Client Alert | US Public Company Advisory / Capital Markets

Key considerations for the 2026 annual reporting and proxy season: your upcoming Form 10-K

By the White & Case Public Company Advisory Group

Each year in our Annual Memo, White & Case's Public Company Advisory Group provides practical insights on preparing Annual Reports on Form 10-Ks, Annual Meeting Proxy Statements and, for FPIs, the Annual Report on Form 20-F. This installment of our Annual Memo will focus on preparations for your Form 10-K, divided into two sections: Annual Report on Form 10-K Housekeeping Considerations in Part I below, and Disclosure Considerations in Part II below.

The SEC has undergone a significant shift in priorities following the inauguration of the second Trump administration in January 2025. Notably, Chair Atkins has stated that "we must simplify and scale the SEC's disclosure requirements" in order to "make them more comprehensible," while taking steps to "de-politicize shareholder meetings" that have been "epitomized [by]… shareholder proposals focused on environmental and social issues" and "return their focus to voting on director elections and significant corporate matters." These priorities are reflected in the following:

- The SEC's decision in March 2025 to end its defense of the recently adopted and highly prescriptive climate change disclosure rules that were challenged in court, placing the focus for climate disclosure on the SEC's 2010 guidance and a principles-based securities law analysis of whether climate change disclosure is material for each registrant.
- The SEC's Division of Corporation Finance's landmark announcement in November 2025 that it will not respond or express views on most shareholder proposal no-action requests submitted under SEC Rule 14a-8.
- Rulemaking initiatives on the SEC's agenda, including consideration of potential rule proposals to address:
  - *Eliminating Mandatory Quarterly Reporting.* This follows President Trump's announcement that companies "should no longer be forced to report on a quarterly basis" and should instead report results once every six months. The initiative reflects criticism that mandatory quarterly reporting places the focus on "short termism" – rather than on long term value creation for investors.
  - *Enhancement of Emerging Growth Company (EGC) Accommodations and Simplification of Filer Status for Reporting Companies.* The SEC is considering proposed rule amendments to expand accommodations that are available to EGCs and "to rationalize filer statuses," "simplify the categorization of registrants and reduce their compliance burdens."[1] This could include accommodations to align and/or expand exemptions available for EGCs, smaller reporting companies (SRCs) and non-accelerated filers.
  - *Rationalization of Disclosure Practices.* The SEC is considering proposed rule amendments "to rationalize disclosure practices" and "facilitate material disclosure by companies," which may include changes to executive compensation disclosure for public companies,[2] among other changes to disclosures required by SEC rules.

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1 For recommendations in this regard, see: Society for Corporate Governance Submits Recommendations to SEC on Scaled Disclosure and Filer Category Reforms for Small- and Mid-Cap Companies.

2 For comments in this regard, see, *e.g.*, the Society for Corporate Governance's comment letter, available here, and other comments, available at SEC.gov | Comments on Executive Compensation Roundtable.

With this shift in the backdrop, public companies are largely now focused on their obligations during the current reporting cycle, under the existing disclosure regime. The business environment presents additional complexities, including emerging challenges and opportunities in artificial intelligence (AI), economic uncertainty and geopolitical developments. These trends have resulted in a wide range of changes confronting public companies, such as the adoption of cost efficiency measures and workforce reductions, while capitalizing on new growth opportunities in AI, as further discussed in our Disclosure Considerations in Part II below. Companies should critically evaluate their annual report disclosures, focusing on materiality assessments, compliance with classic SEC areas of focus such as non-GAAP disclosures and internal consistency across all documents publicly released by public companies, including earnings releases and investor presentations.

Part I: Top housekeeping considerations

As in our prior annual alerts, we begin with our top housekeeping reminders for preparing Annual Reports on Form 10-K this year, as follows:

1. **10-K exhibits:**

   - *Confirm any appropriate updates to your insider trading policy and file the company's insider trading policy as Exhibit 19 to the Form 10-K.* This is the second year that insider trading policies must be filed as Exhibit 19 to Form 10-Ks, pursuant to recent SEC rule amendments.[3] All public companies, including SRCs and EGCs, must comply with this requirement.[4] Ahead of the filing this year, companies should review their insider trading policies and consider whether any updates or changes should be made. For insights on key policy provisions including standard blackout periods, see our second annual survey of insider trading policies.[5] In addition to this exhibit requirement, companies are also required to disclose whether they have adopted an insider trading policy[6] and to tag this disclosure in inline XBRL.[7] This information should be included in the annual meeting proxy statement and incorporated by reference into or otherwise included in the Form 10-K,[8] which should refer to any specific sections of the proxy statement being incorporated by reference.[9]

   - *Beyond the Insider Trading Policy exhibit*: Remember to review your entire 10-K exhibit list, including the following: (1) confirm that all required exhibits are filed under Item 601 of Regulation S-K[10], including: (i)

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3 See Item 408(b) of Regulation S-K. Under Release Nos. 33-11138; 34-96492, Insider Trading Arrangements and Related Disclosures, the requirement began for 10-Ks covering a full fiscal period on or after April 1, 2023, meaning the Form 10-K for the 2024 fiscal year filed in 2025. For SRCs, the requirement applies to the first filing covering a full fiscal period on or after October 1, 2023. *See also,* the Small Entity Compliance Guide and C&DIs 120.26-120.28.

4 *See* Item 601 of Regulation S-K. If a company's insider trading policies are contained in a code of ethics compliant with Item 406 of Regulation S-K 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 For example, thirty-six out of the 50 companies surveyed (or 72%) impose a specified quarterly blackout period, or a set period each quarter when all or certain insiders are prohibited from trading in the company's stock given their access to MNPI about the results of the fiscal quarter. This was a shift from our survey in 2024, where all of the policies surveyed specified a quarterly blackout period. The companies in 2025 that did not impose a specified quarterly blackout period in their insider trading policies were mainly in the biotechnology and pharmaceuticals sectors (as opposed to other industries, including energy, utilities, manufacturing and financial services).

6 *See* Item 408(b) of Regulation S-K. 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*."

7 *See* Item 408(b)(3) of Regulation S-K.

8 Instruction G(3) of the Form 10-K permits the information required by Part III (Items 10, 11, 12, 13 and 14) to be incorporated by reference from a company's annual meeting proxy statement, if such proxy statement is filed not later than 120 days after the end of the fiscal year covered by the Form 10-K.

9 *See* Rule 12b-23 of the Exchange Act, which requires that companies "include an express statement clearly describing the specific location of the information you are incorporating by reference. The statement must identify the document…and the location of the information within that document."

10 This includes the description of securities for securities registered under Section 12 of the Exchange Act. *See* Item 601(b)(4)(iv) of Regulation S-K.

required exhibits filed since last year on Forms 8-K and 10-Q, (ii) the required clawback policy under Item 601(b)(97) of Regulation S-K,[11] and (iii) the consent of the auditors under Item 601(b)(23)(ii) to incorporate the financial statements from the Form 10-K into the company's current registration statements, which must be updated to include any newly filed registration statements and should remove any registration statements that are no longer effective; (2) remove outdated exhibits no longer required to be filed, such as material contracts that have been fully performed; and (3) confirm any permissible redactions in accordance with the three separate avenues for omitting information in exhibits under Item 601 of S-K – *(1) Personal Privacy; (2) Schedules or Similar Attachments; and (3) Confidential Business Information* – as explained in our 2023 Annual Memo's "*Exhibit Index Reminders*." For schedules, companies are reminded that, in general, they may omit schedules from exhibits under Item 601(a)(5) and need not include a related footnote in the exhibit index, provided that the schedules do not contain material information, among other requirements.[12]

2. **Confirm your filing status for 2026.** As always, it is important to confirm your filing status and filing deadline. This year's Form 10-K is due on **Monday, March 2, 2026** *for large accelerated filers*, **Monday, March 16, 2026** *for accelerated filers*, and **Tuesday, March 31, 2026** *for non-accelerated filers*.[13] To confirm your filing status, keep in mind that:
   - *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, 2025 for calendar year end companies) by multiplying (a) the number of shares of common stock on that day *held by non-affiliates*[14] 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."
   - *Large Accelerated, Accelerated and Smaller Reporting 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," or did not qualify as a "smaller reporting company," the thresholds to now move into each respective status are lower than those required for the initial qualification (*i.e.,* 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, or for the SRC public float test, less than $200 million as opposed to $250 million).[15]

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11 For the Form 10-K exhibit list, companies can use a description aligned with Item 601(b)(97), "Policy relating to recovery of erroneously awarded compensation, as required by applicable listing standards adopted pursuant to 17 CFR 240.10D-1."

12 See Item 601(a)(5), which states that "*schedules (or similar attachments) to the exhibits required by this Item are not required to be filed provided that they do not contain information material to an investment or voting decision and that information is not otherwise disclosed in the exhibit or the disclosure document*." The rule also requires companies that omit schedules to provide a list in each exhibit briefly identifying the contents of all omitted schedules, but this list is not required if such information is already included within the exhibit in a manner that conveys the subject matter of the omitted schedules.

13 *See* the SEC's helpful information on filing deadlines.

14 "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 Commission has indicated that status as an officer, director or 10% stockholder is one fact which must be taken into consideration in such inquiry. *See* American-Standard, SEC No-Action Letter (October 11, 1972).

15 *See* Rule 12b-2 of the Exchange Act for the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company," and the SEC's helpful guides for determining filing status and smaller reporting company 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. In addition, for the revenue test to qualify as an SRC, as opposed to the public float test, the lower thresholds also differ and are 80 percent of the prior thresholds under which it failed to qualify as an SRC (i.e., less than $560 million in public float (if it previously had more than $700 million in public float under the public float prong of the revenue test) and less than $80 million in revenue (if it previously had more than $100 million in revenue under the revenue prong of the

- *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.

3. **Clawback checkboxes:** As a reminder, due to the requirement to adopt a clawback policy and make related disclosures pursuant to SEC and stock exchange rules, the cover page of the Form 10-K now includes two clawback checkboxes: The first of these "clawback" checkboxes must be marked if the Form 10-K filing reflects the "*correction of an error to previously issued financial statements*," and the second "clawback" checkbox must be marked if an error correction resulted in a financial statement that "*required a recovery analysis of incentive-based compensation*." Beyond the cover page checkboxes, if your company was required to prepare an accounting restatement, detailed disclosure regarding any clawback is required to be included in the annual meeting proxy statement (and incorporated in or included in the 10-K).[16]

   On April 11, 2025, the SEC issued six new compliance and disclosure interpretations (C&DIs) addressing the clawback checkboxes on the Form 10-K cover page (these C&DIs align with White & Case guidance in our January 2024 Annual Memo). Among other items, the SEC's April 2025 C&DIs confirm that:

   - *Under C&DI 104.20.* The first clawback checkbox must be marked if the filing reflects a change to previously issued financial statements that represents the "correction of an error" under GAAP, which includes "Big R" restatements and "little r" restatements. On the other hand, "out-of-period adjustments" (i.e., the correction of an immaterial prior period error that is recorded in the current year) do not require Checkbox #1 to be marked, since previously issued financial statements are not being revised in such situations.
   - *Under C&DI 104.21.* The second clawback checkbox must be marked if a big "R" or little "r" restatement "required a recovery analysis" – even when, after applying the clawback recovery policy, a company determines that no recovery of erroneously awarded compensation is required. This would include circumstances when (1) no incentive-based compensation was received by any executive officers during the relevant time frame or (2) incentive-based compensation was received but was not based on a financial reporting measure impacted by the restatement. In addition, the company must briefly explain why application of its recovery policy resulted in no recovery.

As further described below, an additional four clawback C&DIs provide clarifications on the applicable years and filings when checkboxes are (or are not) required to be checked (*see* C&DIs 104.22 through 104.24), as well as considerations for interim period restatements (*see* C&DI 104.25).[17]

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revenue test)). As a reminder, for SRCs, the revenue test is based on revenues in the most recent fiscal year completed before the last day of the second fiscal quarter. *See* Section 5110.3 of the Division of Corporation Finance Financial Reporting Manual.

16 This disclosure is required under Item 402(w) of Regulation S-K in the proxy statement and incorporated by reference from Part III, Item 11 of the Form 10-K. Under Item 402(w), companies are also required to disclose if there was an outstanding balance of unrecovered excess incentive-based compensation relating to a prior restatement. This information may also be included in proxy statements and incorporated by reference into the Form 10-K.

17 These three additional C&DIs address the following:

- ***Checkboxes Not Required to be Checked in Second Year (But Item 402(w) Disclosure May Be Required) (Questions 104.22 and 104.23)***: After filing an amended 20X3 10-K where both boxes were checked, an issuer includes the same restated financial statements in its subsequent 20X4 annual report. Assuming there are no additional restatements, the Staff will not object to the check boxes remaining unmarked on the cover page of the 20X4 annual report. However, the proxy or information statement filed during 20X5 that includes 20X4 executive compensation information pursuant to Item 402 must include the disclosure of Item 402(w)(2) of Regulation S-K. The Commission has stated that this information is similar to other executive compensation information required by Item 402 and is likely to serve a similar purpose for investors in evaluating the issuer and making voting decisions. This disclosure is required even if the company included in the amended 20X3 annual report information explaining why application of its recovery policy resulted in no recovery and also when the company already provided such disclosure in the annual report.

4. **D&O questionnaire considerations:** Although there are no required changes this year, companies may want to consider expanding the director skills sections of their D&O Questionnaires to collect information sufficient to assess expertise in cybersecurity and AI, reflecting the growing need for technological fluency at the board level. In addition, companies may consider reassessing questions designed to elicit information on directors' diversity characteristics, given that Nasdaq diversity rules were overturned and proxy advisory firm and investor policies have largely removed director diversity requirements (*also see* the section entitled "*Reassess Human Capital Management and Diversity, Equity and Inclusion (DEI) Disclosures*" below).[18]

Appendix A of this client alert provides additional housekeeping reminders, including (1) additional D&O questionnaire considerations, and (2) considerations for outstanding registration statements.

Part II: Key disclosure considerations

1. **Consider artificial intelligence for 10-K risk factors and business sections, to the extent material.** New AI technologies present both significant opportunities and risks for companies, and disclosure on AI has become a significant disclosure trend. Among the Fortune 100, more than 85% addressed AI in their risk factors last year (up from over 65% in the prior year), and over one-third of the Fortune 100 (or 36%) disclosed AI in a standalone 10-K risk factor (up from 14% in the prior year).[19] To date, AI risk factor disclosures have generally focused on, among other items, risks arising from current and evolving AI regulations; AI-specific cybersecurity exposures; risks that AI systems may fail, under-perform, or disrupt business operations if they produce incorrect or unreliable outputs; and competitive pressures if other market participants deploy AI more effectively.

   In addition to risk factor disclosures on AI,[20] companies should consider any appropriate disclosures about the ways in which AI has materially impacted (or may in the future impact) their business, including their business strategy, capital expenditures, productivity and efficiency, competitive position, workforce and/or customer demand for products, which, depending on the nature of the issuer's business and its particular facts and circumstances, might be included in the "Business" section of their Annual Report on Form 10-K or trend disclosure in the MD&A.

   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. In light of the recent SEC focus on this issue, companies should be cautious not to overstate the benefits of AI for their businesses and assess whether any of their claims about their reliance on AI could be construed as misleading. In April 2025, the SEC filed an action against the founder

- ***Checkboxes Required to be Checked in Form 10-K Even if Restatement Previously Disclosed in Another Filing (Question 104.24)***: If a company initially reports a restatement of an annual period in a form other than Form 10-K such as in a Form 8-K or a registration statement, it still must check the boxes on the cover page of the first Form 10-K that is filed which includes the restated annual period.
- ***Checkboxes Not Required to be Checked for Interim Financial Statement Restatements (But Item 402(w) Disclosure Is Required) (Question 104.25)***: If a company determines that it is required to prepare restatements of its prior quarterly periods, it is not required to mark any of the check boxes on the cover page of its annual report because the restatements do not impact the annual periods in the filing. However, it must still provide Item 402(w) disclosure because, for purposes of that disclosure, an accounting restatement is not limited to restatements that only impact annual periods.

[18] To this end, companies may consider whether to maintain, revise or remove such language in light of these developments, their Board preferences and investor policies, but to the extent companies continue to disclose diversity characteristics, the questionnaire should continue to confirm and obtain consent to disclose such information. *See* C&DI Question 116.11 available at: SEC.gov | Regulation S-K

[19] *See* EY report, "Cyber and AI Oversight Disclosures: What Companies Shared in 2025", (October 2025). Also *see* Deloitte report, "Disclosure Trends From the 2024 Reporting Season", (April 2025), which reports that approximately 84% of Fortune 500 companies discussed AI in their most recent Form 10-Ks, with 42% of such disclosures appearing in the business section, 95% in the risk factor section and 25% in MD&A.

[20] For information on addressing AI in risk factors, see our forthcoming alert, Key Considerations for Updating Annual Report Risk Factors in 2026.

and former CEO of a mobile shopping application company alleging that he made false and misleading statements to investors about the company's purported AI technology.[21]

2. **Reassess human capital management and diversity, equity and inclusion (DEI) disclosures:** The fiscal year 2025 Form 10-K is the sixth annual report in which US public companies must comply with amended Item 101 of Regulation S-K, which requires a description to the extent material of "any human capital measures or objectives" that the company "focuses on in managing its business, such as, depending on the nature of the business and workforce, measures or objectives that address the development, attraction and retention of personnel." Notably, for this section of the 10-K, there has been a significant shift in diversity-related human capital disclosures in 2025, fueled, in part, by a series of executive orders issued by President Trump aimed at eliminating DEI programs, including one which called on agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."[22] For example, 60% fewer S&P 500 companies used the phrase "diversity, equity and inclusion" in their 2025 Form 10-Ks compared to 2024.[23] Similarly, a White & Case survey of the 2025 Form 10-Ks of 25 large-cap companies found that all but one company reduced diversity disclosures, including by removing references to diversity statistics, EEO-1 data and recruiting strategies to increase diversity. Many companies have reframed DEI-related disclosures to emphasize compliance with applicable laws, merit-based opportunities, skills-based hiring, company culture and broader workforce development, while reducing language on diversity and inclusion and/or eliminating disclosures on workforce demographics. These reframed disclosures focused instead on descriptors like "merit-based", "excellence" and "achievement", as well as "belonging," "engagement" and "supporting all employees". In White & Case's Form 10-K survey, over half of the surveyed companies that reduced or removed DEI language added this type of reframed language. In light of this shift in focus, companies should reassess their disclosure and ensure it is updated and aligned with their current priorities and policies on human capital management, including those priorities adopted at the Board level, senior management and investors.[24]

3. **Cybersecurity:** For the third year, public companies are now required to include mandatory cybersecurity disclosures in Form 10-Ks and are required to tag such disclosure in Inline XBRL.[25] For a detailed discussion of the SEC's requirements for cybersecurity disclosure, including guiding principles for preparing the disclosure, see our 2024 Annual Memo. In terms of recent SEC focus areas for this disclosure, there were only three SEC comment letters on Form 10-K cybersecurity disclosures issued after the start of the second Trump

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21 According to the SEC's complaint, filed on April 9, 2025, between spring 2019 and December 2022, the former CEO allegedly marketed the company as a mobile shopping application that used AI to process transactions, including allegedly telling investors that the application used automated technology that relied on AI to complete purchases made through the application without human involvement. However, the company actually relied in large part on contract employees to manually input users' orders placed on the app; the company's success rate for completed transactions was lower than what he represented to investors; and the app was not able to use AI to complete purchases. The SEC's complaint charged the former CEO with violations of Section 17(a) of the Securities Act of 1933 and of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The U.S. Department of Justice (DOJ) also filed a parallel action against the former CEO.

22 In addition, the DOJ issued a memorandum focused on investigating and eliminating purportedly illegal DEI programs in the private sector in conjunction with these executive orders. This was followed by DOJ guidance for recipients of federal funding to ensure they do not engage in unlawful discrimination, which emphasized the significant legal risks of initiatives involving discrimination based on protected characteristics.

23 "How Corporate America is Retreating from D.E.I." by Emma Goldberg, Aaron Krolik and Lily Boyce (New York Times, March 13, 2025), available here.

24 The fiscal year 2025 Form 10-K is the sixth annual report in which US public companies must comply with amended Item 101 of Regulation S-K, which requires a description of human capital resources and human capital measures or objectives that the company focuses on in managing its business, to the extent material to the company as whole.

25 *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 iXBRL to tag these disclosures, which includes a specific flag for "Cybersecurity Risk Materially Affected or Reasonably Likely to Materially Affect Registrant."

administration,[26] all of which addressed companies' failure to include the required Item 1C disclosure.[27] Beyond SEC comments, deficiencies in cybersecurity disclosure remain a target for litigation, and companies should therefore continue to focus on fundamental lessons from prior court decisions that underscore bedrock disclosure principles of materiality and accuracy, including:

- ***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.[28]
- ***Evaluate and update existing disclosures*** to reflect changing circumstances and the company's changed risk profile as a result of any recent cybersecurity incident.[29]
- ***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 company to avoid revealing critical information about its cybersecurity controls or risk to protect against future cyberattacks.[30]

4. **Remember to review and update risk factors.** Risk factor disclosure is a critical part of the Form 10-K, and companies should consider developments in 2025 as they review and update their risk factors. These considerations include developments with respect to (1) AI and related impacts, as referenced above, (2) economic uncertainty and recent cost efficiency measures impacting businesses, (3) political conditions in the US and the risk of future government shutdowns, and (4) wars and other international geopolitical developments, including the imposition of tariffs and recent US military operations in Venezuela. For a discussion of these developments and important tips for drafting risk factors, see our forthcoming alert, Key Considerations for Updating Annual Report Risk Factors in 2026.

5. **MD&A considerations.** As in prior years, MD&A has remained one of the top targets of SEC Staff comments, with most comments in 2025 focused on the requirements in Item 303 of Regulation S-K, including:
    - the ***discussion and analysis of results of operations***, including a description and quantification of each material factor, unusual or infrequent event or other development, that in each case has caused changes in the results of operations between periods (for example, these comments have highlighted changes related to a condensed labor market, wage inflation, global supply chain issues and inflation affecting revenues and underwriting);[31]

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26 The decline in comments may reflect a shift in priorities for the SEC's newly-created Cyber and Emerging Technologies Unit announced in February 2025, which had noted it would focus on "public issuer fraudulent disclosure relating to cybersecurity," indicating a possible move towards enforcement actions premised on traditional concepts of fraud and away from targeting disclosures meeting a lower negligence standard. See SEC.gov | SEC Announces Cyber and Emerging Technologies Unit to Protect Retail Investors.

27 Previous SEC comment letters have included requests for more detailed descriptions of board/management oversight, expertise, and processes for managing cyber risks, clarification on third-party involvement, and ensuring disclosures are not omitted or vague.

28 For example, *see* 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.

29 For example, *see* 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."

30 For example, *see* 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.

31 For example, see the following SEC Staff comment: "Where a material change in a line item is attributed to two or more factors, including any offsetting factors, the contribution of each identified factor should be described in quantified terms, if reasonably practicable. Please revise your disclosures in future filings accordingly. Similar revisions should be considered throughout your results of operations disclosures, such as in your discussion of the change in research and development and selling, general and administrative expenses. Refer to Item 303(a) of Regulation S-K and Section III.D of SEC Release No. 33-6835."

- the ***discussion of known trends or uncertainties*** that are reasonably expected to materially impact near and long-term results, including additional disclosure on the impact of matters such as store closures, billing problems, discounting, unneeded inventory, supply chain disruptions, inflation and increases in interest rates;[32]
- ***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;[33]
- ***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;[34] and
- *the* ***metrics used by management in assessing performance and use of key performance indicators (KPIs)****,* including requests for disclosure on how they are calculated and period over period changes,[35] how KPIs are used by management and why they 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 presented inconsistently.[36]

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 they provide sufficiently specific and thorough analyses.

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32 For example, "Please discuss in future filings whether supply chain disruptions or inflation have materially affected your outlook or business goals. Specify whether these challenges have materially impacted your results of operations or capital resources and quantify, to the extent possible, how your sales, profits, and or liquidity have been impacted. Revise also to discuss in future filings any known trends or uncertainties resulting from mitigation efforts undertaken, if any. Explain whether any mitigation efforts introduce new material risks, including those related to product quality, reliability, or regulatory approval of products."

33 For example, "We note your disclosure which refers the reader to the Notes to the Consolidated Financial Statements for information regarding the recognition of revenue. Please revise future critical accounting estimates disclosures to provide insight into the judgments that are made in your revenue recognition process. The accounting estimate disclosures are designed to supplement the description of accounting policies in the notes to the financial statements and provide greater insight into the quality and variability of information regarding financial condition and operating performance. Typical disclosures discuss the types of assumptions underlying the most significant and subjective estimates, provide a sensitivity analysis of those assumptions to deviations of actual results, and disclose the circumstances that have resulted in revised assumptions in the past. As an example, we note that significant judgment is used in determining total contract cost for revenue that is recorded over time using the cost-to-cost method."

34 For example, "We note that you raised capital in financing transactions and had significant negative cash flows from operations for both the fiscal years presented. Please expand your Liquidity and Capital Resources section to identify any material liquidity deficiencies. Address any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in liquidity increasing or decreasing in any material way. Your discussion should analyze your ability to meet your liquidity needs both on a long-term and short-term basis. Also, tell us how you considered the going concern guidance in ASC 205-40. Provide us with your proposed future disclosure."

35 For example, "We note in your earnings calls that you discuss net revenue per client and inventory turnover. If these metrics are used by management to manage the business, and promote an understanding of the company's operating performance, they should be identified as key performance indicators and discussed pursuant to Item 303(a) or Regulation S-K and Section III.B.1 of SEC Release No. 33-8350. Please tell us your consideration of disclosing these metrics, or other key performance indicators used."

36 For example: "We note your disclosure of revenue per customer contract in your earnings release filings and investor presentations on your website which appears to be a metric. We further note references to and discussions of changes in this metric in your 10-Q and 10-K filings. In future filings, please provide the following disclosures for any metrics disclosed (refer to SEC Release No. 33-10751): [h]ow the metric is calculated, including any estimates or assumptions underlying the metric or its calculation; [t]he reasons why the metric provides useful information to investors; and [h]ow management uses the metric."

See our alert, "SEC Releases New Guidance on KPIs", available here.

6. **Mind the non-GAAP.** The SEC Staff continues to focus on non-GAAP financial measures in its comment letters, following the release of updated non-GAAP C&DIs in December 2022[37] (for a summary of these updates, see "Five Key Reminders on Non-GAAP Compliance" in our 2023 Annual Memo).

   In 2025, many of the Staff's comment letters targeting non-GAAP disclosures focused on (in order of frequency)[38]:

   - the appropriateness of specified adjustments to eliminate normal, recurring cash operating expenses or items identified as non-recurring, infrequent, or unusual;[39]
   - labeling and identification of non-GAAP measures;[40]
   - the presentation with equal or greater prominence of the most directly comparable GAAP financial measure;[41]
   - the use of individually tailored accounting principles;[42]
   - disclosure regarding the reasons why management believes the non-GAAP presentation provides useful information to investors;[43] and
   - reconciliations from the most comparable GAAP financial measure.[44]

7. **Back to basics on environmental disclosures.** Although the SEC has withdrawn its defense of recently adopted and highly prescriptive SEC rules providing for extensive new climate-related disclosures,[45] companies should continue to consider their environmental-related disclosures in light of existing principles-based materiality requirements and guidance, including the SEC's 2010 climate change disclosure guidance and the

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37 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.

38 *See* Price Waterhouse Coopers article, "Non-GAAP measures: SEC staff comments" (May 23, 2025).

39 For example: "As a related matter, we see that Contribution Margin is adjusted to exclude costs in geographies that are in implementation and are not yet generating revenue. Please also revise future filings to remove the adjustment since the costs relate to normal recurring costs to grow your business. Reference Question 100.01 of the CD&I related to non-GAAP Financial Measure Updated December 13, 2022."

Additionally, Staff comments in this regard have focused on non-GAAP adjustments related to frequent restructuring and acquisition-related costs, where the Staff's comments have asked companies to (i) detail the facts and circumstances supporting an adjustment for what could be a recurring cost and (ii) explain and quantify the components of these adjustments.

40 For example: "We note your presentation of several non-GAAP measures including revenue and gross margin excluding acquisitions, gross margin excluding the impact of amortization of acquired software and income tax provisions and effective tax rate excluding various items; however, you have not provided the disclosures required disclosures by Item 10(e)(1)(i) of Regulation S-K nor have you labelled these items as non-GAAP. Please revise to provide the required disclosures or alternatively incorporate the quantitative impact of these items in your discussion of the changes in the respective line items."

41 For example: "You present numerous non-GAAP measures but do not disclose the comparable GAAP measures. Please revise to include the comparable GAAP measure for each non-GAAP measure presented with equal or greater prominence."

42 For example: "We note you include adjustments in arriving at net operating profit after taxes that appear to remove your operating lease rent expense under GAAP and replace it with estimated depreciation and include lease adjustments in arriving at average invested capital. As this appears to be an individually tailored method, please remove from your filling or advise. Refer to Question 100.04 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations."

43 For example: "Tell us and revise your disclosures in future filings to more fully explain what the measure "Tangible book value per common share excluding AOCI" represents and its usefulness to investors. In addition, please revise your Non-GAAP Financial Measures discussion in your investor presentation to clearly explain how, for each of your non-GAAP measures, investors should use the measure or what specifically the measure tells investors."

44 For example: "We note your presentation of the non-GAAP measure total gross margin. Please revise your reconciliation for this non-GAAP measure to the most directly comparable GAAP measure of gross margin in accordance with Item 10(e)(1)(i)(B) of Regulation S-K. If you do not believe gross margin that includes depreciation and amortization is the most directly comparable GAAP measure, please tell us why in your response. In addition, retitle this measure to avoid confusion with the GAAP measure of gross margin."

45 The SEC requested that the Eighth Circuit resolve the litigation on the merits. In September 2025, the Eighth Circuit ordered that the litigation would be held in abeyance until the SEC reconsiders or renews its defense of the Climate Rules, which seems very unlikely at this time. Therefore, the litigation remains paused and will likely remain so for the foreseeable future.

2020 amendments to Items 101 and 103 of Regulation S-K. In particular, under SEC rules, companies continue to be required to disclose any material effects of environmental regulations (under Item 101 of Regulation S-K), and to disclose any proceeding under environmental laws to which a governmental authority is a party, unless the registrant reasonably believes such proceeding will not result in monetary sanctions of $300,000 or more (under Item 103 of Regulation S-K). In addition, although the Staff did not issue any climate-related comments in 2025, companies should continue to be mindful of potential areas of SEC focus that were emphasized in the SEC's 2010 guidance, such as the physical effects of climate change on a company's operations and results[46] and any material expenditures for climate-related projects and compliance costs, which depend on the nature of the company's business and its particular facts and circumstances.[47]

8. **Director and officer Rule 10b5-1 plan adoption and termination disclosure.** As a reminder, under Item 408(a) of Regulation S-K, companies must disclose for each fiscal quarter in Form 10-Qs and for the fourth quarter for their upcoming Form 10-Ks: (1) whether any director or officer has adopted or terminated any Rule 10b5-1 plan or any other written trading arrangement that meets the requirements of a "non-Rule 10b5-1 trading arrangement,"[48] and (2) the material terms of the Rule 10b5-1 or non-Rule 10b5-1 trading arrangement. The "material terms" required to be disclosed include: (i) the name and title of the director or officer, (ii) the date of adoption or termination of the plan and its duration, (iii) the aggregate number of securities to be sold or purchased under the plan and (iv) whether the plan is a 10b5-1 plan or a non-Rule 10b5-1 trading arrangement. Pricing terms are not required to be disclosed. Although there is no requirement to affirmatively indicate if no plans were adopted for a particular quarter, S&P 500 companies have generally been affirmatively stating that "*During the quarter ended [date], no director or Section 16 officer adopted or terminated any Rule 10b5-1 trading arrangements or non-Rule 10b5-1 trading arrangements*" or otherwise simply affirmatively stating "*None*" under a subheading for the relevant item.

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46 For example: "We note disclosure in your Form 10-K 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 disclosure in your Proxy Statement…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 by your Form 10-K and explain whether increased amounts are expected in future periods." September 5, 2023.

In addition, the 2010 guidance noted that: "significant physical effects of climate change, such as effects on the severity of weather (for example, floods or hurricanes), sea levels, the arability of farmland, and water availability and quality, have the potential to affect a registrant's operations and results…".

47 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 in your Form 10-K and for any future periods." September 21, 2022.

48 A "non-Rule 10b5-1 trading arrangement" is defined under the rule as an arrangement where the director or officer asserts that: (i) at a time when they were not aware of MNPI about the security or the issuer of the security, they adopted a written arrangement for trading the securities; and (ii) the trading arrangement: (a) specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be subsequently purchased or sold; (b) included a written formula/algorithm for determining the amount of securities to be purchased or sold and the price at which the securities were to be purchased or sold; or (c) did not permit the covered person to exercise any subsequent influence over how, when, or whether to effect purchases or sales (and any other person who, pursuant to the trading arrangement did exercise such influence must not have been aware of MNPI when doing so). This requirement is intended to capture disclosure of plans that may be viewed by corporate insiders as reducing the likelihood of insider trading, but that do not follow all of the requirements of Rule 10b5-1(c) (including the cooling off period), so that insiders do not purposely enter into these plans solely to avoid disclosure of them.

Appendix A: *Additional Housekeeping Reminders*

1. The following Form 10-K form check items are not new this year, but were added in the past few years and should therefore be confirmed for your upcoming filing:

    a. Confirm that outstanding share data is presented consistently throughout their Form 10-K. For example, the SEC previously published a sample comment letter, which included a sample comment noting that "*the common shares outstanding reported on the cover page and on your balance sheet are tagged with materially different values.*"

    b. Update Item 6 in Part II to state "Item 6. [Reserved]" (instead of "Item 6. Selected Financial Data" from the prior Form 10-K) due to the SEC's elimination of the disclosure requirement for selected financial data in 2021.[49]

    c. Add "Item 9C" in Part II of the Form 10-K with the caption "Disclosure Regarding Foreign Jurisdictions that Prevent Inspections".[50]

    d. 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.[51] Companies should coordinate this tagging with the financial printer.

    e. For companies with mining operations,[52] consider whether expanded Regulation S-K 1300 requirements, which became mandatory for Form 10-Ks 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 10-K.[53] In addition, companies with property that is *individually* material to their business must obtain a technical report summary,[54] which must be signed by a "qualified person" (as defined in Regulation S-K 1300) and filed as Exhibit 96.1 to the Form 10-K.[55]

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49 For more information, *see* "Considerations for the Form 10-K in 2022: Mandatory Compliance with SEC's Rule Amendments to Items 301, 302 and 303" in our prior memo.

50 New Item 9C was added to the Form 10-K in 2021 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 10-Ks.

51 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.

52 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.

53 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.

54 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).

55 The technical report summary must be filed as Exhibit 96.1 to the Form 10-K the first time the company discloses mineral reserves or mineral resources in its Form 10-K. In addition, it must be filed as an exhibit in subsequent Form 10-Ks if: (i) there is a material change in the mineral reserves or mineral resources, as disclosed in the Form 10-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.

2. **Considerations for outstanding registration statements**: Consider how the filing of the Form 10-K may impact any outstanding registration statements. Specifically, if you have an outstanding registration statement on Form S-1, a post-effective amendment to the Form S-1 must be filed in order to incorporate the annual financial statements and other information from the Form 10-K into the Form S-1. You should also consider if you have become Form S-3 eligible, so that you can convert the Form S-1 into a Form S-3 and avoid future post-effective amendments for as long as you remain S-3 eligible. If you have an outstanding registration statement on Form S-3, ensure that you continue to meet the eligibility requirements for using the Form S-3 when filing your Form 10-K by taking the following steps: (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 as a non-WKSI 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 S-1. In addition, remember to update your auditor consent to include any newly filed registration statements and remove any registration statements that are no longer effective.

3. **D&O questionnaires.** Ahead of your Form 10-K filing, review and update your D&O questionnaires, which provide back-up and support for the disclosures to be included in your Form 10-K and proxy statement. In addition to the updates discussed in Part I, Section 5, companies should:

   (i) In light of last year's SEC enforcement action related to director independence, 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 provide examples of the types of relationships that could impair independence;[56]

   (ii) Consider updates to state that a director nominee consents to being named in the proxy statements of both the company and of any dissident shareholder, in order to comply with the new universal proxy rules;

   (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.[57]

[56] 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. 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.

[57] 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 10-K and Form 10-Q disclosure if the company (or any affiliate) knowingly engaged in certain sanctionable activities.

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