



EPA Penalties May No Longer Require Disclosure as SEC Amends SK-103

On August 26, 2020, the U.S. Securities and Exchange Commission (SEC) [announced significant changes](#) to the disclosure requirements for publicly traded companies under Regulation S-K. Businesses that receive monetary sanctions from the EPA and other governmental authorities involving violations of environmental laws will want to carefully review the new Item 103 Legal Proceedings rules as it may substantially alter disclosure obligations.

The current version of SK-103, [17 CFR 229.103](#), contains a threshold for disclosure based on a \$100,000 threshold for proceedings related to federal, state, or local environmental protection laws.^[1] The SEC adopted this bright-line threshold in 1982.

The [SEC's new final rule](#), however, implements a modified disclosure threshold that provides companies alternatives:

- Under the first alternative, the SEC has increased the bright-line threshold from \$100,000 to \$300,000.
- Under the second alternative, a business can (at its election), select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings, provided that the threshold does not exceed the lesser of \$1 million or one percent of the registrant's current assets.

According to the SEC in the Final Rule preamble, "[t]he two-pronged approach that will be required under the final rule will benefit registrants and potentially lower their compliance costs since it includes a minimum quantitative threshold while also providing them with the flexibility to apply a more tailored disclosure threshold within a range that has an upper limit of \$1 million. Under such an approach, registrants will continue to provide information on a bright-line basis using a threshold that is

designed to capture at least all information that would be material to an investment or voting decision but will have the flexibility to use a disclosure threshold that is more indicative of materiality on a company-specific basis. Additionally, the two-pronged approach will reduce the risk of non-disclosure of material information, particularly for larger issuers, because disclosure will be required in all cases for any proceeding when the potential monetary sanctions exceed the lesser of \$1 million or one percent of the current assets of the registrant.”

A word of caution is appropriate. If a registrant chooses to use a threshold other than \$300,000, it must disclose this alternative threshold (including any change thereto) in each annual and quarterly report.

The new SEC SK-103 disclosure rules will take effect 30 days after publication in the [Federal Register](#).

This post was drafted by [Andrew Brought](#), an attorney in the Kansas City, MO office of Spencer Fane LLP. For more information, visit www.spencerfane.com.

[1] Under SK-103, businesses are required to describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business. Tucked away in Instruction 5 is a clarifying note that government enforcement cases in administrative and judicial proceedings arising under any federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment shall be described, “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 \$100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.”