

# PUBLICATION

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## SEC Proposes to Update Regulation S-K

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Recently, the SEC proposed amendments based on recommendations made in the staff's Report on Modernization and Simplification of Regulation S-K. Regulation S-K specifies the contents of issuer securities offering disclosure documents and reports that are governed by the securities laws. The Regulation also indirectly sets disclosure standards for private placement disclosure documents. The proposal will update and revamp specific disclosure requirements of Regulation S-K in order to lower costs and burdens on registrants and reduce redundant disclosures, while still providing all material information for investors.

The proposed amendments will affect quite a number of SEC rules and disclosure items in Regulation S-K, including these noteworthy proposed changes:

### **Risk Factors (Item 503(c))**

Item 503(c) requires that registrants disclose risk factors that make an offering risky, and even goes so far as to give guideposts for registrants, instructing them to include, among other things, a registrant's: (1) lack of an operating history, (2) lack of profitable operations in recent periods, (3) financial position, (4) business or proposed business, or (5) the lack of a market for its securities. The item directs registrants to explain how each risk affects the issuer or the securities being offered.

The Commission is currently proposing to relocate Item 503(c) from Subpart 500 to Subpart 100, specifically new Item 105, to reflect the application of risk factor disclosure to requirements for periodic reports and registration statements on Form 10. Also of note, the proposed amendment could eliminate the risk factor examples enumerated above or change them entirely. The Commission is concerned at present that the inclusion of example risk factors might be unnecessarily skewing the registrant's analysis toward only the examples. Eliminating the examples could work to eliminate the generalized nature of certain disclosures, encouraging registrants to disclose risk factors specific to their business, which would be consistent with the principle-based nature of the disclosure requirements and further focus registrants on their risk identification process.

### **Redaction of Confidential Information in Material Contract Exhibits (Item 601(b)(10)(i))**

Item 601(b)(10) of Regulation S-K requires that registrants provide every contract not made in the ordinary course of business which is material to the registrant and either is to be performed in whole or in part after the filing of the registration statement or report, or was not entered into more than two years before the filing. The proposed revisions to Item 601(b)(10) would permit registrants to omit confidential information from material contracts, if that information both (i) is not material and (ii) would be competitively harmful if publicly disclosed.

Additionally, the proposed rule does not require the registrant to submit a confidential treatment request to the SEC; however, registrants could still request confidential treatment of any supplemental information requested by the Commission. Of course the burden of determining whether all material information has been disclosed and whether a registrant may redact the information under the proposed rules remains with the registrant.

View the entire proposed release [here](#).

If you have any questions about this alert, please reach out to Sam Chafetz or any of the attorneys in [Baker Donelson's Corporate Finance and Securities Group](#).