

## **Form 10-Q Risk Factor Updating Considerations – Quarter Ended June 30, 2022**

Most public companies are in the process of preparing to file quarterly reports on Form 10-Q for the quarter ended June 30, 2022. Many of the factors that have disrupted business, financial, public health and geopolitical conditions since 2020 continue to do so, and in some cases have accelerated. As companies prepare and review their upcoming Form 10-Q reports, they should focus especially on disclosure of the impacts of existing and potential future developments and risks in the risk factors and MD&A sections of Form 10-Q. The discussion below focuses on review of risk factor disclosure in Form 10-Q reports for the quarter ended June 30, 2022.

Item 1A of Form 10-Q requires companies that are not smaller reporting companies to disclose material changes in the risk factors set forth in the company's most recent annual report on Form 10-K. Item 1A does not specify whether a company that updates its risk factor should disclose only the new or updated risk factors or restate the entire risk factor section with new and/or updated risk factors included. SEC rules do not require companies to present updated Form 10-Q risk factor disclosure in any specific format and Form 10-Q itself does not refer to Item 105.

### ***Updates Only, or Amend and Restate in Full?***

There is limited SEC staff guidance on presentation of updated risk factor disclosure in Form 10-Q reports when a company adopts an "amended and restated" format for its risk factor disclosure. The only directly applicable comment on this format that we are aware of is a statement by the SEC when it [adopted](#) the amendments that require companies to update their risk factor disclosure to reflect material changes in Form 10-Q reports that "[t]he amendments do not otherwise require, and we discourage, unnecessary restatement or repetition of risk factors in quarterly reports." Because there is little guidance from the SEC on updating risk factor disclosure in Form 10-Q reports when using an amended and restated format, we believe it may be helpful to discuss what we believe are "better practices" for this disclosure.

If a company chooses to update its risk factor disclosure by restating the entire risk factor section from its Form 10-K report or a subsequent Form 10-Q report, we recommend that the company consider whether it would be better to highlight the changes in some manner that makes it more likely that the changes will come to the attention of readers. We believe that this is particularly relevant where the risk factor disclosure extends to several pages or more, which could have the unintended effect of making it difficult for readers to find and absorb the new disclosure about material changes. Changes could be identified in various ways, such as in an introductory paragraph that refers readers to specific updated paragraphs, by use of footnotes, by use of bold text, or by use of symbols such as an asterisk at the beginning and end of each paragraph that contains changed or new text (which was the way the SEC's EDGAR system marked changed text in the past).

### ***Item 105 of Regulation S-K***

With respect to the requirements of Item 105, which applies to risk factor disclosure in Form 10-K reports and registration statements, we believe that better practices would include compliance with Item 105 even though Item 1A of Form 10-Q does not refer to Item 105 of Regulation S-K.

When the SEC [amended](#) certain Regulation S-K disclosure requirements in 2020, the amended items included Item 105, Risk Factors. Among other things, Item 105 as amended requires a risk factor

summary under an appropriate heading in the forepart of the Form 10-K report or registration statement, consisting of a series of short, concise, bulleted or numbered statements that summarize the principal risk factors, if the risk factor section in the Form 10-K or registration statement is longer than 15 pages. If the risk factors disclosure in a Form 10-Q exceeds 15 pages, we believe that it is appropriate to include a risk factor summary as well. Lastly, the 2020 amendments also require that, to the extent that a risk factor discussion could apply to any company, that risk factor should be included under the caption “General Risk Factors” at the end of the risk factor section

### ***Hypothetical Future Risks vs. Actual Current Risks***

When reviewing risk factor disclosure, companies should confirm that the risk factor disclosure does not disclose hypothetical risks if the risk has actually occurred. A 2019 enforcement proceeding highlights the importance of this issue. The SEC [announced](#) that it had [imposed](#) a \$30 million penalty on a company, in part because the SEC alleged that the company’s risk factor disclosure that a governmental authority *may* take a position contrary to the company’s position on prior Medicaid submissions were misleading because a governmental authority *had already* informed the company that its submissions were incorrectly classified.

We have included some sample risk factors below to highlight issues that may be particularly relevant for updated risk factor disclosure in Form 10-Q reports for the quarter ended June 30, 2022. These samples include alternative text that highlights drafting changes that may result from the difference between potential future risks and risks that are currently affecting the company, and we suggest that companies should review all risk factor disclosure with this important issue in mind.

We also stress that risk factor disclosure is not a substitute for complying with the requirements for MD&A disclosure in Item 303 of Regulation S-K. Further, many risks, both actual current risks and potential future risks, may cause a company’s historical results of operations to be unrepresentative of current or reasonably foreseeable future results, which SEC rules require companies to disclose in MD&A.

### ***Sample Risk Factor Updates for June 30, 2022 Form 10-Q Reports***

The sample risk factors that follow are – at least in terms of general subject matter, if not the specific risks and impacts – likely to be among the more common risk developments that are relevant for the quarter ended June 30, 2022. All sample disclosure should be reviewed to determine whether and how it may apply to a specific company, and each company should consider any other factors that will affect its risk factor disclosure.

- Changes in economic conditions, including inflation, rising interest rates, lower consumer confidence, volatile equity capital markets and ongoing supply chain disruptions and the impacts of the war in Ukraine, [have affected and] may [continue to] affect our business, revenues and earnings adversely.
- Inflation rates have increased and may continue to rise. Our suppliers [have raised their prices and] may [continue to] raise prices that we may not be able to pass on to our customers. This [has adversely affected and] may [continue to] adversely affect our

business, including our competitive position, market share, revenues and profit margins in material ways.

- Rising interest rates may reduce our access to debt capital, which may adversely affect our future business plans and expected growth, and will increase the cost of our long-term fixed rate and short-term variable rate borrowings, which [would][will] reduce our earnings. *[Revise as appropriate if the company maintains an active medium-term notes program.]*
- Volatility in equity capital markets [has adversely affected and] may [continue to] adversely affect market prices of our common shares. This [has and] may [continue to] materially and adversely affect our ability to fund our business through public or private sales of equity securities and the retentive power of our equity compensation plans, which we rely upon in part to retain key executives and employees.
- Declines and/or volatility in the market prices of our common shares [has affected and] may [continue to] adversely affect our willingness and/or ability to raise equity capital [on terms we consider favorable] through sales of our common shares in public and/or private offerings [, and may also adversely affect our willingness and/or ability to access equity capital through our [at-the-market offering program] [and] [equity line purchase agreement]], which may adversely affect our ability to fund our business operations and/or future growth plans.
- Declines in the market prices of our common shares [may result in][has resulted in] notice that we are not in compliance with the per share minimum price requirements for continued listing on the [\_\_\_\_\_] stock exchange. If we [were][are] not able to cure this violation, we [could][will] be delisted, which would have a further material adverse effect on market prices of our common shares and shareholder liquidity.
- The ongoing war in Ukraine has had a broad range of adverse impacts on global business and financial market conditions, some of which have had and are likely to continue to have adverse impacts on our business. These include [identify and discuss specific current and potential future material adverse impacts, such as energy availability and prices, natural materials availability and prices, sanctions, loss of company markets, abandonment of business operations and assets, and financial markets impacts]. If the war continues to disrupt these and other conditions, we may be required to seek alternative sources and markets, pay higher prices for goods and services that are necessary for our business that we may not be able to pass on to customers, change or reduce our business operations and take other actions that may have a material adverse effect on our business, results of operations, financial condition, business plans and market prices for our common shares.
- The COVID-19 pandemic continues to affect many businesses, including ours. Among these impacts are ongoing personnel absences and the effectiveness of return-to-office transition plans. If we are unable to manage these absences and our return-to-office transition, we may experience short-term and/or long-term impacts on our business and business growth that could be material and adverse.