

REPEATING COVID-19 RISK FACTOR UPDATES IN YOUR SECOND (AND THIRD) QUARTER 10-QS

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The SEC issued supplemental disclosure guidance near the end of the second quarter which, among other things, set forth dozens of questions for companies to consider as they assess and disclose the evolving impact of COVID-19 on their operations, liquidity and capital resources.

Many public companies with a December 31 fiscal year end included updated risk factors in their first quarter 10-Q filings, reflecting the uncertainties and adjusted risk profile in light of COVID-19. Disclosure practices varied, with some companies including a small number of risk factors (or even a single risk factor) that updated previously disclosed risks in a global manner. Other companies updated a small subset or suite of risk factors affected by COVID-19, and some may have updated all of their risk factor disclosure from the previous Form 10-K.

As companies assess their risk factor disclosure for the second (and third) quarters, it is important to consider that Item 1A of Part II of Form 10-Q requires disclosure of “any material changes from risk factors as previously disclosed in the registrant’s Form 10-K in response to Item 1A to Part 1 of Form 10-K.” In other words, as a technical matter, companies don’t get the benefit in later quarters of relying on updates in previous 10-Q filings in the same fiscal year. (Compare this requirement with, for example, the instruction to Part II, Item 1 as to Legal Proceedings, where disclosure in subsequent Form 10-Q filings in the same fiscal year are only required in quarters whether there have been “material developments.”)

Accordingly, it has become common practice to strictly comply with the instruction and include any risk factors, if still relevant, filed in a previous Form 10-Q, and not rely on the fact that such risk factors have been previously disclosed in a prior Form 10-Q in that fiscal year. This should save companies from trying to make fine judgment calls as to whether adjustments to the first quarter Form 10-Q risk factors are in fact “material,” or whether, in cases where a subset of risk factors was updated from the previous Form 10-K, only certain of those risk factors should be included and updated.

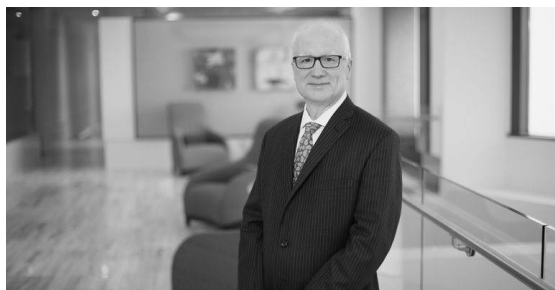
As a result, companies will have the opportunity to adjust the risk factors to take into consideration the questions noted in recent SEC guidance and to make them speak in real time (i.e., the second or third quarter), as visibility into the impact of COVID-19 on a company’s business and operations

continues to evolve. Companies that took a more minimal approach should also consider whether an even broader risk factor update is appropriate for the second (or third) quarter Form 10-Q as compared to Q1. While we are not aware of any SEC actions against companies that have relied on the updated risk factor disclosure in a prior 10-Q and not included the updated risk factor in subsequent 10-Q's in the same fiscal year, the SEC supplemental guidance also noted that the Division of Corporation Finance "continues to monitor how companies are disclosing the effects and risks of COVID-19 on their businesses, financial condition, and results of operations." For that reason, we would encourage companies to consider including all the risk factors in the first quarter 10-Q, even if the perception is they have not materially changed.

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