

Form 10-Q Risk Factor Updates: Better Practices for Companies that Restate Risk Factors

Should companies that restate the entire Risk Factors section from the most recent Form 10-K report when they update the risk factor disclosure in their Form 10-Q reports to reflect material changes in that disclosure do anything to identify the changes? Although not specifically required, we believe that identifying material changes in risk factor disclosure in these cases can offer advantages for companies, including more effective communication with investors and a potentially stronger position in the event of future claims about the company's disclosure.

How to Identify Material New and Changed Risk Factor Disclosure

To begin with the conclusion of this PCAP Update, we believe that, if a company chooses to restate the entire Risk Factor section from its most recent Form 10-K report, the company should consider identifying the material new and revised risk factor disclosure contained in the current Form 10-Q report as a “better practice.” Companies that choose to do so could use one of the following three methods:

- Identify materially changed disclosure by use of changes such as use of bold or italicized type, accompanied by an explanation of the significance of the bold or italicized type (for example, “Material new risks and material changes in previously disclosed risks are presented in [bold] [italicized] type”);
- Identify paragraphs or sections that contain materially changed disclosure by use of a parenthetical note that indicates the change and the date of the change (for example, “added June 30, 2023” or “revised April 30, 2023”); or
- Include a note at the beginning of the Risk Factors section that identifies sections containing materially changed disclosure by disclosure topic (for example, “The disclosure below relating to potential risks arising in connection with adverse claims involving the company's intellectual property rights contains material changes and/or additions to the company's earlier disclosures”) or by section heading or caption (for example, “The discussion of potential risks under the caption ‘Disputes Involving Ownership of the Company's Intellectual Property Rights’ contains material changes and/or additions to the company's earlier disclosures”).

Background

With the due dates for Form 10-Q reports for fiscal quarters ended June 30, 2023 approaching for most companies, this is an appropriate time to review compliance options for risk factors disclosure in Form 10-Q reports. Item 1A in Part II of Form 10-Q requires companies to “[s]et forth 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.” The specific requirements for risk factor disclosure are contained in Item 105 of Regulation S-K. Note that smaller reporting companies (SRCs) can elect not to include risk factor disclosure in Form 10-K or Form 10-Q reports.

Although Item 1A requires companies to update their risk factor disclosure in Form 10-Q reports to include material new risks and material changes in the company’s risk factor disclosure since the most recent Form 10-K annual report, neither Item 1A of Form 10-Q nor Item 105 of Regulation S-K indicate how companies should present this disclosure in Form 10-Q reports. Companies usually present updated risk factor disclosure in Form 10-Q reports using one of two approaches:

- Include only the material new or materially changed risk factors (the “amend” approach); or
- Restate the entire risk factor section from the company’s most recent Form 10-K, or Form 10-Q report that included risk factor disclosure, if applicable (the “restate” approach).

Updated risk factor disclosure presented using the “amend” approach inherently focuses attention on the changes in the company’s risk factor disclosure because only material new or materially modified risk factor disclosure will be included in the Form 10-Q report.

This is not the case with updated risk factor disclosure presented using the “restate” approach. A lengthy Risk Factors section – and some companies’ Risk Factor sections are 50 pages or more – can make it very difficult for most readers to identify the material changes in a company’s risk factor disclosure. This can reduce the value of risk disclosure that is in part intended to promote information parity among the company and investors and reduce the likelihood and impact of unexpected future disclosures that differ from prior disclosure.

With no instructions in Form 10-Q or Regulation S-K and no explicit guidance on how companies that restate the entire Form 10-K Risk Factors section should present that disclosure, companies that follow the “restate” approach must make their own decisions about whether to identify the material changes in the disclosure in the Risk Factors section of a Form 10-Q report and how to do so if the company wants to identify these changes.

Identify Material New and Changed Risk Factors – a “Better” Practice

We described three ways to identify material changes and additions to the Risk Factors section of a Form 10-Q report above at the beginning of this PCAP Update.

We suggest that identifying material changes in risk factor disclosure is a “better” practice because it promotes more effective communication with investors and can protect the company from potential future claims involving the adequacy of the company’s disclosures. Why not use the term “best” practice? The reason is that the term “best practice” could suggest that there is something affirmatively wrong with not identifying these changes. Whatever advantages doing so offers in terms of effective disclosure and reduction of potential liability for securities-related disclosure claims, it is clear that no SEC rule or form specifically requires companies to identify these material changes and many companies have and will continue to file Form 10-Q reports without doing so.

Smaller reporting companies are not required to provide the information required by this item.

Please contact our [Public Company Advisory Practice](#) with any questions.

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