Client Alert | US Public Company Advisory / Capital Markets

Key Considerations for the 2025 Annual Reporting Season: Your Upcoming Form 20-F and other FPI-Specific Considerations

By the White & Case Public Company Advisory Group

This memorandum outlines key considerations from White & Case's Public Company Advisory Group for foreign private issuers ("FPIs'") during the 2024 annual reporting season, divided into two sections: Form 20-F Housekeeping Considerations in Part I below, and Disclosure Considerations in Part II below.

With the inauguration of US President Trump on January 20, 2025, public companies await the impact of the new administration on the US Securities and Exchange Commission ("SEC"). President Trump's pick for the next SEC Chair, Paul Atkins, is an experienced appointee, having previously served as SEC Commissioner from August 2002 to 2008 as an appointee of former President George W. Bush.[1] Atkins will assume office following an unprecedented period of SEC rulemaking impacting public companies, with approximately 50 new substantive SEC rules adopted over the past four years, including three rules that were subsequently vacated by courts holding that the SEC had overreached its authority.[2] Despite an expected change in approach by the new administration away from prescriptive rulemaking and towards a more principles-based approach, it is important to note that the SEC's recent rule changes and guidance remain in effect and public companies remain subject to them, absent further action by the SEC.

Part I: Top Housekeeping Considerations

As in our prior annual alerts, we begin with our top housekeeping reminders for preparing your Annual Report on Form 20-F, as follows:

1. **New Exhibit: File your insider trading policy as Exhibit 11 to the Form 20-F.** Under new Item 16J of Form 20-F, insider trading policies must be filed as exhibits to upcoming Form 20-Fs for the 2024 fiscal year filed in

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1 Mr. Atkins also served as a member of the staff of two former SEC Chairmen, Richard C. Breeden and Arthur Levitt. For more information, see: SEC.gov | Paul S. Atkins.

2 For example, the US Court of Appeals for the Fifth Circuit held that the SEC acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, in adopting the share repurchase disclosure rule, which was officially vacated on December 19, 2023. In addition to the three vacated rules, the SEC's climate disclosure rules remain voluntarily stayed pending judicial review of consolidated petitions challenging the rule on many fronts, including that the SEC exceeded its authority. For those recent rule changes in effect, any amendments would require the issuance of a new proposed rule, allowing for a comment period, followed by issuing an adopting release. As opposed to rules, recent guidance issued by the SEC in Compliance and Disclosure Interpretations ("C&Dis"), SEC staff comments and "Dear Issuer" letters to public companies, as well as staff bulletins are expected to be more readily changed by the new administration. However, absent additional guidance from the SEC, public companies should continue to follow current SEC guidance.

2025.[3] Companies must file their insider trading policy as Exhibit 11 to the 2024 Form 20-F,[4] and this new exhibit is required for all public companies, including emerging growth companies ("EGCs").

- ***Disclosure Beyond the Exhibit.*** In addition to the exhibit requirement, companies are also required to disclose whether they have adopted insider trading policies *"governing the purchase, sale, and other dispositions of the registrant's securities by directors, senior management, and employees that are reasonably designed to promote compliance with applicable insider trading laws*,"[5] and to tag this disclosure in inline XBRL.[6]

- ***Importance of Reviewing Insider Trading Policy Before Public Filing.*** Companies should review their insider trading policies *before* disclosing them publicly in their 20-F exhibit and consider whether any updates should be made in advance of their initial public filing. These updates can include, for example, removing any personal contact information of personnel identified in the policy, as well as any substantive revisions to update the policy in light of recent SEC rule changes and emerging market trends. For more information on insider trading policies and market practices on key policy provisions, see our recent client alert "Insider Trading Policies: A Survey of Recent Filings."

2. **Exhibit Housekeeping.** Beyond the Insider Trading Policy exhibit, remember to review your exhibit list including the following steps: (1) confirm that all required exhibits are included in accordance with Item 19 of Form 20-F, including for example: (i) exhibits filed since last year's Form 20-F on Form 6-K (to the extent required to be filed on Form 20-F), and (ii) the required clawback policy under Instruction 97 to Item 19 of Form 20-F,[7] which was new last year; (2) remove outdated exhibits no longer required to be filed, such as material contracts that have been fully performed; and (3) confirm permissible redactions and omissions in filed exhibits under Item 19 of Form 20-F (*see* our 2023 Annual Memo's Housekeeping Considerations for further information on these permissible redactions and omissions for exhibits).

3. **Confirm your Filing Status for 2025.** It is important to confirm your filing status in order to appropriately complete the checkboxes on your Form 20-F cover page. For an FPI, filing status will also impact (i) to the extent applicable, whether it continues to qualify as an EGC (i.e., until the first fiscal year where an issuer becomes a "large accelerated filer"), and (ii) whether it is subject to SOX 404(b) auditor attestation requirements (which apply once an issuer becomes an "accelerated filer" or a "large accelerated filer").

   Filing status does not affect the Form 20-F filing deadline for FPIs. This year's Form 20-F is due on **April 30, 2025**, for all calendar year-end FPIs, regardless of filing status. However, where a calendar year-end FPI has an effective shelf registration statement on Form F-1 or F-3 (e.g., for resales by selling shareholders) and plans to allow uninterrupted sales of securities from its registration statement, SEC rules require that the company file its audited FYE 2024 financial statements by March 31, 2025, which may push up the Form 20-F deadline to such earlier deadline. For more information, see "2. Considerations for Outstanding Registration Statements" in **Appendix A**.

   To confirm your filing status, keep in mind that:

[3] Under Release Nos. 33-11138; 34-96492, Insider Trading Arrangements and Related Disclosures, the requirement began for 20-Fs covering a full fiscal period on or after April 1, 2023, meaning the Form 20-F for the 2024 fiscal year filed in 2025. *See also*, the Small Entity Compliance Guide and C&DIs 120.26-120.28.

[4] *See* Item 16J of Form 20-F. If a company's insider trading policies are contained in a code of ethics compliant with Item 16B of Form 20-F and the code of ethics is filed as an exhibit, a hyperlink to that exhibit accompanying the company's disclosure as to whether it has insider trading policies and procedures will satisfy this requirement.

[5] *See* Item 16J(a) of Form 20-F. A straightforward example of this disclosure is the following: "Policy Prohibiting Insider Trading and Related Procedures. We have adopted an insider trading policy governing the purchase, sale, and other dispositions of the registrant's securities by directors, senior management, and employees. A copy of the insider trading policy is filed as an exhibit to this Annual Report."

[6] *See* Item 16J(c) of Form 20-F.

[7] For the Form 20-F exhibit list, companies can use a description aligned with Instruction 97 to Item 19 of Form 20-F, "Policy relating to recovery of erroneously awarded compensation, as required by applicable listing standards adopted pursuant to 17 CFR 240.10D-1."

i. *Determining Public Float*: Public float is central to calculating your filing status and is computed as of the last business day of the company's most recently completed second fiscal quarter (June 30, 2024, for calendar year end companies) by multiplying (a) the number of shares of common stock on that day *held by non-affiliates*[8] by (b) the closing stock price on that day. As a result, confirming the identity and holdings of affiliates and subtracting out their shares is critical for an accurate calculation of "public float."

ii. *Large Accelerated, Accelerated and Non-Accelerated Thresholds*: The public float thresholds for initial qualifications are set forth in Rule 12b-2 of the Exchange Act, but if your company previously qualified as a "large accelerated filer" or an "accelerated filer," the thresholds to now move into accelerated or non-accelerated status are lower than those required for the initial qualification (e.g., less than $560 million as opposed to $700 million for accelerated filer status, less than $60 million as opposed to $75 million for non-accelerated filer status).[9]

iii. *Emerging Growth Company (EGC) Status Check*. If your company is an EGC, remember to annually assess whether you have ceased to qualify as an EGC based on: (1) having total annual gross revenues of $1.235 billion or more, (2) the passage of time beyond the fifth anniversary of the first date common equity was sold pursuant to an effective registration statement, (3) the issuance of more than $1 billion in non-convertible debt in the previous three years, or (4) becoming a large accelerated filer. See the definition of "emerging growth company" in Rule 12b-2.

Outstanding Share Data: Companies should also confirm that their outstanding share data is used and presented consistently throughout their Form 20-F. In September 2023, the SEC published a sample comment letter to companies regarding their XBRL disclosures, which included a sample comment that "the common shares outstanding reported on the cover page and on your balance sheet are tagged with materially different values. It appears that you present the same data using different scales (presenting the whole amount in one instance and the same amount in thousands in the second)."

4. **Clawback checkboxes (new last year)**: Starting December 1, 2023, public companies were required to have in place a clawback policy compliant with stock exchange listing standards adopted pursuant to the SEC's new clawback rules. As set forth in the Form 20-F and explained in SEC C&DI 104.19, companies must now have the two additional checkbox disclosures shown below on the cover page of their Form 20-Fs. For guidance on when to check these boxes, see our 2024 Annual Memo.

Check Box #1:	If securities are registered pursuant to Section 12(b) of the Act, indicate by check mark whether the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements. ☐

Check Box #2:	Indicate by check mark whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period pursuant to §240.10D-1(b). ☐

8 "Holdings" only includes shares of common stock that are outstanding. Thus, "holdings" excludes shares of common stock that have not yet been issued but are still considered "beneficially owned" under Rule 13d-3 insofar as they can be acquired within 60 days (e.g., shares underlying exercisable options). The term "affiliate" is defined under Rule 12b-2 of the Exchange Act as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." An individual or entity's status as an "affiliate" is a fact-specific inquiry which must be determined by considering all relevant facts and circumstances; however, the SEC has indicated that status as an officer, director or 10 percent stockholder is one fact which must be taken into consideration in such inquiry. *See* American-Standard, SEC No-Action Letter (October 11, 1972).

9 *See* Rule 12b-2 of the Exchange Act for the definitions of "large accelerated filer" and "accelerated filer" and the SEC's helpful guides for determining filing status. Each issuer should run this calculation as facts and circumstances vary depending on prior qualifications. For example, if a company had previously been a large, accelerated filer, the subsequent qualification thresholds to become an accelerated filer are less than $560 million but $60 million or more, or to become a non-accelerated filer, less than $60 million, in each case, in public float. An FPI filing on Form 20-F may not qualify as a smaller reporting company.

- Beyond the cover page checkboxes, clawback disclosure is also required under new Item 6.F of Form 20-F if your company was required to prepare an accounting restatement that required a clawback (or if there is an outstanding balance of unrecovered compensation related to a prior restatement).[10]

5. **D&O Questionnaire Update**: Given the SEC's recent enforcement action related to director independence, D&O questions for assessing director independence under the general independence test for purposes of stock exchange rules have become a focal point for public companies. The general independence test generally requires the Board to affirmatively determine that there are no relationships between the director and the listed company's management that impact the director's independence. As a result, companies should consider clarifying to directors that close business or personal relationships with management may need to be disclosed in their responses to D&O Questionnaires, and, as an illustration, providing examples of the types of relationships that could impair independence under the general independence test.[11] A company's D&O Questionnaire should also make clear that a director's responses to D&O Questionnaires are important and form the basis for disclosures made by the company in its SEC filings.

- **Appendix A** of this client alert provides additional housekeeping reminders for preparing Form 20-Fs this year, including (1) additional D&O questionnaire reminders and (2) considerations for outstanding registration statements.

Part II: Key Disclosure Considerations

1. **Cybersecurity**: For the second year, public companies are now required to include in Form 20-Fs (under Part III, Item 16K) mandatory cybersecurity disclosure. For a detailed discussion of the SEC's requirements on this cybersecurity disclosure, including guiding principles for preparing the disclosure, see our 2024 Annual Memo. As a reminder, all registrants must begin tagging responsive disclosure in inline XBRL beginning with annual reports for fiscal years ending on or after December 15, 2024.[12]

   Since the filing of last year's Form 20-Fs, SEC Staff has issued comments on the new cybersecurity disclosure in annual reports on Form 10-Ks (which are filed by U.S. domestic issuers) that may provide guidance for Form 20-F disclosures. In particular, these comments focused on the following:

   - ***Inconsistent statements*** regarding the use of third parties in cybersecurity risk management (*e.g.*, one company stated that it "does not currently engage any third-party service providers" but went on to disclose that the Audit Committee receives updates from third party support specialists);[13]
   - ***Inadequate disclosure regarding the relevant expertise*** of members of the management or management committees (e.g., one company failed to sufficiently identify which management positions

[10] Under Item 6.F, companies are also required to disclose if there was an outstanding balance of unrecovered excess incentive-based compensation relating to a prior restatement.

[11] For example, in the SEC's recent action, the relationship at issue involved a director with a close friendship with one of the company's executives, which included regular, luxury vacations together with their respective spouses, paid for by the director.

[12] *See* Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, SEC Release No. 34-97989 (July 26, 2023). The inline XBRL tagging must include block text tagging narrative disclosures and detail tagging quantitative amounts. The SEC has stated that companies must use the "Cybersecurity Disclosure Taxonomy" tags within inline XBRL to tag these disclosures, which includes a specific flag for "Cybersecurity Risk Materially Affected or Reasonably Likely to Materially Affect Registrant."

[13] For example, "We note the following statements … 'We have not currently engaged any third party service providers to support, manage, or supplement our cybersecurity processes,' 'The Audit Committee periodically receives updates from management and our third party IT support specialists of our cybersecurity threat risk management and mitigation strategies…' and 'In such sessions, the Audit Committee … discusses such matters with our third party IT support specialists and other members of senior management.' These statements appear inconsistent. Please revise future filings to clarify whether you engage assessors, consultants, auditors or other third parties in connection with your processes for assessing, identifying and managing material risks from cybersecurity threats as required by Item 106(b)(1)(ii) of Regulation S-K." Comment letter to Wilhelmina International, Inc. (August 21, 2024).

or teams are responsible for managing material risks from cybersecurity threats, and failed to provide the required information on their expertise, as is required under Item 16K(c)(2)(i) of Form 20-F); and[14]

- ***Whether and how the company's process for assessing, identifying and managing material risks from cybersecurity threats has been integrated into its overall risk management system*** or processes (e.g., one company noted that it had a comprehensive and layered auditing approach to evaluate the effectiveness of existing controls, but did not explain how this was integrated into its overall risk management system or processes).[15]

During 2024, the SEC's Division of Enforcement continued its focus on cybersecurity disclosure. For example, in October 2024, the SEC announced settled charges against four technology companies that had been impacted by the 2020 SUNBURST cyberattack for making misleading disclosures regarding cybersecurity incidents and risks, and in December 2024, the SEC charged yet another company for misleading disclosure following a cybersecurity breach, including for describing cyber risks hypothetically (e.g., cybersecurity attacks "may interrupt our business or compromise sensitive customer data..."), despite the fact that the company had already experienced a cyberattack that did exfiltrate sensitive customer data and did disrupt operations.

Although the new administration is expected to change the SEC's enforcement approach on cybersecurity, public companies should still take away important reminders from recent actions that reiterate lessons from prior court decisions and underscore bedrock disclosure principles of materiality and accuracy, including:[16]

- ***Do not disclose a risk as hypothetical when in fact that risk has already materialized***, and do not describe specific, known risks in only generic terms.
- ***Evaluate and update existing disclosures*** to reflect changing circumstances and the company's changed risk profile as a result of any recent cybersecurity incident.
- ***Describe fully and accurately any cybersecurity incidents that are disclosed***; quantifying certain aspects of an incident without disclosing other material information on its scope and impact may be materially misleading. Nonetheless, any disclosures should be balanced against the need for the

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[14] For example, "We note that leaders from your executive management team oversee cybersecurity risk management. Please confirm that in future filings you will identify which management positions or teams are responsible for assessing and managing material risks from cybersecurity threats, and provide the relevant detail of all such persons or members in such detail as is necessary to fully describe the nature of the expertise as required by Item 106(c)(2)(i) of Regulation S-K." Comment letter to TNF Pharmaceuticals, Inc. (September 23, 2024). There were eight comment letters to this effect in 2024.

One comment letter specifically called on the company to describe the relevant expertise of the senior leadership team responsible for risk management, in addition to the expertise of the CISO, which had already been disclosed. *See* comment letter to Equifax Inc. (September 16, 2024). In its response, Equifax noted that "[w]hile our senior leadership team … has responsibility for risk management at the managerial level and overall managerial responsibility for the various programs of the Company, including information security, our Chief Information Security Officer ('CISO') is the management position responsible for assessing and managing material risks from cybersecurity threats under Item 106(c)(2)(i) of Regulation S-K. In future filings, we will clarify that the CISO is the management position responsible for assessing and managing material risks from cybersecurity threats."

The SEC made a similar comment to First Merchants Corp., noting that the company "describe[s] the relevant expertise of [its] CISO but not of the other members" of the information security committee that "assists executive management and the Board of Directors in their oversight of responsibilities related to information security."

[15] For example, "We note the statement … that your internal audit executes a 'comprehensive and layered auditing approach' to evaluate the effectiveness of existing controls and 'ensure that cybersecurity risk has been adequately mitigated within [y]our institution.' Please revise future filings to disclose whether your processes for assessing, identifying, and managing material risks from cybersecurity threats have been integrated into your overall risk management system or processes. See Item 106(b)(1)(i) of Regulation S-K." Comment letter to Community Trust Bancorp Inc. (August 29, 2024).

[16] Including: (i) Mylan N.V., a major pharmaceutical company that agreed to pay a $30 million penalty to the SEC for using hypothetical language to discuss risks related to potential misclassification of its most profitable product as a generic drug because the company knew at the time that a government agency had in fact already taken a contrary position; (ii) Yahoo, Inc., where the SEC found that Yahoo's risk factor disclosures in its annual and quarterly reports were materially misleading in that they claimed the company only faced the "risk of potential future data breaches" that might expose the company to loss and liability "without disclosing that a massive data breach had in fact already occurred"; and (iii) First American Financial Corporation, a real estate settlement services company that settled an enforcement action for its alleged failure to adequately disclose a security vulnerability that could be used to compromise the company's computer systems, which the company's information security personnel had been aware of for several months.

company to avoid revealing critical information about its cybersecurity controls or risk to protect against future cyberattacks.

2. **Artificial Intelligence Considerations for your Annual Report.** New artificial intelligence ("AI") technologies present both significant opportunities and risks for companies. In addition to risk factor disclosure,[17] companies should consider whether it is necessary or advisable to make disclosures about the ways in which AI might impact their strategy, productivity, competition or product demand, which, depending on the nature of the issuer's business and its particular facts and circumstances, might be appropriately included in the "Business" section (Item 4 of Form 20-F) or trend disclosure in the MD&A (Item 5 of Form 20-F). To the extent the potential impact of AI is in fact discussed, it is important not to "AI" wash, or mislead investors as to your true artificial intelligence capabilities, which SEC Chair Gary Gensler cautioned companies against in a statement late last year.

3. **Remember to Review and Update Risk Factors.** Risk factor disclosure is a critical part of the Form 20-F, and companies should consider developments in 2024 as they draft their risk factors. These considerations include developments with respect to (1) cybersecurity, (2) artificial intelligence, (3) international geopolitics, (4) climate (including the potential application of sustainability accounting standards, discussed in "Section 6., Climate Change" below), (5) supply chain considerations and (6) human capital management and labor. These risks can also become factors related to known trends and uncertainties for discussion in the MD&A (see below). For a discussion of these developments and important tips for drafting risk factors, see our forthcoming client alert dedicated to risk factor updates.

4. **MD&A Considerations.** As in prior years, MD&A has remained one of the top targets of SEC Staff comments, with most recent comments focused on the following:
   - the ***discussion and analysis of results of operations***, including the description and quantification of each material factor, unusual or infrequent events, and economic developments causing changes in results between periods (including a condensed labor market, wage inflation, global supply chain issues and inflation affecting revenues and underwriting);[18]
   - the ***discussion of known trends or uncertainties*** that are reasonably expected to impact near and long-term results (e.g., the impact of supply chain disruptions, inflation, increases in interest rates);[19]
   - ***metrics used by management in assessing performance***, including how they are calculated and period over period changes;[20]
   - ***critical accounting estimates***, including the judgments made in the application of significant accounting policies and the likelihood of materially different reported results if different assumptions were used;[21] and

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[17] For information on addressing AI in risk factors, see our upcoming client alert dedicated to risk factor updates.

[18] For example, see the following SEC Staff comment: "Please provide a more comprehensive discussion and analysis of your operating results at both the consolidated and segment levels, including the segment profit measure used by the CODM, gross profit, that includes specific, material factors positively and negatively impacting each material line item along with an analysis of those material factors … When multiple factors positively and/or negatively impact a line item, ensure you quantify the impact of each factor. Refer to Item 303(b)(2) of Regulation S-K and Section 501.12.b. of the Financial Reporting Codification (i.e., Release 33-8350, Section III.B.) for guidance." See comment letter to Bioceres Crop Solutions Corp., (February 1, 2024).

[19] For example, "When discussing the decrease in your sales and marketing expenses, your disclosure focuses on the effect of share-based compensation expense and the impact it had on your period over period comparisons. We note on a year-over-year basis, your revenue increased by 2% and your sales and marketing expenses excluding share-based compensation decreased by 15%. Please revise to discuss material factors impacting your results for the periods presented, and any known trends which are anticipated to have a material effect on the company's results of operations in future periods. Refer to Item 5 of Form 20-F." See comment letter to Alibaba Group Holding Ltd. (September 27, 2023).

[20] For example, "Although we note the metrics information … we note no discussion of your changes in revenues period over period or linkage to changes in your key metrics. Please provide us proposed revised disclosure to be added in future Forms 20-F that discusses the changes in revenues with linkage to your underlying metrics and the causes for the changes in both the metrics and your revenue recognized." See comment letter to INX Ltd. (September 1, 2023).

[21] For example, "We note your disclosure of critical accounting policies and estimates only cross-references to your summary of significant accounting policies disclosures within the financial statement footnotes. In future filings, please enhance your disclosure to provide qualitative and quantitative information necessary to understand the estimation uncertainty and the

- ***liquidity and capital resources***, including requests for a clearer discussion of the drivers of cash flows and the trends and uncertainties related to meeting known or reasonably likely future cash requirements.[22]

In particular, the Staff has continued to focus on key performance indicators ("KPIs") and has requested disclosure by companies on how KPIs are defined and calculated and how they are used by management. In addition, the Staff has asked companies why KPIs are useful for investors and why KPIs or other performance metrics are discussed in earnings releases or investor presentations if they are not also discussed in their periodic reports or are presented inconsistently.

Companies should keep in mind these areas of focus and review their MD&A disclosure to confirm they provide investors with key information on the company's financial performance and future outlook through the eyes of management, allowing readers to have a deeper understanding of the company's financial condition from the perspective of company leadership. As the MD&A is crucial to an understanding of the company's current performance and future trends that will impact operations, companies should review their MD&A disclosures to confirm that the provide sufficiently specific and thorough analyses.

5. **Mind the Non-GAAP/Non-IFRS.** The SEC Staff continues to focus on non-GAAP/non-IFRS financial measures in its comment letters, following the release of updated non-GAAP/non-IFRS C&DIs in December 2022[23] (for a summary of these updates, see "Non-GAAP/Non-IFRS Compliance – Five Key Reminders" in our 2023 Annual Memo). In 2024, many of the Staff's comment letters focused on:
    - the prominence of the most directly comparable GAAP/IFRS measure when compared to the non-GAAP/non-IFRS financial measure;
    - reconciliations of the non-GAAP/non-IFRS financial measure to the most directly comparable GAAP/IFRS financial measure;
    - the appropriateness of adjustments;
    - the use of individually tailored accounting principles; and
    - the lack of disclosure as to why management believes the non-GAAP/non-IFRS financial measure provides useful information to investors.

SEC Staff comments also focused on compliance with the C&DIs. For example, the Staff asked registrants whether operating expenses are "normal" or "recurring" and, therefore, whether their exclusion from a non-GAAP/IFRS financial measure could be misleading based on C&DI Question 100.01.[24] The Staff has also commented on non-GAAP/non-IFRS adjustments to revenue and expenses that could have the effect of changing the recognition and measurement principles required by GAAP/IFRS, thereby rendering them "individually tailored" and potentially resulting in a misleading measure, based on C&DI Question 100.04.[25] It is

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impact your critical accounting estimates have had or are reasonably likely to have on your financial condition and results of operations. In addition, discuss how much each estimate and/or assumption has changed over a relevant period and the sensitivity of reported amounts to the underlying methods, assumptions and estimates used. The disclosures should supplement, not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements. Refer to Item 303(b)(3) of Regulation S-K and SEC Release No. 33-8350." See comment letter to Bancolombia S.A. (November 28, 2023).

[22] For example, "We note your proposed cash flow disclosures in response to prior comment[s] … appear to be a recitation of changes evident from the financial statements. As previously requested, please explain in sufficient detail the underlying reasons and implications of material changes between periods to provide investors with an understanding of trends and variability in cash flows. Ensure your revised disclosures materially satisfy the requirements of Item 303(a)-(b) of Regulation S-K and the three principal objectives of MD&A, as noted in SEC Release No. 33-8350." See comment letter to Audiocodes Ltd. (July 12, 2024).

[23] Specifically, the SEC updated Non-GAAP Financial Measures C&DIs Questions 100.01, 100.04-100.06, and 102.10(a), (b) and (c), which can be found here.

[24] For example: "We note that your reconciliation of proforma adjusted EBITDA to net loss … includes adjustments related to provision for onerous contracts, write-down on inventories, and reclassification of R&D funding. As these costs appear to be normal recurring operating expenses, please remove these adjustments. Refer to Question 100.01 of the SEC Staff's C&DI on Non-GAAP Financial Measures." See comment letter to Ads-Tec Energy Public Ltd. Co. (September 3, 2024).

[25] For example: "Please revise future filings to quantify the amounts added back for 'returns on equity invested in certain variable interest entities' and 'your share of adjusted earnings from your investments in certain associates' for 2023 and 2024. If material, please tell us in detail how these items are accounted for in your financial statements and explain in more

important that companies review any non-GAAP/non-IFRS disclosures against SEC requirements (i.e., Item 10(e) of Regulation S-K and Regulation G for any non-GAAP/non-IFRS disclosures included in Form 20-Fs/registration statements or Form 6-Ks incorporated by reference into Form 20-F/registration statements, and Regulation G only for all other disclosures), and guidance to ensure that non-GAAP/non-IFRS measures are appropriately used and compliant with regulatory requirements.

6. **Climate Change Disclosure.** Momentum may have shifted away from ESG overall, but climate change remains a key focus for many public companies and investors. Although the SEC's extensive climate-related disclosure requirements have been voluntarily stayed pending the resolution of legal challenges, companies should continue to consider their existing climate-related disclosure in light of the SEC's 2010 climate change disclosure guidance and the SEC's 2021 sample comment letter on climate disclosure.

   While climate-related comments from the SEC decreased in 2024 when compared with 2023, companies should still pay attention to known areas of Staff focus, depending on the nature of the company's business and its particular facts and circumstances. These known areas of Staff focus include:

   - ***Direct and indirect impacts*** of climate-related business trends, such as decreased demand for goods or services that produce significant greenhouse gas emissions and increased demand for energy from alternative sources;[26]
   - ***Physical effects*** of climate change on operations and results;[27]
   - ***Material expenditures*** for climate-related projects and compliance costs;[28] and
   - ***Whether information contained in sustainability reports*** is material and therefore required to be included in the Form 20-F.[29]

   In addition to comment letters, a recent SEC enforcement action targeted a company's sustainability disclosures, arguing that Keurig's disclosures regarding the recyclability of its coffee pods were inaccurate, because two of the nation's largest recycling companies had given negative feedback on a recycling plan and did not intend to accept pods for recycling, which was not disclosed in the company's filings.[30] This action highlights the continued importance of ensuring that disclosures on sustainability-related topics are complete

detail why you add them back. Additionally, please tell us how you considered the guidance in Question 100.04 of the C&DIs on Non-GAAP Financial Measures in determining that the adjustments were appropriate. Please provide us your proposed revised disclosure." See comment letter to Brookfield Wealth Solutions Ltd. (September 9, 2024).

[26] For example: "To the extent material, discuss the indirect consequences of climate-related regulation or business trends, such as the following: decreased demand for goods or services that produce significant greenhouse gas emission or are related to carbon-based energy sources; increased demand for goods that result in lower emissions than competing products; increased competition to develop innovative new products that result in lower emissions; increased demand for generation and transmission of energy from alternative energy sources; and any anticipated reputational risks resulting from operations or products that produce material greenhouse gas emissions."

[27] For example: "We note [your] disclosure … that climate change may increase the frequency and severity of natural catastrophes and the resulting losses in the future and impact your risk modeling assumptions. We further note [your] disclosure … that insured losses due to extreme weather events are increasing over time, and as climate change worsens, these losses will continue to grow. Please discuss the physical effects of climate change on your operations and results. This disclosure may include the following: severity of weather, such as floods, hurricanes, sea levels, arability of farmland, extreme fires, and water availability and quality; quantification of material weather-related damages to your property or operations; potential for indirect weather-related impacts that have affected or may affect your major customers or insured locations; and any weather-related impacts on the cost or availability of (re)insurance. Include quantitative information for each of the periods covered … and explain whether increased amounts are expected in future periods."

[28] For example: "We note your disclosure … stating that you are taking certain steps to address climate change. Revise your disclosure to identify any past and/or future capital expenditures for climate-related projects. As part of your response, provide quantitative information for these types of expenditures for each of the periods for which financial statements are presented … and for any future periods."

[29] For example: "We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report."

[30] It is worth noting that the SEC charged Keurig with violating Section 13(a) of the Securities and Exchange Act of 1934 and Rule 13a-1 thereunder, which require accurate and complete reports be filed with the SEC, rather than alleging that the company had made any materially misleading statements or omissions or violated anti-fraud provisions.

and not misleading due to the omission of information, and emphasizes the SEC's willingness to review non-filed materials, such as sustainability reports, when assessing the accuracy and completeness of disclosure.[31]

IFRS Sustainability Standards: FPIs may also be required to comply with new IFRS sustainability standards requiring financial statement disclosures—IFRS S1 (sustainability-related risks and opportunities) and IFRS S2 (climate-related risks and opportunities)—that were adopted in 2023, depending on their home country.[32] FPIs should consult with home country auditors on whether they need to include any disclosures under these standards in their financial statements to be included in annual reports on Form 20-F this year, or whether they should begin to prepare for the implementation of these standards in future disclosures.

7. **Consider your Human Capital Management (HCM) Disclosures**. The HCM disclosures required in the "Business" section of U.S. domestic issuers' Form 10-Ks are not required for FPIs, and FPIs generally are not adopting such disclosures voluntarily. However, given institutional investor focus on the area, suggest this could also be a focus area for Form 20-F readers, so it is important for FPIs to consider any appropriate risk factor disclosure on this topic, depending on their investor base (subject to any limitations imposed by the laws of the jurisdiction under which the registrant is organized). Companies should assess what, if any, material issues their company faces with respect to human capital resources. This could include risks related to the ability to attract and retain skilled employees, employee health and safety issues, increases in labor costs and increased employee turnover.

   Based on White & Case survey information of Fortune 50 companies' Form 10-K disclosure in recent years, companies have covered a broad range of topics in their HCM disclosure, including employee engagement and culture initiatives, talent development and retention, employee health and wellness, flexible work arrangements, pay equity and diversity, equity and inclusion (DEI). Given the increased scrutiny on DEI programs and reports of a retreat on DEI at US public companies,[33] FPIs should carefully consider whether to include HCM disclosures specifically addressing DEI, if any at all. To the extent they will include these disclosures, companies should consider which human capital measures or objectives the board and senior management focused on during fiscal 2024, and how these should be discussed in the company's disclosure.

8. **Diversity Considerations*:* Nasdaq Board Diversity Disclosure Rules No Longer in Effect.** In December 2024, the United States Court of Appeals for the Fifth Circuit, in a 9-8 vote, struck down The Nasdaq Stock Market's ("Nasdaq") board diversity rules, holding that the SEC exceeded its statutory authority when it approved the rules. As a result of the ruling, effective immediately, public companies listed on Nasdaq no longer need to comply with Nasdaq's board diversity rule requirements, including providing the board diversity matrix required by Nasdaq and having the specified number of directors, or explaining why they do not. Companies may choose to remove their board diversity matrix and related disclosure from their annual meeting proxy statement on Form 6-K, website or Form 20-F, as applicable. They should also consider whether any other updates are necessary in light of this decision (for example, companies should also remove references to Nasdaq's diversity rule from their D&O questionnaires and consider whether any other changes are appropriate).

   - When deciding what, if any, diversity disclosure to provide, companies should continue to be mindful of the diversity disclosure and board composition policies of proxy advisory firms and institutional investors. Both ISS and Glass Lewis, as well as many institutional investors, including BlackRock, Vanguard and State Street, have their own diversity policies, including various definitions of what diversity means. *See* **Appendix B**. Depending on a company's investor base, these policies may be a

[31] Although the SEC did not claim inaccurate or incomplete statements in Keurig's sustainability reports, it included the Company's inclusion of a recyclability goal in an older sustainability report as part of the factual record.

[32] The standards were issued by the IFRS Foundation on June 26, 2023, and countries are at different stages of adopting these standards. For example, the United Kingdom, South Africa, Singapore, Turkey and Nigeria have adopted or completed consultations, while others, including Canada, Mexico, Brazil, Japan and South Korea, are conducting ongoing consultations. Australia, the Philippines and India completed consultations in 2024, with adoption timelines pending.

[33] *See* "From Ford to Walmart, Corporate America Drew Back From DEI. The Upheaval Isn't Over. - WSJ" (noting that "Ford Motor said it would stop providing workplace data to a gay-rights lobbying group. UBS stopped giving out $25,000 grants directed at businesses led by women of color. Walmart said it wouldn't renew funding for a charity it created to address racial disparities.")

reason, among others, for continuing to publicly disclose certain aspects of board diversity and/or to seek diverse board composition.

Appendix A: *Additional Housekeeping Reminders*

1. The following Form 20-F form check items are not new this year, but were recently added in the past three years and should therefore be confirmed for your upcoming filing:

   (a) Confirm that Item 3.A states "Item 3.A [Reserved]" (instead of "Item 3.A Selected Financial Data" as may have been included in prior Form 20-Fs) due to the SEC's elimination of the disclosure requirement for selected financial data in 2021.[34]

   (b) Confirm "Item 10J: Annual Report to Security Holders." Item 10J was added to Form 20-F in 2022. While the SEC has not released formal guidance on how to respond to Item 10J, including whether it needs to be included in Form 20-F, we believe that issuers should address it as follows:

   - If an issuer is not required under home country law to furnish, or does not otherwise furnish, to its security holders an annual report separate from the Form 20-F, then the issuer should write: "Not applicable."
   - If an issuer is required under home country law to furnish, or otherwise furnishes, to its security holders an annual report separate from the Form 20-F, then it should write: "If we are required to provide an annual report to security holders in response to the requirements of Form 6-K, we will submit the annual report to security holders in electronic format in accordance with the EDGAR Filer Manual."

   (c) Confirm the inclusion of "Item 16I" of the Form 20-F with the caption "Disclosure Regarding Foreign Jurisdictions that Prevent Inspections." New Item 16I was added to the Form 20-F in 2022 pursuant to the Holding Foreign Companies Accountable Act (HFCAA) (as explained in our prior alert) in order to identify any issuers that retain auditors that the PCAOB is unable to inspect completely. Given the SEC's recent statement that "the PCAOB has been able to fulfill its oversight responsibilities as it relates to audit firms in China and Hong Kong," this year, companies should not have any disclosure (beyond "Not applicable" or "None") under this item in their upcoming Form 20-Fs.

   (d) As in the past, tag in inline XBRL the independent auditor's: (i) name; (ii) location (i.e., city and state, province or country); and (iii) PCAOB ID number.[35] Companies should coordinate this tagging with the financial printer.

   (e) For companies with mining operations,[36] consider whether expanded Regulation S-K 1300 requirements, which became mandatory for Form 20-Fs filed in 2022 for the fiscal year ended December 31, 2021, apply. If a company's current mining operations, in the aggregate, are material to its business, Regulation S-K 1300 disclosures would be required in its Form 20-F.[37] In addition,

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[34] For more information, *see* "Key Considerations for the 2022 Annual Reporting Season: Form 20-F and Other FPI-Specific Considerations: in 2022: Mandatory Compliance with SEC's Amendments to Part I of Form 20-F, Item 3.A and Item 5Items 301, 302 and 303" in our prior memo.

[35] This requirement is a result of the SEC's December 2021 amendments implementing the HFCAA for all auditors that provide their opinions related to financial statements, in accordance with Section 6.5.54 of the EDGAR Filing Manual. Practices vary as to the location of this tagging in annual reports, but a commonly used option is to tag the auditor's name and PCAOB ID number in the Index to the Financial Statements and the auditor's location at the end of the audit report.

[36] The SEC's comment letter practices indicate that this inquiry should be conducted both by companies that sell mineral extractions and vertically integrated companies that do not sell their mineral extractions but whose mining operations supply raw materials.

[37] These disclosures include: (i) summary property disclosure on overall mining operations, mineral resources and mineral reserves; (ii) individual property disclosure for any property that is individually material to their business; and (iii) a description of the internal controls that the company uses in its exploration and mineral resource and reserve estimation efforts, including quality control/quality assurance programs, verification of analytical procedures and a discussion of comprehensive risk inherent in the estimation.

companies with property that is *individually* material to their business must obtain a technical report summary,[38] which must be signed by a "qualified person" (as defined in Regulation S-K 1300) and filed as Exhibit 96.1 to the Form 20-F.[39]

See **Appendix B** for a summary of key investor and proxy advisory firm policies on board diversity.

It is also important to keep track of the number of boards on which each of your directors sits, bearing in mind key investor and proxy advisory firm policies on over boarding, which tend to be country/region-specific. See **Appendix C** for a discussion of overboarding policies.

2. **Considerations for Outstanding Registration Statements**: Consider how the filing of the Form 20-F may impact any outstanding registration statements.

   (a) **All Effective Registration Statements**: Remember to update your auditor consent attached as an exhibit to the Form 20-F to include any newly filed registration statements and remove any registration statements that are no longer effective.

   (b) **Effective Shelf Form F-1s**:

      (i) Post-Effective Amendment and Timing of Form 20-F: You must file a post-effective amendment to the Form F-1 in order to incorporate the audited annual financial statements and other information from the Form 20-F into the Form F-1. If you plan to allow uninterrupted sales (e.g., by selling stockholders) off of that Form F-1, you must file and have the SEC declare effective this post-effective amendment by the end of the third month after your fiscal year end (for calendar-year end FPIs, March 31, 2025). For the sake of efficiency, you may want to consider filing your Form 20-F before this three-month deadline (for calendar-year-end FPIs, March 31, 2025) and then immediately preparing and filing a post-effective amendment on Form F-1, all with enough time to ensure the SEC declares the post-amendment effective by the three-month deadline.

      (ii) Potential Form F-3 Eligibility: You should also consider if you have become Form F-3 eligible, so that you can convert the Form F-1 into a Form F-3 and avoid future post-effective amendments for as long as you remain F-3 eligible.

   (c) Effective Shelf Form F-3s:

      (i) Timing of Form 20-F: You are not required to file a post-effective amendment with audited annual financial statements and can instead update the registration statement merely by filing the Form 20-F. However, if you plan to allow uninterrupted sales off of that Form F-3, you must file your audited annual financial statements by the last day of the third month after your fiscal year end (March 31, 2025, for calendar-year end FPIs). You should consider filing the Form 20-F by the three-month deadline, ahead of the normal 120-day deadline for filing an annual report on Form 20-F, or, if your Form 20-F is not ready by such date, filing by such deadline a current report on Form 6-K with the audited financial statements (incorporated by reference into the Form F-3).

      (ii) Form F-3 Eligibility: You should also ensure that you continue to meet the eligibility requirements for using the Form F-3 when filing your Form 20-F: (i) if you previously filed as a well-known seasoned issuer (WKSI), confirm that you are still a WKSI in order to use that registration statement (otherwise, it will need to be re-filed (if eligible) as a non-WKSI

[38] The technical report summary must describe the information reviewed and conclusions reached by the qualified person about the company's mineral resources and/or reserves on each material property (or, optionally, exploration results).

[39] The technical report summary must be filed as Exhibit 96.1 to the Form 20-F the first time the company discloses mineral reserves or mineral resources in its Form 20-F. In addition, it must be filed as an exhibit in subsequent Form 20-Fs under either of the following circumstances: (i) there is a material change in the mineral reserves or mineral resources, as disclosed in the Form 20-F, from the last technical report summary filed for the property; or (ii) the company has previously filed a technical report summary supporting the disclosure of exploration results and there is a material change in the exploration results from the last technical report summary filed for the property.

shelf); or (ii) if you previously filed a non-WKSI shelf registration statement, confirm that you still meet the requirements to use that registration statement. Otherwise, you will need to re-file as a Form F-1.

While it does not affect the Form 20-F, all FPIs with outstanding registration statements should also bear in mind the requirement to file a Form 6-K by the date that is nine months after the end of their fiscal year, including six-months consolidated interim financial statements (which may be unaudited), containing explanatory notes.[40] This Form 6-K should be incorporated by reference into any effective Form F-3s and would trigger a prospectus supplement for any effective Form F-1.

3. **D&O Questionnaires.** Ahead of your Form 20-F filing, review and update your D&O questionnaires, which provide backup and support for the disclosures to be included in your Form 20-F. In addition to the updates discussed in Part I, Section 5, companies should:

(i) If you plan to voluntarily disclose the diversity of your directors in proxy statement, website or other public disclosure (such as the Form 20-F), include a question to elicit information on your directors' diversity characteristics that covers the potential diversity categories that you may want to disclose (under investor policies) and to obtain their consent to disclose this information;[41]

(ii) Consider adding a question to elicit information from directors on their expertise with respect to AI, cybersecurity, climate change and human capital, as applicable, in light of investor focus on board qualifications in these areas;

(iii) Consider adding or refining questions on outside directorships or officerships to identify any potential antitrust concerns, given the Department of Justice's focus on potential violations of Section 8 of the Clayton Act; and

(iv) Consider building out (or adding) Iran-related activities questions to cover potentially problematic transactions with Russian entities.[42]

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[40] This is based on the following requirement from Item 8.A.5 of Form 20-F, as follows: "The interim financial statements should include a balance sheet, statement of comprehensive income (either in a single continuous financial statement or in two separate but consecutive financial statements; or a statement of net income if there was no other comprehensive income), cash flow statement, and a statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners, or (ii) all changes in equity (including a subtotal of all non-owner items recognized directly in equity). Each of these statements may be in condensed form as long as it contains the major line items from the latest audited financial statements and includes the major components of assets, liabilities and equity (in the case of the balance sheet); income and expenses (in the case of the statement of comprehensive income) and the major subtotals of cash flows (in the case of the cash flow statement). The interim financial statements should include comparative statements for the same period in the prior financial year, except that the requirement for comparative balance sheet information may be satisfied by presenting the year end balance sheet. If not included in the primary financial statements, a note should be provided analyzing the changes in each caption of shareholders' equity presented in the balance sheet. The interim financial statements should include selected note disclosures that will provide an explanation of events and changes that are significant to an understanding of the changes in financial position and performance of the enterprise since the last annual reporting date. If, at the date of the document, the company has published interim financial information that covers a more current period than those otherwise required by this standard, the more current interim financial information must be included in the document. Companies are encouraged, but not required, to have any interim financial statements in the document reviewed by an independent auditor. If such a review has been performed and is referred to in the document, a copy of the auditor's interim review report must be provided in the document."

[41] See above discussion in Section 8 "Diversity Considerations: Nasdaq Board Diversity Disclosure Rules No Longer in Effect."

[42] Since February 2022, the US has imposed sweeping sanctions on Russia, bringing a number of high-net-worth individuals and companies with substantial investments in the US within scope of the of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA). Companies should undertake diligence to determine whether any sanctioned individuals or entities may be involved in their activities to assess compliance and potential disclosure requirements, as the ITRA requires Form 20-F disclosure if the company (or any affiliate) knowingly engaged in certain sanctionable activities. In addition, Section 219 ITRA added Section 13(r) to the Exchange Act, which requires FPIs to disclose contracts, transactions and "dealings" with Iranian and certain other entities in their Form 20-F. If an FPI includes such disclosure, it must also separately file with the SEC, at the same time it files its Form 20-F, a notice (IRANNOTICE) that such disclosure is contained in the report.

Appendix B

Board Diversity Policies

Gender and Racial/Ethnic Diversity Policies of Proxy Advisory Firms:

FPIs in US Tax Havens
ISS's policy for FPIs in US tax havens requires at least one female director (*see* America's regional voting guidelines).

Israeli FPIs

- **ISS**: ISS does not have specific policies on gender and racial/ethnic diversity for Israeli companies. *See* here for its policies for Israeli companies.
- **Glass Lewis**:
  - *Gender Diversity*: Glass Lewis defaults to US requirements, and as such, will generally recommend voting against the nominating committee chair of a board that has fewer than two female directors, except for boards of six or fewer total directors. *See* here for Glass Lewis's policies on Israeli companies.
  - *Racial/Ethnic Diversity*: Glass Lewis encourages ethnic/racial diversity, and specifically notes the relatively low percentage of Israeli Arabs serving on boards but will not make a voting recommendation on it except in a contested election. Glass Lewis states that it "believes that the composition of a board should be representative of a company's workforce, the jurisdictions in which it principally conducts its business activities, and its other key stakeholders" and that Israeli FPIs "should consider including diversity of ethnicity and/or national origin as attributes in their composition profiles, whether defined targets for diversity of ethnicity and national origin should be set, and the manner and extent to which the ethnic and national backgrounds of directors and board nominees is publicly disclosed."

FPIs in Other Countries

- ISS and Glass Lewis policies on board diversity are region and/or country specific. For the currently applicable policies, *see* ISS's current voting policies and Glass Lewis's current voting policies.

Diversity Policies of Institutional Investors:

- **BlackRock**: BlackRock maintains region/country-specific market guidelines:
  - *EMEA*: In its EMEA voting guidelines, BlackRock notes that, "to ensure there is appropriate diversity of perspectives, we look to boards to be representative of the company's key stakeholders, with an approach to diversity that is aligned with any market-level standards or initiatives designed to support diversity (particularly gender and ethnic diversity) among board members." BlackRock also notes its "general view" that, subject to market-specific standards, it is looking for "all boards to be taking steps towards at least 30 percent of their members being comprised of the under-represented gender (which should be read in conjunction with applicable country-specific guidelines)." BlackRock asks companies, consistent with local law, "to provide sufficient information on each director/candidate and in aggregate so that shareholders can understand how diversity (covering professional characteristics, such as a director's industry experience, specialist areas of expertise, and geographic location; as well as demographic characteristics such as gender, ethnicity, and age) has been accounted for within the proposed board composition. These disclosures should cover how diversity has been accounted for in the appointment of members to key leadership roles, such as board chair, senior/lead independent director and committee chairs."[43]
  - *Latin America*: To the extent that a company's board is an outlier and does not have a mix of professional and personal characteristics that is comparable to local requirements and/or market

[43] *See* BlackRock Investment Stewardship Proxy voting guidelines for European, Middle Eastern, and African securities.

norms, BlackRock may vote on case-by-case basis against relevant director(s).[44] Personal characteristics may include, but are not limited to, gender; race/ethnicity; disability; veteran status; LGBTQ+; and national, Indigenous, religious or cultural identity.
  - *Israel*: While BlackRock is looking for companies in this region to make progress towards having greater female representation at board level in line with its general guidelines, BlackRock is likely to take voting action if the board has failed to appoint at least directors from the underrepresented gender. *See* BlackRock's Israel-specific voting guidelines here.

- **Vanguard**: For European and UK companies, Vanguard "expects disclosure of tenure, skills, and experience at the director level (sometimes referred to as a "skills matrix") … [and asks] companies to meet local market standards intended to support gender and ethnic diversity, and at a minimum to demonstrate progress toward at least 30% gender diversity at board level (to be read in conjunction with country-specific guidelines below) and, where necessary, disclose plans to align with any current or upcoming local requirements." Vanguard will consider applicable market regulations and expectations, along with additional company-specific context. Generally, "Boards should reflect diversity of attributes including tenure, skills, and experience and … should also, at a minimum, represent diversity of personal characteristics, inclusive of at least diversity in gender, race, and ethnicity on the board. Boards should take action to reflect a board composition that is appropriately representative, relative to their markets and to the needs of their long-term strategies. Disclosure of directors' personal characteristics (such as gender, ethnicity, or nationality) should occur on a self-identified basis and may occur on an aggregate level or individual director level. Disclosure of skills and experience at the director level is preferred. Companies should provide disclosure regarding their process for evaluating the composition and effectiveness of their board on a regular basis, the identification of gaps and opportunities to be addressed through board refreshment and evolution, and a robust nomination (and renomination) process to ensure the right mix of skills, experience, perspective, and personal characteristics into the future."[45]

- **State Street**: State Street's published guidelines state that it expects boards of companies in all markets and indices to have at least one female board member. It may waive the policy if a company engages with State Street and provides a specific, timebound plan for adding at least one woman to the board. State Street also expects companies in the Russell 3000, TSX, FTSE 350, STOXX 600 and ASX 300 indices to have boards composed of at least 30 percent women directors. State Street may waive the policy if a company engages with SSGA and provides a specific, timebound plan for reaching 30 percent representation of women directors. If a company fails to meet any of these expectations outlined above, State Street may vote against the Chair of the Nominating Committee or the board leader in the absence of a Nominating Committee, if necessary. Additionally, if a company fails to meet this expectation for three consecutive years, State Street may vote against all incumbent members of the Nominating Committee, or those persons deemed responsible for the nomination process. For more information, see State Street's State Street's Global Proxy Voting and Engagement Policy.

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44 *See* BlackRock's Proxy voting guidelines for Benchmark Policies - Latin American securities.

45 *See* Vanguard's Proxy voting policy for European and UK portfolio companies. Vanguard's voting policies for other regions can be found at: Investment Stewardship reports and policies.

Appendix C

Director Overboarding Policies

While most stakeholders support limits on the number of outside directorships a director can hold, the overboarding policies of proxy advisory firms and institutional investors are generally country or region-specific and therefore companies are advised to carefully consider the specific policies of the relevant firms when considering whether their directors may be considered "overboarded." *See* the country-specific policies of ISS and Glass Lewis. In addition, while issuers should always check for country-specific guidance, the general policies of major institutional investors are discussed below:

- **BlackRock**: "The role of a director is becoming increasingly demanding and therefore requires appropriate time to commit and engage effectively on board and committee matters. Given the nature of the role, it is important that a director has sufficient flexibility to respond to unforeseen events and therefore only takes on a maximum number of non-executive mandates that provides this flexibility. To give shareholders a sense of directors' ability to be engaged and the board to function effectively, we appreciate when **companies disclose board and committee members' attendance**, as well as the **time commitment required from directors**. Shareholders would benefit from additional transparency over how nomination committees assess their directors' time commitments and with what frequency these reviews take place. However, in BIS's experience, the assessment of whether a director is over-committed is not just based on their attendance record but also their ability to provide appropriate time to meet all responsibilities when one of the companies on whose board they serve faces exceptional circumstances."
    - *EMEA:* For companies in EMEA, BlackRock will ordinarily consider there to be a significant risk that a board candidate has insufficient capacity, and therefore consider voting against his/her (re)election, where the candidate would (if elected) be: (i) serving as a non-executive director (but not the board chair) on **more than four total** public company boards; (ii) serving as a non-executive board chair on one public company board and as a non-executive director (but not the board chair) on **more than two** other public company boards; (iii) serving as a non-executive board chair on **two** public company boards and as a non-executive director on **at least one** other public company board; or (iv) serving as a non-executive director (but not the board chair) on **more than one** public company board while also serving as an executive officer at one public company.[46] In case of an executive officer, Blackrock would vote against his/her (re)election only to boards where he/she serves as a non-executive director. In assessing whether to support a (re)election in these circumstances, through BlackRock's engagement with the board it will consider any perceived progress in the candidate's response to concerns about capacity, the circumstances in which the candidate will remain in all of his/her different roles and the time frame over which changes will be made.[47]
    - *Latin America*: For companies in Latin America, BlackRock's policy is that: (i) a public company executive can sit on a total of **three public company boards**, and (ii) non-executive directors can sit on a total of **five public company boards**. In addition, where a director maintains a Chair role of a publicly listed company in European markets, BlackRock may consider that responsibility as equal to **two** board commitments, consistent with its EMEA Proxy Voting Guidelines, and will take the total number of board commitments across its global policies into account for director elections.[48]

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[46] Under BlackRock's EMEA guidelines, the executive officer consists of the executive chair, the chief executive officer (CEO), the deputy chief executive officer, the chief financial officer, the chief operating officer and other similar level executives who are members of the management leadership team or executive committee (e.g., Chief Information Officer, Chief Technology Officer, Chief Risk Officer, Chief People Officer, etc.) or members of the management board of listed companies with a two-tier system

[47] *See* BlackRock Responsible Investment Guidelines EMEA. There may also be country-specific nuances that companies should consider in BlackRock's guidelines.

[48] *See* BlackRock's Proxy voting guidelines for Benchmark Policies - Latin American securities.

For companies in other regions, BlackRock's Global Engagement and Voting Guidelines note that BlackRock "will take local norms and practices into consideration when making … voting determinations across markets" and that they "may vote against the election of directors who do not seem to have sufficient capacity to effectively fulfil their duties to the board and company."[49]

- **State Street**: State Street may take voting action against directors who exceed the following number of board mandates: (i) named executive officers (NEOs) (a term which applies to insiders of US domestic issuers) who sit on **more than two** public company boards; (ii) non-executive board chairs or lead independent directors who sit on **more than three** public company boards; or (iii) non-executive directors who sit on **more than four** public company boards.[50] State Street may consider waiving its policy and voting in support of a director (other than an NEO) if the company discloses its director commitment policy in a publicly available manner (e.g., corporate governance guidelines, proxy statement, company website). This policy or associated disclosure must include: (i) description of an annual policy review process undertaken by the Nominating Committee to evaluate outside director time commitments, and (ii) a numerical limit on public company board seats a director can serve on.[51]

- **Vanguard**: For European and UK companies, Vanguard believes that "[d]irectors' responsibilities are complex and time-consuming. Therefore, the funds seek to understand whether the number of directorship positions held by a director makes it challenging to dedicate the requisite time and attention to effectively fulfill their responsibilities at each company (sometimes referred to as being "overboarded"). While no two boards are identical and time commitments may vary, the funds believe the limitations on the number of board positions held by individual directors are appropriate, absent compelling evidence to the contrary." A fund will generally vote against: (i) any director who holds an executive role of any public company and serves on **two or more additional outside** public company boards; and (ii) any director who serves on **more than four** public company boards. "In certain instances, will consider voting for a director who would otherwise be considered overboarded if: (i) the director has committed to stepping down from a/the directorship(s) necessary to fall within the thresholds listed above by the following year's annual general meeting; (ii) the director becomes overboarded as a result of becoming an interim executive officer or has become an executive officer within the last 12 months; and/or (iii) the company provides specific, verifiable information confirming that (a) the director devotes significantly less than an average amount of time to one or more of the boards on which they sit and (b) that the reduced workload is appropriate based on the nature of the company's board (*e.g.*, the company's business model or governance structure) and the relevant director continues to fulfill their obligations to that company, irrespective of their diminished hours of service."[52]

Israeli FPIs

- **ISS**: Under extraordinary circumstances, will vote against individual directors, members of a committee or the entire board, due to "[e]gregious actions related to a director's service on other boards that raise substantial doubt about his or her ability to effectively oversee management and serve the best interests of shareholders at any company."

- **Glass Lewis**: Generally recommend against a director who: (i) serves as an executive officer of a public company while serving on **more than one additional** public company board, (ii) serves as an executive chair/vice chair of a public company while serving on **more than two additional** external public company

[49] For BlackRock's specific voting policies for other regions, see its region/country specific guidelines, for example, Proxy voting guidelines for Benchmark Policies - Southeast Asia, South Korea and Taiwan securities and Proxy voting guidelines for Japan securities.

[50] Service on mutual fund boards, UK investment trusts or Special Purpose Acquisition Company boards is not considered when evaluating directors for excessive commitments.

[51] *See* State Street Global Advisors Global Proxy Voting and Engagement Policy.

[52] *See* Vanguard's Proxy voting policy for European and UK portfolio companies. Vanguard's voting policies for other regions (including certain countries that have standalone guidelines) can be found at: Investment Stewardship reports and policies.

boards; and (iii) any other director who serves on **more than five** public company boards. However, Glass Lewis also takes the following into consideration:

- When determining whether a director's service on an excessive number of boards may limit the ability of the director to devote sufficient time to board duties, may consider relevant factors, such as the size and location of the other companies where the director serves on the board, the director's board roles at the companies in question, whether the director serves on the board of any large privately-held companies, the director's tenure on the boards in question and the director's attendance record at all companies and the director's attendance record at all companies.
- May not recommend that shareholders vote against overcommitted directors at the companies where they serve an executive function.
- Will generally refrain from recommending against a director who serves on an excessive number of boards within a consolidated group of companies or a director that represents a firm whose sole purpose is to manage a portfolio of investments which include the company.
- May refrain from recommending against the director if the company provides a sufficiently compelling explanation regarding his or her significant position on the board, specialized knowledge of the company's industry, strategic role (such as adding expertise in regional markets or other countries), etc.[53]

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[53] *See* Glass Lewis's Israel Voting Guidelines.

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