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How to Feel More Secure About Your Cyber Disclosures

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Proxy season is an excellent time to review and refresh company disclosures around cybersecurity preparedness. There are a few areas in particular that are worth attention this year.

The first area to consider is risk factor disclosure. Cybersecurity risk factors often have a different look and feel to them when compared to a company's other risk factors, perhaps because functions like information security, data privacy and public relations contribute to their preparation in a way they don't relative to other risk factors. But disclosure counsel still has a role in ensuring their accuracy.

For example, at this point in time almost every business has had a cybersecurity incident of some kind, so consider whether the risk factors discuss such events in only a hypothetical way. The SEC has brought enforcement actions against companies that described actual cyber events as if they were only hypothetical on the theory that doing so was materially misleading to investors.

Another risk factor pet peeve is excessive use of mitigating language, such as:

> *Although we have put in place numerous countermeasures, threat actors may still….*

If your risk factor makes use of terminology such as "although," "however," "despite" and such, consider a rewrite. Mitigating language under-cuts the prophylactic value of the risk disclosure, and both the SEC and private plaintiffs are likely to assert as much in litigation.

The Business and MD&A sections of the Form 10-K are much better places to discuss all the wonderful things the company is doing to repel threat actors and manage risk. If there is still pressure to give a nod to these efforts in the risk factors, recast the description as a risk. Instead, say:

> *Our cybersecurity countermeasures may be ineffective to repel all attacks on our systems, which may cause….*

Moving past risk factors, investors increasingly expect a discussion of how the company is approaching cybersecurity from an operational, financial and governance perspective. As alluded to above, the Business and MD&A sections provide a forum for this narrative. As new government regulations regarding cybersecurity are released, consider whether the impact of any new legislation or regulations is material to the business and should be disclosed. The board's oversight role in these matters is also worthy of consideration in the proxy statement.

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Finally, the disclosure controls and internal controls environment around cybersecurity is another area of increased SEC focus. Again, the SEC has brought enforcement cases where there have been deficient control environments when personnel responsible for SEC disclosure were not informed about significant cyber events, even if those events were not material to the company.

Developing lines of communication between information security personnel and financial reporting personnel is crucial, as is ensuring the Board and relevant committees remain apprised of these developments. Including information security and data privacy personnel on disclosure review committees is also emerging as a best practice.

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