necessarily providing additional meaningful information to investors. When registrants provide risk disclosure that exceeds 15 pages, we propose to require registrants to provide summary risk factor disclosure in the forepart of the prospectus or annual report, as applicable, under an appropriately captioned heading. The summary would consist of a series of short, concise, bulleted or numbered statements summarizing the principal factors that make an investment in the registrant or offering speculative or risky. The proposed 15-page threshold may provide registrants with an incentive to limit the length of their risk factor disclosure. We estimate that a 15-page threshold would affect approximately 40 percent of current filers.[263] If registrants determine that it is appropriate to provide risk factor disclosure that exceeds 15 pages, summary risk factor disclosure highlighted in the forepart of the document should enhance the readability and usefulness of this disclosure for investors. We believe that this approach would appropriately balance the need to provide more focused disclosure about a registrant's risk profile with the concerns raised by commenters about imposing page limits on risk factor disclosure.

2. Replace the Requirement To Disclose the ''Most Significant'' Factors With the ''Material'' Factors

Since the Commission first published guidance on risk factor disclosure in 1964,[264] 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.[265] Notwithstanding this additional guidance, the length of risk factor disclosure and the number of risks disclosed has increased in recent years.[266]

We are proposing to update Item 105 to replace the requirement to discuss the ''most significant'' risks with ''material'' risks. Securities Act Rule 405 defines ''material'' as follows:

> The term *material,* when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security.[267]

We propose revising the standard for disclosure from the ''most significant'' risks to ''material'' risks to focus registrants on disclosing the risks to which reasonable investors would attach importance in making investment decisions. We believe that this approach could result in risk factor disclosure that is more tailored to the particular facts and circumstances of each registrant, which would reduce the amount of risk factor disclosure that is not material and potentially shorten the length of the risk factor discussion, to the benefit of both investors and registrants.[268]

3. Require Registrants To Organize Risk Factors Under Relevant Headings

Since 1964, the Commission has periodically emphasized the importance of organized and concise risk factor disclosure.[269] The Concept Release solicited feedback on the ways in which we could improve the organization of registrants' risk factor disclosure to help investors better navigate the disclosure.[270] Several commenters supported grouping similar risks together,[271] with one commenter noting that the current organizational structure, and not the length, of risk factor disclosure, should be the primary concern.[272] As stated above, some commenters noted that registrants often provide headings before each specific risk factor, which act as a summary.[273] Further, one commenter noted that the grouping of related risk factors together under subheadings for clarity is a best practice currently used by many registrants as risk factors have lengthened.[274]

The Concept Release also solicited comment on whether generic risk factors are important to investors and if not, how to discourage this disclosure.[275] As noted above, several commenters discussed the importance of including both specific and generic risk disclosures.[276] One of these commenters supported revising the current text of Item 105 to eliminate the proscription against including ''risks that could apply to any issuer or offering.'' [277] In contrast, many commenters opposed inclusion of generic risk factors.[278]

We are proposing to require registrants to organize their risk factor disclosure under relevant headings in an effort to help readers comprehend lengthy risk factor disclosures. As noted above, many registrants already do this and we believe that further organization within risk factor disclosure will improve the effectiveness of the disclosures. In addition, if a registrant chooses to disclose a risk that could apply to other companies or securities offerings and the disclosure does not provide an explanation of why the identified risk is specifically relevant to an investor in its securities, we are proposing to require the registrant to disclose such risk factors at the end of the risk factor section under the caption ''General Risk Factors.''

Request for Comment

35. Would our proposed approach to Item 105 result in improved risk factor disclosure for investors?

36. Would our proposal to require summary risk factor disclosure if the

[261] *See* letters from E&Y and Deloitte.

[262] Commission staff reviewed a representative sample of filings to help determine the proposed threshold. *See infra* Section IV, note 314.

[263] *See infra* Section IV.B.2.

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

[265] ''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.

[266] *See supra* notes 250 and 251 and accompanying text.

[267] 17 CFR 230.405. Exchange Act Rule 12b–2 defines materiality similarly: ''The term 'material,' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to *buy or sell the securities registered*.'' 12 CFR 240.12b–2 (emphasis added).

[268] For a discussion of the potential economic effects of switching from a ''most significant'' risks to a ''material risks'' disclosure standard, including the possibility that the change could result in either more or less expansive disclosure, s*ee infra* Section IV.B.2.iv.

[269] *See* 1964 Guides, *supra* note 264; 1982 Integrated Disclosure Adopting Release, *supra* note 9; and *Securities Offering Reform,* Release No. 33–8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)].

[270] *See* Concept Release, *supra* note 6.

[271] *See* letters from PNC, Fenwick, and Wilson Sonsini.

[272] *See* letter from Wilson Sonsini.

[273] *See* letters from SIFMA, Fenwick, and General Motors.

[274] *See* letter from Fenwick.

[275] *See* Concept Release, *supra* note 6.

[276] *See* letters from E&Y, Maryland Bar Securities Committee, and CalPERS (refuting the notion that generic and boilerplate risk factors cannot impart material information); *see also* letter from NYSSCPA (stating that generic and boilerplate risk factors should be included if critical to the overall understanding of a registrant's business environment).

[277] *See* letter from E&Y.

[278] *See* letters from EEI and AGA, Investment Program Association (July 21, 2016), NAREIT, Better Markets (July 21, 2016), Davis, Fenwick, Reardon, NIRI, Financial Services Roundtable, Shearman and A. Radin.

risk factor discussion exceeds 15 pages result in improved risk factor disclosure for investors?

37. Is 15 pages an appropriate number of pages to trigger summary risk factor disclosure? If not, what is the appropriate page limit that should trigger summary risk factor disclosure? Is there a better alternative than a page limit to trigger summary risk factor disclosure (*e.g.,* should we consider a word limit instead)?

38. If summary risk factor disclosure is triggered, should we require the summary to consist of a series of short, concise, bulleted or numbered statements summarizing the principal factors that make an investment in the registrant or offering speculative or risky, as proposed? Should we in addition or instead limit the length of the summary disclosure (*e.g.,* no more than one page)? Should we require the bulleted or numbered statements summarizing the risk factors to also include hyperlinks to each of the risk factors summarized?

39. If the risk factors discussion exceeds 15 pages, should we require a registrant to include only those risk factors that pose the greatest risk to the registrant in the first 15 pages instead of requiring it to prepare a risk factor summary?

40. Should we specify that registrants should present summary risk factor disclosure in the forepart of the prospectus or annual report, as proposed? Alternatively, should the summary immediately precede the full discussion of risk factors? Currently, when the risk factor discussion is included in a registration statement, it must immediately follow the summary section. Should registrants be permitted to provide the full discussion of risk factors elsewhere in the document to enhance readability when a summary section is included?

41. Would changing the standard from the requirement to discuss the ''most significant'' factors to the ''material'' factors, as proposed, result in more tailored disclosure and reduce the length of the risk factor disclosure? Would changing the standard, as proposed, result in other consequences that we have not considered? If so, provide specific examples of such consequences.

42. Would our proposal that registrants organize their risk factors under relevant headings improve disclosures for investors?

43. Should we require registrants to prioritize the order in which they discuss their risk factors so that the risk factors that pose the greatest risk to the registrant are discussed first? Would this improve disclosures for investors or be unduly burdensome for registrants?

44. If the registrant discloses generic risk factors, should the registrant be required to disclose them at the end of the risk factor section, and caption them as General Risk Factors, as proposed?

45. Should we require registrants to explain how generic, boilerplate risk factors are material to their investors, and what, if anything, management does to address these risks?

46. Foreign private issuers that file their Exchange Act annual reports on Form 20–F must provide risk factor disclosure as required by that Form whereas foreign private issuers that file registration statements on Forms F–1, F–3, and F–4 must provide risk factor disclosure pursuant to Item 105. Currently Form 20–F does not require a summary of the risk factors if the risk factor disclosure exceeds a certain page limit, does not state that material risks should be disclosed, and does not require the presentation of risk factors, including generic risk factors, under appropriate headings. Should we amend Form 20–F to include any or all of the proposed risk factor disclosure provisions under Item 105? If we do not similarly amend risk factor disclosure under Form 20–F, would having one set of risk factor disclosure requirements for Form 20–F annual reports and another set for registration statements on Forms F–1, F–3, and F–4 cause confusion for registrants or investors?

47. How might we further improve risk factor disclosure?

## III. General Request for Comments

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the proposed amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

## IV. Economic Analysis

This section analyzes the expected economic effects of the proposed 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 propose 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.[279] An important objective of the proposed amendments is to revise Items 101(a), 101(c), and 105 to be more principles-based. Overall, investors and registrants may benefit from the proposed 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 the risk that emphasizing a principles-based approach and granting registrants more flexibility to determine what and how much disclosure about a topic to provide may result in the elimination of some information to investors. However, we believe that any such loss of information would be limited given that, under the proposed principles-based approach, registrants still would be required to provide disclosure about these topics if they are material to the business.

We are sensitive to the costs and benefits of these amendments. The discussion below addresses the potential economic effects of the proposed amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation.[280] At the outset,

[279] While Items 101, 103 and 105 have not undergone significant revisions in over thirty years, many characteristics of the registrants have changed substantially over this time period. For example, in 1988, the largest 500 U.S. companies in Standard & Poor's Compustat database had an average market capitalization of $4.27 billion, foreign income of $281 million, and ratio of intangible assets to market capitalization of 8.44%. The largest 100 companies had an average market capitalization of $12.25 billion, foreign income of $730 million, and ratio of intangible assets to market capitalization of 7.07%. In 2018, the largest 500 companies had an average market capitalization of $49.10 billion, foreign income of $1.70 billion, and ratio of intangible assets to market capitalization of 29.70%. The largest 100 companies had an average market capitalization of $ 141.46 billion, foreign income of $5.18 billion, and ratio of intangible assets to market capitalization of 32.62%. There is also significant turnover among the largest companies: approximately 34% of top 50 companies in 1988 were still in the top 50 companies on 2018. We believe that certain of the proposed amendments (the disclosure of the material effects of compliance with material government regulations, including foreign government regulations) would provide investors with information consistent with the changing nature of the registrants.

[280] 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

Continued

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 proposed amendments. In many cases, however, we are unable to quantify the economic effects because we lack information necessary to provide a reasonable estimate. For example, we are unable to quantify, with precision, the costs to investors of utilizing 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*

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 proposed amendments include investors and other users of registration statements and periodic reports, and proxy statements, such as financial analysts, as well as registrants subject to Regulation S–K.

The proposed amendments affect both domestic issuers and foreign private issuers [281] that file on domestic forms [282] and foreign private issuers that file on foreign forms.[283] We estimate that approximately 6,919 registrants filing on domestic forms [284] and 393 foreign private issuers filing on foreign forms would be affected by the proposed amendments. Among the registrants that file on domestic forms, approximately 29 percent are large accelerated filers, 19 percent are accelerated filers, 19 percent are non-accelerated filers, and 33 percent are smaller reporting companies. In addition, we estimate that approximately 21.3 percent of domestic issuers are emerging growth companies.[285]

*B. Potential Costs and Benefits*

In this section, we discuss the anticipated economic benefits and costs of the proposed 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 proposed amendments. We then discuss the potential costs and benefits of specific proposed amendments.

1. Principles-Based Versus Prescriptive Requirements

Prescriptive requirements employ bright-line, quantitative 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 propose to revise Items 101(a), 101(c), and 105 to be more principles-based.[286] Principles-based requirements may result in more or less detail than prescriptive requirements, which set forth explicit criteria for disclosure. The economic effects of replacing a prescriptive requirement with a more principles-based disclosure standard based on materiality depend on a variety of factors, 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 issuers with no loss of investor protection because the current requirements occasionally result in some disclosure that is immaterial to an investment decision and costly for issuers 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.[287] In addition, a principles-based approach may permit or encourage registrants to present more tailored information, which also may benefit investors.[288]

impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

[281] *See supra* note 24 for the definition of foreign private issuer.

[282] The number of issuers that file on domestic forms is estimated as the number of unique issuers, identified by Central Index Key (CIK), that filed Forms 10–K and 10–Q, or an amendment thereto, with the Commission during calendar year 2018. We believe that these filers are representative of the registrants that would primarily be affected by the proposed amendments. For purposes of this economic analysis, these estimates do not include issuers that filed only initial domestic Securities Act registration statements during calendar year 2018, and no Exchange Act reports, in order to avoid including entities, such as certain co-registrants of debt securities, which may not have independent reporting obligations and therefore would not be affected by the proposed amendments. Nevertheless, the proposed amendments would affect any registrant that files a Securities Act registration statement and assumes Exchange Act reporting obligations. We believe that most registrants that have filed a Securities Act registration statement, other than the co-registrants described above, would be captured by this estimate through their Form 10–K and Form 10–Q filings. The estimates for the percentages of smaller reporting companies, accelerated filers, large accelerated filers, and non-accelerated filers are based on data obtained by Commission staff using a computer program that analyzes SEC filings, with supplemental data from Ives Group Audit Analytics.

[283] The number of affected issuers 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, or an amendment thereto with the Commission during calendar year 2018. *See also supra* note 24.

[284] This number includes fewer than 25 foreign issuers that file on domestic forms and approximately 100 business development companies.

[285] An ''emerging growth company'' is defined as an issuer that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. *See* 17 CFR 230.405 and 17 CFR 240.12b–2. *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.

[286] Although Items 101(c) and Item 105 use a principles-based approach, based on comments received on prior initiatives, it appears that some registrants may view these items as imposing prescriptive requirements. *See supra* Sections II.B and II.D. Therefore, we are proposing amendments to emphasize the principles-based approach of these items.

[287] *See* A. Lawrence, *Individual Investors and Financial Disclosure,* 56 J. Acct. & Econ., 130 − 147 (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.

[288] 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. 277–310 (1988) (providing evidence that management modifies existing lease agreements to avoid crossing rules-based criteria 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, Timothy S. Doupnik, and George T. Tsakumis. *Principles-based versus rules-based accounting standards: The influence of standard precision and audit committee strength on financial reporting decisions,* 86.3 The Acct. Rev. 747–767 (2011) (conducting experiments in which experienced financial statement preparers are placed in a lease classification decision context and

On the other hand, shifting to a more principles-based approach may result in the elimination of disclosure material to an investment decision if issuers misjudge what information is material.[289] To the extent that prescriptive requirements result in more complete disclosures, such requirements could benefit investors by reducing information asymmetry. Reducing information asymmetry may also benefit registrants by improving stock market liquidity and decreasing cost of capital.[290] Further, prescriptive standards could enhance the comparability and verifiability of information.[291] We acknowledge, however that differences between principles-based standards and prescriptive standards have been studied in the accounting context. These differences may be narrower in the context of the proposed 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, saving registrants the costs associated with materiality assessments.

Some of the costs of shifting to a more principles-based approach could be mitigated by external disciplines, such as the Commission staff's filing review program. In addition, registrants would remain subject to the antifraud provisions of the securities laws.[292] There also may be incentives for registrants to voluntarily disclose additional information if the benefits 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 materiality assessments, replacing prescriptive requirements with principles-based requirements is likely to reduce compliance costs because registrants would have the flexibility to determine whether certain information is material under the principles-based approach. To the extent the principles-based approach reduces compliance costs, the cost reduction should be more beneficial to smaller registrants that are financially constrained. Although eliminating information that is not material should benefit all investors, it could benefit retail investors more since 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 loss of information material to investors. In the event of loss of material information (the risk of which, as noted above, is offset by mitigants including accounting controls and the antifraud provisions of the securities laws), retail investors in these registrants may be more 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, and these costs may fall more heavily on retail investors than on institutional investors.

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 since 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 Proposed Amendments

We expect the proposed amendments would result in costs and benefits to registrants and investors, and we discuss those costs and benefits qualitatively, item by item, in this section. The proposed changes to each item would impact the compliance burden for registrants in filing particular forms. Overall, we expect the net effect of the proposed 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 proposed amendments in this section, we expect certain aspects of the proposed amendments to increase compliance burdens, while others are expected to decrease the burdens. Taken together, we estimate that the proposed 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.[293]

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 predict its growth rates[294] and

finding that preparers applying principles-based accounting are less likely to make aggressive reporting decisions than preparers applying a more precise rules-based standard and 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,* 13.2–3 J. Corp. Fin. 251–269 (2007) (providing evidence, in the context of mergers and acquisitions, where rule-based thresholds deviate from investor preferences). Papers that highlight a preference for rules-based materiality criteria are cited below.

[289] The presence of other controls, including accounting controls, likely reduces the risk that issuers will misjudge what information is material.

[290] *See, e.g.,* C. Leuz and P. Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research,* 54.2 Journal of Accounting Research 525–622 (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).

[291] *See* Mark W. Nelson, *Behavioral evidence on the effects of principles-and rules-based standards,* 17.1 Accounting Horizons 91–104 (2003); and Katherine Schipper, *Principles-based accounting standards,* 17.1 Accounting Horizons 61–72 (2003) (noting potential advantages of rules-based 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 Journal of Accounting and Finance Research 87–98 (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 comparability may improve as financial statement preparers become more experienced and hold higher organizational rank); Andrew A. Acito, Jeffrey J. Burks, and W. Bruce Johnson, *The Materiality of Accounting Errors: Evidence from SEC Comment Letters,* 36.2 Contemp. Acct. Res. 839, 862 (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).

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

[293] *See infra* Section V.B.

[294] *See* David S. Evans, *The Relationship between Firm Growth, Size, and Age: Estimates for 100 Manufacturing Industries,* 35 J. Indus. Econ. 567–81 (1987) (finding that firm growth decreases with both firm size and age). *See also* C. Arkolakis, T. Papageorgiou, and O. A. Timoshenko, *Firm Learning and Growth,* 27 Rev. Econ. Dyn. 146–168

Continued

corporate innovation.[295] Merger activities can affect shareholder value and predict future performance.[296] Given the relevance of such information to firm value, and thus investors, the effects of the proposed amendments to Item 101(a) on investors would depend on whether they result in more concise [297] and material disclosures of business development information under Item 101(a).

We propose to revise the requirements in Item 101(a) to be more principles based, requiring disclosure of information material to an understanding of the general development of the registrant's business. The shift to a more principles-based approach for these requirements would 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. We propose to eliminate the prescribed five-year timeframe for this disclosure. Eliminating this specific requirement would provide registrants with flexibility to choose a 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 have the flexibility to determine the appropriate timeframe, this proposed amendment is likely to reduce compliance costs. Investors may also benefit if the timeframe chosen by the registrants is more consistent with their preferences than the prescribed five-year timeframe, but may be harmed if the timeframe chosen by the registrants 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, we propose revising Item 101(a)(1) to require only an update of this disclosure with an active hyperlink to the registrant's most recently filed disclosure that, together with the update, would present a complete discussion of the general development of its business.[298] If duplicative disclosure distracts investors from other important information, the proposal may benefit investors by highlighting material developments in the reporting period. However, to the extent that historical information would be available through hyperlinking as opposed to being in the same filing, investors would have to spend more time to retrieve the information from another disclosure document. Because the proposed provisions would involve the use of only one hyperlink, we believe the increase in retrieval costs for investors would be minimal. While registrants may incur minimal compliance costs to include hyperlinks, we believe registrants would benefit from the proposal due to the reduction in costs to disclose duplicative information.

We propose to amend Item 101(a) to provide a non-exclusive list of topics that should be disclosed if material. Providing potential disclosure topics should clarify the requirements and avoid potential confusion among registrants. Besides items currently required under Item 101(a), the proposed topics also include material changes to a registrant's previously disclosed business strategy, which is not currently required to be disclosed. Since several studies have found that business strategy is a critical determinant of corporate success [299] and an essential component of business model design,[300] investors may benefit from any increase in the disclosure of material changes to previously disclosed business strategies. Since we are not proposing to make the disclosure of business strategy mandatory if a registrant has not previously disclosed its business strategy, the costs of revealing proprietary information that could be harmful to registrants' competitive positions should be somewhat limited.

Overall, investors and registrants may benefit from the proposed 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, granting registrants additional flexibility to determine (i) whether certain information is material, and (ii) how to disclose such information may result in the elimination of information in cases in which issuers stop disclosing 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 propose to revise the requirements in Item 101(c) to be more clearly principles based. The proposed amendments would require a description of the business and would set forth seven non-exclusive examples of information to be disclosed if material to an understanding of the

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

[295] *See* Elena Huergo and Jordi Jaumandreu, *How Does Probability of Innovation Change with Firm Age?,* 22 Small Bus. Econ. 193–207 (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); A. Coad, A. Segarra, and M. Teruel, *Innovation and Firm Growth: Does Firm Age Play a Role?,* 45 Res. Policy 387–400 (2016) (finding that young firms undertake riskier innovation and receive larger benefits from R&D).

[296] *See* Sara B. Moeller, Frederik P. Schlingemann, and Rene M. Stulz, *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave,* 60 J. Fin. 757–82 (2005) (finding that, although small gains were made in the 1980s, investors experienced negative gains from 1998 to 2001, and firms that announce 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. 69–88 (2013) (finding that the average long-term performance of acquisitions initiated during merger waves is significantly worse than those initiated off the waves).

[297] Investors may benefit from more concise disclosure that facilitates their ability to focus on information material to an investment decision. *See supra* note 286 for details.

[298] A registrant would be required to incorporate by reference the earlier disclosure into the updated filing. *See supra* Section II.A.2. We are also proposing 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 proposed Item 101(a)(2), including the proposed hyperlink requirement.

[299] *See* Jay B. Barney, *Strategic Factor Markets: Expectations, Luck, and Business Strategy* 32 Mgmt. Sci. 1231–41 (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* T. Ritter and H. G. Gemunden, *The Impact Of A Company's Business Strategy on Its Technological Competence, Network Competence and Innovation Success,* 57(5) J. Bus. Res. 548–556 (2004) (finding that a company's innovation success is positively correlated with the strength of its technology-oriented business strategy).

[300] *See* David J. Teece, *Business Models, Business Strategy and Innovation,* 43 Long Range Plan. 172–94 (2009) (examining the significance of business models and explorings their connections with business strategy, innovation management, and economic theory). *See also* P. Spieth, D. Schneckenberg, K. Matzler, *Exploring the Linkage between Business Model (&) Innovation and the Strategy of the Firm,* 46 R&D Mgmt. 403–413 (2016) (examining firm strategy-business model linkage and exploring the role of business model innovation as analytic perspective for identifying sources of firm performance).

business. These examples include some, but not all, of the topics currently required under Item 101(c) as well as some additional topics. Emphasizing a principles-based approach to Item 101(c) would give rise to the potential economic effects discussed in Section I.B.1 above. In addition, eliminating prescriptive requirements for certain items, such as the number of employees, may diminish comparability across firms.

The topics that would be retained as examples under the proposed 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 material effects of compliance with environmental laws.[301] Since the information required under Item 101(c) may be relevant to firm value,[302] investors and registrants would likely benefit if the proposed examples elicit information material to an investment decision while allowing registrants to tailor the disclosure to their specific circumstances.

Two of the proposed topics are more expansive than the current disclosure requirements contained in Item 101(c). We propose to replace the requirement to disclose the number of employees with a description of the registrant's human capital resources, including in such description 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. The proposed amendment provides 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,[303] have positive effects on firm performance. Another author found that turnover rates reflect human resource management practices.[304] Therefore, it is possible that investors may benefit from additional information elicited by the human capital topic. Registrants would incur incremental compliance costs to provide this additional information, if they determine that it is material.

We also propose to 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, if they determine that it is material to an understanding of their business. To the extent that many registrants already disclose such information, the incremental benefits and costs could be limited.

Some of the disclosure requirements currently contained in Item 101(c) would not be included as potential topics in the revised rule.[305] To the extent that the exclusion of these items results in a loss of material information,[306] there may be costs to investors. However, we believe that any such costs would be limited given that, under the proposed principles-based approach, the list of disclosure topics is not exhaustive and registrants still would be required to provide disclosure about these topics 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, we propose not to include working capital practices as a potential topic in Item 101(c), with the expectation that working capital would be discussed in a registrant's MD&A, to the extent material. If duplicative disclosure distracts investors from other important information, the proposal may benefit investors by reducing repetition and facilitating more efficient information processing. However, to the extent that information on working capital practices would no longer be readily available in multiple locations, investors may have to spend more time to retrieve the information. Registrants may marginally benefit from reduced compliance costs from the elimination of duplicative disclosure.

Overall, investors and registrants may benefit from the proposed amendments to Item 101(c) if the existing requirements result in disclosure that is not material to an investment decision 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. Several studies also have found that the possibility of legal proceedings may affect corporate decisions, such as pricing of securities [307] and management's information dissemination.[308]

[301] The current Item 101(c) requirement to disclose the number of a registrant's employees potentially would be encompassed by the proposed more expansive human capital resources disclosure topic. *See supra* Section II.B.7.

[302] 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, Koen Pauwels, Jorge Silva-Risso, and Shuba Srinivasan, *New Products, Sales Promotions, and Firm Value: The Case of the Automobile Industry,* 68 J. Marketing 142–56 (2004).and Amil Petrin, *Quantifying the Benefits of New Products: The Case of the Minivan,* 110 J. Pol. Econ. 705–29 (2002). Some academic research has also 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–C116 (2002), and Zvi Griliches, *Market Value, R&D and Patents,* 7 Econ. Letters 183–87 (1981).

[303] *See* T. R. Crook, S. Y Todd, J. G. Combs, D. J. Woehr, & D. J. Ketchen Jr., *Does human capital matter? A meta-analysis of the relationship between human capital and firm performance,* 96 J. Appl. Psychol. 443–56 (2011).

[304] *See* M.A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and Corporate Financial Performance,* 38 Acad. Manag. J. 635–672 (1995).

[305] The proposed amendments would 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.

[306] An academic article shows that acquisition of new segments has significant effects on firm productivity. Firms diversifying into a new segment experience a net reduction in productivity. While productivity of new plants increases, incumbent plants suffer. *See* Antoinette Schoar, *The Effect of Diversification on Firm Productivity,* 62 J. Fin. 2379–2403 (2002). Another article shows that backlog orders can predict future earnings. *See* Siva Rajgopal, Terry Shevlin, and Mohan Venkatachalam, *Does the Market Fully Appreciate the Implications of Leading Indicators for Future Earnings? Evidence from Order Backlog,* 8 Rev. Acct. Stud. 461–492 (2003). Based on these studies, one could anticipate that availability of material information on new segments and dollar amount of backlog orders believed to be firm could benefit investors.

[307] *See* Michelle Lowry and Susan Shu, *Litigation Risk and IPO Underpricing,* 65 J. Fin. Econ. 309–35 (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).

[308] *See* Douglas J. Skinner, *Why Firms Voluntarily Disclose Bad News?,* 32 J. Acct. Res. 38–60 (1994)

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Therefore, investors might benefit if the proposal to update Item 103 results 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. We propose to revise Item 103 to encourage the use of hyperlinks or cross-references to avoid repetitive disclosure. If duplicative disclosure distracts investors from other important information, the proposal may benefit investors by reducing repetition and facilitating more efficient information processing. However, to the extent that some information on legal proceedings would no longer be readily available under Item 103, investors may have to spend more time to retrieve the information through hyperlinks or cross-references. However, we believe the increase in retrieval cost for investors would be minimal. While registrants may incur minimal compliance costs if they choose to include hyperlinks, we believe registrants would benefit from the proposal due to the potential reduction in costs to disclose duplicative information.

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. We propose to adjust the $100,000 threshold to $300,000 to account for the effects of inflation. Some research has found that environmental liabilities can influence certain corporate decisions related to managing environmental regulatory risk [309] and that some investors include environmental criteria in their investment strategies.[310] Therefore, the disclosure of environmental proceedings at the appropriate level might benefit investors who have a particular interest in environmental matters. The economic effects of increasing the disclosure threshold depend on investor preferences. In other words, if investors do not use information about environmental proceedings that result in sanctions smaller than $300,000 to inform investment decisions, the proposal may benefit investors since elimination of disclosure that investors do not use may facilitate more efficient information processing. If investors use such information, however, the proposal may have a cost to them. Since the proposed threshold is higher than the current threshold, registrants should benefit from reduced compliance costs.

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.[311] There also is evidence suggesting that investors benefit from risk-factor disclosures that are more specific.[312] In measuring long-run returns to IPO stocks, some studies conclude that the returns are commensurate with the risk profiles of the individual firms.[313] Together, this research supports the notion that effective disclosures of risk factors can help investors better manage their risk exposure.

We propose to amend Item 105 to require summary risk factor disclosure 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 summary of 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 proposed threshold could also incentivize registrants to limit the length of their risk factor disclosure to 15 pages. Based on current disclosure practices, we estimate that a 15-page threshold would affect approximately 40 percent of registrants.[314] In order to comply with

(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, Chen Lin, Sibo Liu, and Lai Wei, *Litigation Risk and Voluntary Disclosure: Evidence from Legal Changes,* Account. Rev. (forthcoming 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).

[309] *See* Dean Neu, Kathryn Pedwell, and Hussein Warsame, *Managing Public Impressions: Environmental Disclosures in Annual Reports,* 23 Acct. Org. & Soc'y 265–82 (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, Kangkang Fu, Tao Li, Lewis Tam, and George Wong, *Corporate Environmental Liabilities and Capital Structure* (2018), available at *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).

[310] *See* Steve Schueth, *Socially Responsible Investing in the United States,* 43 J. Bus. Ethics 189–94 (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, Parth Venkat, and Qifei Zhu, *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.

[311] *See* John L. Campbell, Hsinchun Chen, Dan S. Dhaliwal, Hsin-min Lu, and Logan B. Steele, *The information content of mandatory risk factor disclosures in corporate filings,* 19 Rev. Acct. Stud. 396–455 (2014) (finding that the required disclosures 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).

[312] *See* Ole Kristian Hope, Danqi Hu and Hai Lu, *The Benefits of Specific Risk-Factor Disclosures,* 21 Rev. Acct. Stud. 1005–45 (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).

[313] *See* Bjørn Eckbo and Øyvind Norli, *Liquidity Risk, Leverage, and Long-Run IPO Returns,* 11. J. Corp. Fin. 1–35 (2005) (constructing a portfolio of 6,000 IPO stocks and measure 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.

[314] 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 they 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 would affect approximately 40 percent of registrants.

the proposed amendments, registrants may incur additional costs to summarize or shorten their risk factor disclosure. 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 this requirement.

We propose to update Item 105 to replace the requirement to discuss the ''most significant'' risks with ''material'' risks. The economic effects of the proposal depend on the preferences of investors. If the existing ''most significant'' standard elicits too much or too little information, investors may benefit from the proposed materiality standard. 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.

We propose to update Item 105 to require registrants to organize their risk factor disclosure under relevant headings, with generic risk factors, if disclosed, at the end of the section captioned as ''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.[315] Therefore, well-organized risk factor disclosure that gives greater prominence to the most significant 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. Registrants may incur additional costs to organize their risk factor disclosure.

Overall, the proposed amendments to Item 105 may benefit investors if they result in disclosure that is more likely to be material and concise. Registrants may incur additional costs to organize and summarize their risk factor disclosure. To the extent that registrants shorten their risk factor disclosure to avoid triggering the summary disclosure requirement and investors valued the additional information, investors would incur costs associated with the loss of some information.

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

As discussed above, the proposed amendments may improve capital allocation efficiency by enabling investors to make more efficient investment decisions. For example, the proposed 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,[316] elimination of such information may facilitate more efficient investment decision making. In addition, permitting issuers to omit disclosure of information when it is not material may reduce issuer compliance costs, allowing issuers 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 issuers that are resource-constrained.[317]

However, in cases in which issuers misjudge what information is material, a principles-based disclosure framework relying on issuers' determinations could result in increased information asymmetries between issuers 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 proposed amendments would eliminate disclosure that is not considered to be material, we believe these effects would be limited. Moreover, we would expect this risk to be offset by mitigants including accounting controls and the antifraud provisions of the securities laws.

### D. Alternatives

We are proposing to revise Items 101(a), 101(c), and 105 to be more principles-based. As an alternative to this proposal, we considered modifying these requirements using prescriptive standards. A prescriptive standard could preserve the information investors currently receive while eliciting additional specific disclosures, may be easier to apply, and could enhance the comparability and verifiability of information. For example, in response to previous requests for comment, commenters advocated for additional specific disclosures about environmental and foreign regulatory risks, the number and types of employees, and business strategy. 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 should be 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 for a particular issuer or for comparable issuers may lead investors to rely on that metric for the issuer or as a comparative tool with respect to other issuers.

We also are proposing to adjust for inflation the bright-line threshold for environmental proceedings in Item 103 from $100,000 to $300,000. As an alternative to this proposal, we considered applying 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 cash flows of a small registrant but a trivial impact on cash flows of a large registrant. On the other hand, the bright-line threshold is easier to apply and could enhance comparability across registrants and over time. Given that some environmental proceedings can be factually and legally complex, a bright-line threshold provides an easy-to-apply benchmark for registrants when determining whether a particular environmental proceeding should be disclosed. Another alternative is to adopt a lower or higher bright-line threshold than the one proposed. The optimal threshold depends on the preference of investors. For example, a

[315] *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 examines 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).

[316] *See* David Hirshleifer and Siew Hong Teoh, *Limited attention, information disclosure, and financial reporting,* 36 J. Acct. & Econ. 337–86 (2003) (developinging 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, misvaluation, long-run abnormal returns, and corporate decisions).

[317] 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 proposed amendments.

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 revising Form 20–F so that certain of the proposed amendments would also apply to foreign private issuers.[318] For example, we considered making the business disclosure requirements under Form 20–F, which are largely prescriptive, more principles based as we have proposed to do for domestic registrants. One advantage to similarly amending the business disclosure requirements under Form 20–F is that it would enable foreign registrants to realize the same expected benefits as domestic 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, this could reduce the ability of foreign private issuers to use a single disclosure document that would be accepted in multiple jurisdictions.[319]

More particularly, similar to our rule proposal for registrants filing on domestic forms, we considered amending Form 20–F to include as a business disclosure topic human capital resources, including any human capital measures or objectives that management focuses on in managing the business, to the extent material to an understanding of the registrant's business. Such an amendment could impose additional costs in the short run for foreign private issuers, to the extent that this disclosure is not required in other jurisdictions. At the same time, investors could benefit from any additional information elicited by the human capital topic.

We also considered amending Item 101(h), which permits a smaller reporting company to provide the disclosure about its business development and description of its business pursuant to that Item as an alternative to Items 101(a) and (c).[320] We considered amending the disclosure requirements of Item 101(h), which are largely prescriptive, to make them more principles-based, similar to the approach proposed for Items 101(a) and (c). Such an amendment would enable smaller reporting companies to tailor their business disclosure to fit their particular circumstances, which could help to eliminate information that is not material. Smaller reporting companies with less established reporting histories, however, may be the most at risk of persistent information asymmetries if the principles-based approach results in loss of information material to investors. As noted above, this risk would be offset by mitigants including accounting controls and antifraud provisions of the securities laws.

### *E. Request for Comments*

In addition to the request for comments in Sections II and III of this release, we request comment on various aspects of the costs and benefits of our proposed amendments. We request comment from the point of view of investors, registrants, and other market participants. We are interested in comments on the analyses and conclusions of this Section and any effect the proposed amendments may have on efficiency, competition, and capital formation. We also request comments on alternatives presented in this release as well as any additional alternatives to the proposed amendments that should be considered. We appreciate any data or analysis that may help quantify the potential costs and benefits identified. In particular, we appreciate any data or analyses that would help understand the effects of using a higher or lower quantitative threshold for environmental proceedings. In addition, if the proposed materiality standards in this release diminish comparability among registrants, we appreciate any data or analyses on the costs associated with the loss of such comparability.

## 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 proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[321] The Commission is submitting the proposed amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[322] 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:

''Regulation S–K'' (OMB Control No. 3235–0071);[323]

''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);

''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).

We adopted all of the existing regulations, schedules, and forms pursuant to the Securities Act and the Exchange Act. The regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic reports, and proxy and information statements filed by registrants to help investors make informed investment and voting decisions. A description of the proposed amendments, including the need for the information and its proposed 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 the Proposed Amendments' Effects on the Collections of Information*

The following table summarizes the estimated effects of the proposed

[318] As previously explained, business disclosure for foreign private issuer registrants 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 in large part to the non-financial disclosure standards endorsed by IOSCO. *See supra* note 190 and accompanying text.

[319] *See supra* note 191 and accompanying text.

[320] *See supra* note 80.

[321] 44 U.S.C. 3501 *et seq.*

[322] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[323] 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. To avoid a PRA inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S–K.

amendments on the paperwork burdens associated with the affected forms listed in Section V.A.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE PROPOSED AMENDMENTS

| Proposed amendments and effects | Affected forms | Estimated net effect * |
|---|---|---|
| Item 101(a):<br>• More principles-based disclosure requirement, elimination of timeframe, and, for registration statements subsequent to the initial registration statement, requiring only an update with a hyperlink to the most recently filed 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 Schedule 14A, 0.3 hour per schedule**.<br>• Addition of material changes to business strategy as a potential disclosure topic could 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 Schedule 14A, 0.1 hour per schedule**. | • Forms S–1, S–4, 10, 10–K.<br>• Schedule 14A ..... | • 2 hour net decrease in compliance burden per form.<br>• 0.2 hour net decrease in compliance burden per schedule. |
| Item 101(c):<br>• More principles-based disclosure requirement is expected to decrease the paperwork burden. Estimated burden decrease: 3 hours per form; and, for Schedule 14A, 0.3 hour per schedule**.<br>• Addition of human capital resources/measures and objectives as potential disclosure topic would likely increase the paperwork burden. Estimated burden increase: 5 hours per form; and, for Schedule 14A, 0.5 hour per schedule**.<br>• Addition of material government (and not just environmental) regulations as a potential disclosure topic could 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 Schedule 14A, 0.1 hour per schedule**. | • Forms S–1, S–4, 10, 10–K.<br>• Schedule 14A ..... | • 3 hour net increase in compliance burden per form.<br>• 0.3 hour net increase in compliance burden per schedule. |
| Item 103:<br>• Expressly providing for the use of hyperlinks or cross-references is expected to decrease the paperwork burden by discouraging repetitive disclosure. Estimated burden decrease: 1 hour per form/schedule.<br>• Raising the disclosure threshold for governmental environmental proceedings could also 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, Schedule 14A. | 3 hour net decrease in compliance burden per form/schedule. |
| Item 105:<br>• 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. Estimated burden increase: 1 hour per form, except no increase for Form S–11,*** and 0.67 hour increase per form for Forms 10, 10–K, and 10–Q±.<br>• 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, 10–K, and 10–Q±.<br>• ''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, 10–K, and 10–Q±.<br>• 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, 10–K, and 10–Q±. | • Forms S–1, S–3, S–4, F–1, F–3, F–4, SF–1, SF–3.<br>• Form S–11 .....<br>• Forms 10, 10–K, 10–Q. | • 3 hour net decrease in compliance burden per form.<br>• no change in compliance burden.<br>• 2 hour net decrease in compliance burden per form. |
| Total ..... | • Forms S–1, S–4 .....<br>• Forms S–3, S–11, F–1, F–3, F–4, SF–1, SF–3.<br>• Form 10, 10–K .....<br>• 10–Q .....<br>• Schedule 14A ..... | • 5 hour net decrease per form.<br>• 3 hour net decrease per form.<br>• 4 hour net decrease per form.<br>• 5 hour net decrease per form.<br>• 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 Schedule 14A reflects the Commission staff estimate that no more than 10% of the Schedule 14As filed annually include Item 101 disclosures.

*** Because Form S–11 already has a summary risk factor disclosure requirement, the proposed Item 105 amendment is not expected to affect the compliance burden for Form S–11 registrants.

± The reduced estimated average incremental burden for Forms 10, 10–K and 10–Q reflects the fact that smaller reporting companies, which comprise approximately one-third of the registrants filing those forms, are not required to provide Item 105 risk factor disclosure.

*C. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments*

Below we estimate the incremental and aggregate reductions in paperwork burden as a result of the proposed 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 nature of their business. We do not believe that the proposed amendments would change the frequency of responses to the existing collections of information; rather, we estimate that the proposed amendments would change only the burden per response.

The burden reduction estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take a registrant to prepare and review disclosure required under the proposed 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.[324]

PRA TABLE 2—STANDARD ESTIMATED BURDEN ALLOCATION FOR SPECIFIED FORMS AND SCHEDULES

| Form/schedule type | Internal (percent) | Outside professionals (percent) |
|---|---|---|
| Forms 10–K, 10–Q, Schedule 14A | 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 proposed amendments.

PRA TABLE 3—CALCULATION OF THE INCREMENTAL CHANGE IN BURDEN ESTIMATES OF CURRENT RESPONSES RESULTING FROM THE PROPOSED AMENDMENTS

| Form | Number of estimated affected responses | Burden hour reduction per current affected response | Reduction in burden hours for current affected responses | Reduction in company hours for current affected responses | Reduction in professional hours for current affected responses | Reduction in professional costs for current affected responses |
|---|---|---|---|---|---|---|
| | (A)[325] | (B) | (C) = (A) × (B)[326] | (D) = (C) × 0.25 or 0.75 | (E) = (C) × 0.75 or 0.25 | (F) = (E) × $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 | 5 | 114,535 | 85,901 | 28,634 | 11,453,600 |
| Sch. 14A | 5,586 | 2.9 | 16,199 | 12,149 | 4,050 | 1,620,000 |
| Total | 40,310 | | | 126,001 | | 20,577,200 |

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

PRA TABLE 4—REQUESTED PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS

| Form | Current burden | | | Program change | | | Requested change in burden | | |
|---|---|---|---|---|---|---|---|---|---|
| | Current annual responses | Current burden hours | Current cost burden | Number of affected responses | Reduction in company hours | Reduction in professional costs | Annual responses | Burden hours | Cost burden |
| | (A) | (B) | (C) | (D) | (E)[327] | (F)[328] | (G) = (A) | (H) = (B) + (E) | (I) = (C) + (F) |
| S–1 | 901 | 148,556 | $182,048,700 | 901 | 1,126 | $1,351,600 | 901 | 147,430 | $180,697,100 |
| S–3 | 1,657 | 193,730 | 236,322,036 | 1,657 | 1,243 | 1,491,600 | 1,657 | 192,487 | 234,830,436 |
| S–4 | 551 | 565,079 | 678,291,204 | 551 | 689 | 826,400 | 551 | 564,390 | 677,464,804 |

[324] 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 reports with the Commission.

[325] 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. We do not expect that the proposed amendments will materially change the number of responses in the current OMB PRA filing inventory.

[326] The estimated reductions in Columns (C), (D) and (E) are rounded to the nearest whole number.

[327] From Column (D) in PRA Table 3.

[328] From Column (F) in PRA Table 3.

PRA TABLE 4—REQUESTED PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS—Continued

| Form | Current burden | | | Program change | | | Requested change in burden | | |
|---|---|---|---|---|---|---|---|---|---|
| | Current annual responses | Current burden hours | Current cost burden | Number of affected responses | Reduction in company hours | Reduction in professional costs | Annual responses | Burden hours | Cost burden |
| | (A) | (B) | (C) | (D) | (E) [327] | (F) [328] | (G) = (A) | (H) = (B) + (E) | (I) = (C) + (F) |
| S–11 | 64 | 12,290 | 15,016,968 | 64 | 48 | 57,600 | 64 | 12,242 | 14,959,368 |
| F–1 | 63 | 26,815 | 32,445,300 | 63 | 47 | 56,800 | 63 | 26,768 | 32,388,500 |
| F–3 | 112 | 4,448 | 5,712,000 | 112 | 84 | 100,800 | 112 | 4,364 | 5,611,200 |
| F–4 | 39 | 14,265 | 17,106,000 | 39 | 29 | 35,200 | 39 | 14,236 | 17,070,800 |
| SF–1 | 6 | 2,076 | 2,491,200 | 6 | 5 | 5,600 | 6 | 2,071 | 2,485,600 |
| SF–3 | 71 | 24,548 | 29,457,900 | 71 | 53 | 64,000 | 71 | 24,495 | 29,393,900 |
| 10 | 216 | 12,072 | 14,356,888 | 216 | 216 | 259,200 | 216 | 12,018 | 14,032,888 |
| 10–K | 8,137 | 14,220,652 | 1,898,891,869 | 8,137 | 24,411 | 3,254,800 | 8,137 | 14,190,138 | 1,894,823,469 |
| 10–Q | 22,907 | 3,253,411 | 432,290,354 | 22,907 | 85,901 | 11,453,600 | 22,907 | 3,167,510 | 420,836,754 |
| Sch. 14A | 5,586 | 551,101 | 73,480,012 | 5,586 | 12,149 | 1,620,000 | 5,586 | 538,952 | 72,362,812 |
| Total | 40,310 | 15,775,632 | 3,617,910,431 | 40,310 | 126,001 | 20,577,200 | 40,310 | 18,897,101 | 3,596,957,631 |

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy and assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to, Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–11–19. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7–11–19 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

## VI. Regulatory Flexibility Act Certification

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (''RFA'') [329] requires the agency to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (''IRFA'') that will describe the impact of the proposed rule on small entities.[330] Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.[331]

Although the rule proposal would have an impact on a substantial number of small entities,[332] the Commission expects that the impact on entities affected by the proposed rule would not be significant.[333] The primary effects of the rule proposal would be to: (1) Increase the flexibility for an entity when providing 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 understanding of the business or to an entity's legal proceedings; and (3) encourage risk factor disclosure that is shorter and concerns only material risks. As a result of these effects, we expect that the impact of the rule proposal would be a reduction in the paperwork burden of affected entities, including small entities, and that the overall impact of the paperwork burden reduction would be modest and would be beneficial to small entities.[334] Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed amendments to Items 101, 103, and 105 of Regulation S–K, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

Request for Comment

We request comment on this certification. In particular, we solicit comment on the following: Do commenters agree with the certification? If not, please describe the nature of any impact of the proposed amendments on small entities and provide empirical data to illustrate the extent of the impact. Such comments will be considered in the preparation of the final rules (and in a Final Regulatory Flexibility Analysis if one is needed) and, if the proposed rules are adopted, will be placed in the same public file as comments on the proposed rules themselves.

## VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[335] the Commission must advise OMB as to whether the proposed amendments constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

[329] 5 U.S.C. 601 *et seq.*

[330] 5 U.S.C. 603(a).

[331] 5 U.S.C. 605(b).

[332] Approximately 2,283, or 33%, of the registrants filing on domestic forms in 2018 were small entities. *See supra* Section IV.A.

[333] *See* Section IV.B.

[334] We estimate that the proposed 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. *See supra* Section V.B.

[335] 5 U.S.C. 801 *et seq.*

• An annual effect on the U.S. economy of $100 million or more (either in the form of an increase or a decrease);

• A major increase in costs or prices for consumers or individual industries; or

• Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments would be a ''major rule'' for purposes of SBREFA. In particular, we request comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

## VIII. Statutory Authority and Text of Proposed Rule and Form Amendments

The amendments contained in this release are being proposed 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 Proposed Amendments

In accordance with the foregoing, the Commission is proposing to amend 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:

**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 paragraphs (c) and (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) Transactions and events that affect or may affect the company's operations, including material changes to a previously disclosed business strategy;

(ii) Bankruptcy, receivership, or any similar proceeding;

(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) For filings other than initial registration statements, a full discussion of the general development of the registrant's business is not required. For such filings, an update to the general development of the business disclosure with a focus on material developments in the reporting period may be provided instead of a full discussion. If a full discussion of the general development of the registrant's business is not included, pursuant to § 230.411 or § 240.12b–23 of this chapter as applicable, incorporate by reference, and include an active hyperlink to, the registrant's most recently filed disclosure that, together with the update, would present the full discussion of the general development of its business.

* * * * *

(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, include the information specified in paragraphs (c)(1)(i) through (v) of this section, to the extent such information is material to an understanding of the business taken as a whole.

(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 material government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. Include in such disclosure material estimated capital expenditures for environmental control facilities for the current fiscal year and any other subsequent period that the registrant deems material; and

(ii) 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 (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the attraction, development, and retention of personnel).

* * * * *

(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), except that, for filings other than initial registration statements, a smaller reporting company may provide an update to the general development of the business disclosure, instead of a full discussion, which complies with paragraph (a)(2) of this section. If the smaller reporting company has not been in business for three years, give the same information for predecessor(s) of

the smaller reporting company if there are any. This business development description should include:

* * * * *

■ 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; provided, however, that such proceedings which 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 forefront of the prospectus or annual report, as applicable, a series of short, concise, bulleted or numbered statements 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. 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, DC 20549**

**Form S–4**

**Registration Statement Under the Securities Act of 1933**

* * * * *

**Part I**

**Information Required in the Prospectus**

* * * * *

*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.

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■ 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.**

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*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 8, 2019.

**Vanessa A. Countryman,**

*Secretary.*

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