

## KEY ISSUES FOR UPCOMING Q3 10-Q FILINGS

Oct 15, 2020

As public companies prepare their Q3 releases and filings, some of the key issues they should consider include:

- **MD&A** – the SEC Staff issued COVID-19 guidance in June calling for companies to disclose the impact of the pandemic through the eyes of management, including, to the extent material:
  - The effects of the pandemic on a company's operations, liquidity and capital resources; the short- and long-term impact of any federal relief received under the CARES Act; and the company's ability to continue as a going concern
  - Operational changes as a result of the pandemic – from converting to telework to modifying supply chain and customer contracts, and now converting to the return to the workplace and business reopenings
  - Trends, events or uncertainties (such as possible events of default, breach of covenants, etc.), unless a company can conclude either that it is not reasonably likely that the trend, uncertainty or other event will occur, or that a material effect on the company's liquidity, capital resources or results of operations is not reasonably likely to occur
- **Non-GAAP Financial Measures** – as we recently noted, it appears [few companies are jumping on the EBITDAC bandwagon](#); however, the SEC staff has issued comments on such measures that include adjustments for COVID-19, as in [Comment 6](#). Accordingly, companies should be prepared to explain the quantification of any such adjustments and their rationale, consistent with the guidance described in our earlier post.
- **Risk Factors** – The instructions to Form 10-Q call for disclosure of any material changes from risk factors included in the last 10-K.
  - The [Regulation S-K amendments](#) become effective on Monday, November 9, which is also the 10-Q due date for large accelerated filers. This also means any filings after 5:30 pm ET on Friday, November 6 must comply with the amendments. Although the 10-Q instructions

do not expressly reference S-K Item 105, companies that elect to restate risk factors in their quarterly filings may want to consider whether to reflect the new requirements of that Item, such as a risk factor summary and organization with sub-headings.

- As we discussed in a [previous post](#), companies should carefully review existing 10-K (or 10-Q) risk factors to consider whether new risks have emerged or hypothetical ones have become real.
- **Forward Looking Statements** – Similarly to risk factors, companies should review the substance and priority of factors include in their FLS disclaimers, with careful attention to tailoring the listed factors to the specific forward-looking statements in the filing.
- **Legal Proceedings** – the [Regulation S-K amendments](#) also permit disclosure of material legal proceedings pursuant to Item 103 through a hyperlink or cross reference to disclosures elsewhere in same filing, such as notes to financial statements. They also raise the disclosure threshold for the disclosure of environmental proceedings to which the government is a party from \$100,000 to \$300,000 (or such higher amount disclosed by the company – and reasonably designed to result in disclosure of material proceedings - not to exceed \$1 million or 1% of current assets on a consolidated basis).

## RELATED CAPABILITIES

- Securities & Corporate Governance

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