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October 19, 2021

Updating 10-K Risk Factors in Your 10-Q: 5 Things to Consider

As our clients are preparing their Form 10-Qs and quarterly earnings updates, a curious thing has arisen this time around. We're getting more questions than usual about whether - and how - to update risk factors from the last Form 10-K in the upcoming 10-Q. Nearly all companies went through this drill in 2020 to add risk factors about the impact of COVID-19 - but new concerns are popping up this year. Here are five things to consider: 1. The SEC's rule is that you should update risk factors from your 10-K in any of the subsequent three 10-Qs for any "material" changes.

2. One key question to ask yourself here: "Should something that is a driver of results - or a known trend - be disclosed as a risk factor too? Or can the trend be addressed just in the MD&A with some cautionary language?" It depends. The analysis requires you to look at your existing risk factors. If the risk or trend is generally covered by pre-existing risk factor disclosure - meaning that that disclosure adequately describes what is happening now - then you may be fine with the risk factor disclosure you already provided along with an appropriate discussion in MD&A. If a trend is new and material, you will certainly need new disclosure in the upcoming 10-Q in the MD&A about it- but you also may need a risk factor covering it if it presents a material risk. If it's a trend that's been addressed in prior MD&A disclosures - but not as a risk factor - you may need to elevate the disclosure into your risk factors for this 10-Q if the trend is playing out worse than previously disclosed - or the trend is going the wrong way. While MD&A disclosure with a risk bent may be appropriate to address also as a risk factor - sort of like "free insurance" - disclosure as a risk factor can also be interpreted as an admission that the topic is material for your company. So you don't want to address every trend as a risk factor - it's a facts and circumstances consideration that partially depends on the materiality of the topic.

3. Remember a good risk factor is broad enough to cover the general - and sometimes universal - risk, but adds specificity about the unique impact for your particular company. In other words, generic risk factors that don't highlight what makes the topic a risk for a particular company or that don't cite known examples of how the risk is playing out for your company won't get you full protection.

4. Remember that once you put the risk factor into a Form 10-Q, you'll want to leave it in subsequent 10-Qs until you get to the next 10-K (since Form 10-Q calls for material changes from what was disclosed in the last 10-K). You may wind up keeping it or an evolved version in your next 10-K too - depending on whether the issue still exists for the company as a material risk.

5. Sometimes clients ask when they should restate their full slate of risk factors - including an update of the risk factors that have been in prior filings - in a 10-Q rather than just adding in new risk factors. It's fairly rare for a company to decide to include a full new slate, typically triggered by a company's new line of business - perhaps due to a major acquisition - that requires updates across many risk factors.

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