

UPDATING U.S. FORM 10-Q RISK FACTORS DURING THE COVID-19 PANDEMIC – NEW RISKS AND RISKS THAT AREN'T JUST HYPOTHETICAL ANYMORE

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As more companies prepare to file Form 10-Qs, they should give special attention to risk factors – particularly to consider whether new risks have emerged or hypothetical ones have become real. The Form calls for disclosure of any material changes from risk factors included in the last 10-K. However, the COVID-19 pandemic presents unique challenges to responding to other requirements as well, such as instructions to address “known trends and uncertainties” in MD&A or to provide “such further information . . . as may be necessary to make the required statements, in the light of the circumstances under which they were made not misleading” in Rule 12b-20. Careful consideration of risk factors can help complete the picture for investors. Although companies need only disclose what is known or reasonably available, it can be challenging to comfortably determine what elements of the current state of affairs will, with hindsight, be viewed as both “known” and material to investors.

In order to prepare their disclosures, companies should

- utilize appropriate disclosure controls and procedures, and seek input from relevant constituencies, including operating units, HR, IT, the law department and finance, to determine the scope and depth of impacts
- if a designated individual or team is addressing the company’s COVID-response, be sure they are included
- review each of the 10-K risk factors to evaluate which ones might need to be updated or supplemented or whether new ones should be added
- confer with IR and senior management to assess the state of existing knowledge and understanding by investors of the company’s situation and prospects
- review the most recent filings by other companies, particularly competitors or companies in adjacent industries, to benchmark risks they view as material

Based on a review of recent 10-Qs, some of the approaches being taken include:

- *One global COVID-19 pandemic risk factor.* This has been the most prevalent approach, with the scope ranging broadly. For some companies, the risk factor is relatively short and generalized, such as when consistent with the norm, and no particular effects are so material that they warrant individualized focus. In others, the effects of the pandemic have been significant and addressed through longer narrative discussions or bulleted paragraphs addressing areas of emphasis. (Examples: [Mastercard](#); [Ford Motor Co.](#); [TransUnion](#), [Sirius XM](#); [American Express](#); [Coca Cola](#); [Dominos Pizza](#); [Invesco](#); [Interpublic Group](#); [Ally Financial](#))
- *One general COVID-19 risk factor with additional discrete risk factors.* This approach can make sense when a global risk factor becomes lengthy or needs to be supplemented by specific individual risk factors, or sub-risks, such as particularly significant supply chain or manufacturing or operational challenges including, in some cases, matters unrelated to COVID-19. (Examples: [Delta Air Lines](#); [General Electric](#); [Allegion PLC](#); [Universal Biosensors](#); [Safehold](#); [Kaiser Aluminum](#); [Escalade](#); [First Financial Bankshares](#)) .
- *One general COVID-19 risk factor with numerous additional discrete risk factors or generally restated risk factors.* Some companies have elected to present a longer set of risk factors that are either COVID-related or that represent a restated and updated set of all or a selection of 10-K risk factors. In some cases, the company's historical practice has been to restate risk factors quarterly. (Examples: [Cummins](#); [Procter & Gamble](#); [Verisign](#); [Snap](#); [Biogen](#); [Limelight Networks](#); [Iridium Communications](#))

As with any disclosure, the best approach will depend on the each company's particular facts and circumstances. One size does not fit all. Ideally, the approach selected would represent the one that most effectively communicates the risks to investors.

When preparing risk factors, companies should remain mindful of the SEC's view that presenting risks as merely hypothetical can be misleading if the risk has actually occurred in the past. In the case of a Form 10-Q, this could become a concern if a company fails to update a material risk that had been presented in the Form 10-K as merely theoretical or hypothetical but subsequently materialized before the 10-Q filing. In light of the pervasive effects of the COVID-19 pandemic, a careful review of 10-K risk factors, along with other steps listed above, can help to address that concern.

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