Public Company Responsibilities Memorandum

A Practical Guidance® Template by
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Summary

This template memorandum summarizes the obligations, restrictions, and liabilities that apply to a newly public company and its directors and officers under the federal securities laws. Topics addressed include the company's reporting and corporate governance obligations, as well as reporting obligations and other restrictions applicable to the company's directors and officers. This template includes practical guidance and drafting notes.

This template memorandum assumes that the company is a U.S. company with common stock listed on a national securities exchange. You should tailor the memorandum to the extent any assumptions do not apply and distribute it shortly before the company completes its initial public offering.

In addition to providing the memorandum, you may wish to conduct an information session with the company's board of directors and senior management to educate directors and officers about the federal securities laws. The discussion is usually accompanied by a PowerPoint or other visual presentation in summary form. For further information on public company responsibilities, see Corporations, Directors, and Officers: Potential Criminal and Civil Liability, Initial Public Offerings Resource Kit, Top 10 Practice Tips: Initial Public Offerings, Public Company Responsibilities Presentation, and NYSE and Nasdaq Board of Directors and Committee Governance Requirements Under Sarbanes-Oxley and Dodd-Frank.

MEMORANDUM

To: The Directors and Officers of [name of company] (the "Company")

Drafting Note to addressees

Recipients of Memorandum. This memorandum should be sent to all of the Company's directors and officers (as defined in Rule 16a-1(f) (17 C.F.R. § 240.16a-1) of the Securities Exchange Act of 1934, as amended (Exchange Act) (15 U.S.C. § 78a et seq.)). For more information on determining Section 16 officers, see Part V., Obligations under Section 16 of the Exchange Act below.

From: [firm / author of memorandum]

Drafting Note to Author of Memorandum

Author of Memorandum. This memorandum may come from the Company's general counsel or outside counsel.

Date: [date of distribution of memorandum]

Drafting Note to Date

Date of Distribution of Memorandum. Although this memorandum should ideally be distributed before the Company actually becomes public, there is no requirement to do so (or to distribute a memorandum at all). As a best practice, public companies should educate their directors and officers about what will be expected of them under the federal securities laws before they are actually subject to them. As new directors and officers join the public company, they should also receive this memorandum

Subject: Public Company Obligations and Liabilities of the Company and Its Directors and Officers

You are receiving this memorandum to inform you of the obligations and liabilities of the Company and its directors and officers under the federal securities laws following the Company's initial public offering ("IPO").

The federal securities laws include the Securities Act of 1933, as amended ("Securities Act"), the Securities Exchange Act of 1934, as amended ("Exchange Act"), and all rules and regulations promulgated by the Securities and Exchange Commission ("SEC") thereunder, as well as the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").

The requirements of the federal securities laws discussed in this memorandum are in addition to the requirements of state laws regarding corporate procedures, shareholder rights, and the duties and responsibilities of officers and directors, as well as various state "Blue Sky" laws which apply to offers and sales of the Company's securities, including grants of stock options and other securities to officers, directors, and employees for compensatory purposes. These state law provisions are not discussed in this memorandum.

This memorandum is intended to provide you with a basic knowledge of these issues but is a summary only. If you have any further questions or need further guidance, you should contact [name of legal contact] at [phone number] or [email address] ("Primary Contact").

PART I. **PUBLIC COMPANY REPORTING REQUIREMENTS UNDER THE EXCHANGE ACT.**

As the Company's common stock will be registered under Section 12 of the Exchange Act, the Company must file periodic and current disclosure reports with the SEC in order to keep shareholders informed on a current and timely basis.

1.1. **Reporting Company Categories in General.** Rule 12b-2 under the Exchange Act sets out the following categories of reporting companies:

(a) ***Accelerated Filer.*** An accelerated filer is a company which (i) had an aggregate worldwide market value of voting and non-voting common equity held by its non-affiliates (often referred to as "public float") of at least $75 million, but less

than $700 million as of the last business day of the company's most recently completed second fiscal quarter, (ii) has been subject to the reporting requirements of the Exchange Act for at least 12 months, (iii) has filed at least one annual report pursuant to the Exchange Act, and (iv) is not eligible to use the requirements for smaller reporting companies for its annual or quarterly reports under the revenue test in the definition of smaller reporting companies (annual revenues of less than $100 million in the most recent fiscal year for which audited financial statements are available).

(b) ***Large Accelerated Filer.*** A large accelerated filer is a company which (i) had a public float of at least $700 million as of the last business day of the company's most recently completed second fiscal quarter, (ii) has been subject to the reporting requirements of the Exchange Act for at least 12 months, (iii) has filed at least one annual report pursuant to the Exchange Act, and (iv) is not eligible to use the requirements for smaller reporting companies for its annual or quarterly reports under the revenue test in the definition of smaller reporting companies (annual revenues of less than $100 million in the most recent fiscal year for which audited financial statements are available).

(c) *Non-accelerated Filer*. Although not defined in Rule 12b-2, a "non-accelerated" filer is implicitly understood to be a company that has a public float of less than $75 million as of the last business day of the company's most recently completed second fiscal quarter.

(d) *Smaller Reporting Company*. A smaller reporting company is an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that (1) had a public float of less than $250 million or (2) had annual revenues of less than $100 million and either (a) no public float or (b) a public float of less than $700 million (in each of these cases, measured on the last business day of the issuer's second fiscal quarter).

(e) *Emerging Growth Company*. An emerging growth company is a company that had total annual gross revenues of less than $1.235 billion during its most recently completed fiscal year. A company that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of (1) the last day of the fiscal year during which it had total annual gross revenues of $1.235 billion or more, (2) the last day of the fiscal year following the fifth anniversary of the consummation of its IPO, (3) the date on which the company has, during the previous three-year period, issued more than $1.0 billion in non-convertible debt, or (4) the date on which the company is deemed to be a large accelerated filer.

Drafting Note to Section 1.1.(e)

Emerging Growth Company status. The annual gross revenue threshold for emerging growth company status was increased from $1.07 billion to $1.235 billion, effective September 20, 2022. See Inflation Adjustments under Titles I and III of the JOBS Act; Release Nos. 33-11098; 34-95715 (September 9, 2022) (2022 SEC LEXIS 2301).

1.2. **The Company's Reporting Category.** The Company will be a non-accelerated filer during the first year following its IPO.

[The Company also qualifies as a smaller reporting company / emerging growth company.]

Drafting Note to Section 1.2.

Company status. Include the bracketed language if the company qualifies as a smaller reporting company or emerging growth company. A company may qualify as either or both.

1.3. **Required Reports**. As a reporting company, the Company will be required to file the following reports with the SEC, which must comply with the disclosure requirements in Regulation S-K and Regulation S-X:

(a) ***Annual Report on Form 10-K.***

An annual report on Form 10-K ("Form 10-K"), which describes the business and financial condition of the Company, including, among other items, management's discussion and analysis of financial condition and results of operations ("MD&A") for the most recent two years, and three years of audited annual financial statements. Smaller reporting companies and emerging growth companies enjoy certain "scaled" (i.e., lesser) disclosure obligations, such as being required to provide only the previous two years of audited financial statements.

The disclosure requirements of Form 10-K are significant, and the Company should work closely with its legal counsel and auditors to prepare it.

Drafting Note to Second Paragraph of Section 1.3.(a)

Form 10-K. For further information on preparing Form 10-K, see Form 10-K Drafting and Review.

Signature requirements. As a best practice, all the Company's directors should sign the Form 10-K. The Company's principal executive officer (the chief executive officer (CEO)), principal financial officer (the chief financial officer (CFO)), and controller or principal accounting officer must also sign the Form 10-K.

Drafting Note to Signature Requirements

Form 10-K signatures. Although the SEC requires only a majority of directors to sign the Form 10-K, most companies request all directors to sign. Accordingly, you should not stress the technicality that only a majority of directors are actually needed. You want each of the directors to review the Form 10-K as carefully as possible, which they are more likely to do if they sign the document. Occasionally, a new director will be hesitant to sign a Form 10-K which covers periods before their tenure, and although that is acceptable, it may be noticeable if the company has always followed the best practice of having all directors sign the document

Many companies have their directors sign a power of attorney for the company secretary or other individual involved in the Form 10-K process to sign the Form 10-K on their behalf. Since powers of attorney must also be signed and can only apply to the particular filing or an amendment thereto, this is only a convenience because the power of attorney can be signed in advance (often at the board meeting preceding the filing) and ready for the filing. On the other hand, the signature page for the Form 10-K can just as easily be signed (unlike, for example, registration statements, which may be filed at varying times when the board is not available or its members difficult to track down). If a power of attorney is used, it must be filed as an exhibit to the Form 10-K.

As for all documents signed manually and filed electronically through the Electronic Data Gathering, Analysis and Retrieval system ("EDGAR"), the company must keep a copy of the manual signature page (or authentication document, as discussed below under "Electronic Signatures") for periodic disclosure documents for five years. See Rule 12b-11(d) (17 C.F.R. § 240.12b-11) under the Exchange Act.

Signature pages must be signed before the document is filed. It is never acceptable to obtain the physical signature after the fact.

Electronic Signatures. On November 17, 2020, the SEC approved amendments to Rule 302(b) of Regulation S-T (17 C.F.R. § 232.3032) which now allow electronic signatures to be used for SEC filings. Prior to these amendments, each signatory to an electronic SEC filing was required to manually sign a signature page or other document (the authentication document) before the filing. Under the new provisions, when a person signs electronically, the signing process for the electronic signature must:

- Require a physical, logical, or digital credential that authenticates the signatory's identity
- Provide for non-repudiation of the signature
- Attach the signature to the document being signed –and–
- Include a timestamp for the date and time of the signature

The company will be required to keep a copy of the authentication document for the signature for five years and present it to the SEC upon request. In addition, before a signatory initially uses an electronic signature to sign an authentication document, the signatory must manually sign an attestation agreeing that the electronic signature is equivalent for legal purposes to a manual signature.

The amendments to Rule 302(b) were effective December 4, 2020. See Electronic Signatures in Regulation S-T Rule 302, Release Nos. 33-10889; 34-90441; 39-2534; IC-34096 (November 17, 2020).

Filing due date. For a non-accelerated filer, the Form 10-K will be due 90 days after the Company's fiscal year-end.

For accelerated filers and large accelerated filers, the due dates are 75 and 60 days, respectively, after the fiscal year-end.

(b) ***Quarterly Report on Form 10-Q.***

A quarterly report on Form 10-Q ("Form 10-Q") includes significant operational or financial events that have occurred in the most recent quarter, as well as MD&A for the quarter and unaudited quarterly financial statements.

Drafting Note to First Paragraph of Section 1.3.(b)

Form 10-Q. For further information on preparing Form 10-Q, see Form 10-Q Drafting and Review.

Signature requirements. Form 10-Q must be signed by both a duly authorized officer, who signs on behalf of the Company, and the principal financial or chief accounting officer of the Company. If the CFO or chief accounting officer is also duly authorized to sign on behalf of the Company, one signature is acceptable as long as the Company clearly indicates the dual responsibilities of the signatory (See Instruction G to Form 10-Q).

Filing due date. For a non-accelerated filer, the Form 10-Q will be due 45 days after each of the first three fiscal quarters of each fiscal year.

For accelerated filers and large accelerated filers, quarterly reports are due 40 days after each of the first three fiscal quarters of each fiscal year.

(c) ***Current Report on Form 8-K.***

The Company must alert shareholders of certain specified material events that occur in between periodic filings by filing a current report on Form 8-K ("Form 8-K"). These include:

- Events relating to the Company's business and operations, including entering into or terminating a material definitive agreement, bankruptcy or receivership, and mine safety reporting
- Events relating to the financial information of the Company for each of the completed first three fiscal quarters of each fiscal year, including completing an acquisition or disposition of significant assets; results of operations and financial condition; creation of direct financial obligations or off-balance sheet arrangements; triggering events that accelerate or increase an existing material obligation; costs associated with exit or disposal activities; and material impairments
- Events relating to the securities and trading markets, including notice of delisting or failure to satisfy a continued listing rule or standard; transfer of listing; unregistered sales of equity securities; and material modification to rights of security holders
- Certain accounting matters, such as material restructuring charges or impairments, changes in independent auditor, or notice of potential restatement
- Certain corporate governance matters, including changes in control; departure, election and/or appointment of directors and/or officers; compensation arrangements of certain officers; amendments to the certificate of incorporation, bylaws, or code of ethics; waiver of the code of ethics; submission of matters to a shareholder vote and results of a shareholder vote; change in fiscal year; and shareholder director nominations
- Pension plan blackout under Regulation Blackout Trading Restriction ("Regulation BTR") –and–
- Regulation FD disclosure

The above is a summary of reportable events only. [Any officers or other members of management likely to be involved in planning a Form 8-K triggering event shall receive a separate detailed memorandum further explaining the requirements of Form 8-K.

Drafting Note to Paragraph of Section 1.3.(c) Following the Bullet List

Form 8-K. You may either distribute the Form 8-K memorandum separately or attach it to this memorandum, in which case you should amend the language accordingly. For a template memorandum, see Memorandum to Management on 8-K Triggering Events and Related Disclosure Reporting Procedures.

For further information on Form 8-K, see Form 8-K Drafting and Filing, Form 8-K Preparation for a Section 1 Event, Form 8-K Preparation for a Section 2 Event, Form 8-K Preparation for a Section 3 or Section 4 Event, Form 8-K Preparation for a Section 5 Event, Form 8-K Preparation for Asset-Backed Securities, Reg. FD Disclosure, Other Events, and Filing Exhibits, Executive Compensation Decisions: Form 8-K Disclosure, and Regulation FD.

Signature requirements. Form 8-K must be signed by an authorized officer of the Company.

Filing due date. The Form 8-K must be filed within four business days of the reportable event.

Drafting Note to Required Reports

Required Reports. For an overview of periodic and current reporting requirements, see Periodic and Current Reporting Resource Kit.

1.4. **Directors' and Officers' Role in Preparing Reports.**

Members of the Company's legal and finance departments will gather the information for a Form 10-K, Form 10-Q, or Form 8-K, draft the disclosure, and present the forms for management's review.

All directors should read the Form 10-K (and if you are on the audit committee, Form 10-Qs as well, which are in large part financial disclosure). Directors not on the audit committee will receive copies of the draft Form 10-Q before it is filed, as well as earnings releases filed with Form 8-K.

The CEO and the CFO should always review the Form 10-K, Form 10-Q, and any substantive Form 8-Ks, in part because of the certifications they sign, as discussed below.

The CFO should be heavily involved in preparing and reviewing periodic filings and should have input on the Form 10-Qs and financial parts of Form 10-Ks. The general counsel of a public company, depending on its size, may delegate most of the review and preparation to the in-house securities counsel or, if need be, outside counsel, but should read and review the Form 10-K, Form 10-Q, and any Form 8-Ks.

Other officers (besides the CEO, CFO, and general counsel) should review the Form 10-K and any substantive Form 8-Ks that relate to their area of responsibility or expertise (e.g., a business unit or the human resources department), in part because they have potential liability on these filings, as discussed later in this memorandum.

[If you are on the Company's Disclosure Committee, you may have additional responsibilities in reviewing and supervising the preparation of the Company's Form 10-Ks, Form 10-Qs or Form 8-Ks. You should refer to the Company's Disclosure Committee Charter Company for more information on your responsibilities.]

Drafting Note to Bracketed Paragraph of Section 1.4.

Insert the bracketed text if the Company has a disclosure committee, as recommended by SEC Release No. 33-8124 (Aug. 28, 2002) (67 Fed. Reg. 57276). Although not strictly required, disclosure committees have become increasingly common among public companies as best practice for a public company's disclosure controls and procedures. In 2002, the SEC adopted rules under Sarbanes-Oxley that set forth certain requirements relating to disclosure controls and procedures. Under Rules 13a-15(e) (17 C.F.R. § 240.13a-15) and 15d-15(e) (17 C.F.R. § 240.15d-15) under the Exchange Act, "disclosure controls and procedures" are defined as "controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the [Exchange Act] is recorded, processed, summarized and reported, within the time periods specified in the [SEC's] rules and forms."

Through SEC Release No. 33-8124, the SEC has recommended, but not required, the formation of a committee "with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis." For more information on disclosure committees, disclosure controls and procedures, see Disclosure Committees and Disclosure Committee Charter.

You should immediately notify the party preparing the periodic disclosure document as well as the Primary Contact of any material misstatements or omissions you find in any disclosure document that you review, provide information for, or are asked to sign. Your potential liability for these documents is discussed below.

1.5. **Certifications.**

The CEO and CFO are each required by Sections 302 and 906 of Sarbanes-Oxley to personally certify for each Form 10-K and Form 10-Q filed by the Company as to:

- The information contained in the Form 10-K and the Form 10-Q –and–
- The controls in place at the Company to ensure timely and accurate disclosure and financial statement reporting with the SEC

The certifications required by Section 302 of Sarbanes-Oxley state that the CEO and CFO each have reviewed the report being filed with the SEC and, based on each of their knowledge:

- The report does not contain any materially false or misleading statements with respect to the period covered by the report –and–
- The financial statements and other financial information fairly present in all material respects the financial condition, results of operations, and cash flows of the company presented in the report.

The CEO and CFO also must certify as to the design and effectiveness of the Company's disclosure controls and procedures as well as its internal control over financial reporting, as required under the Exchange Act.

Section 906 of Sarbanes-Oxley contains a second certification requirement for each periodic report containing financial statements that:

- The report fully complies with the SEC's reporting requirements applicable to the company –and–
- The information contained in the report fairly presents, in all material respects, the company's financial condition and results of operations.

The language of the certifications largely cannot be changed and they are attached as exhibits to the periodic filings. Neither certification is required for a Form 8-K.

The SEC can impose criminal penalties and substantial fines against the CEO and CFO personally if they submit inaccurate certifications.

Drafting Note to Section 1.5.

Certifications. For further information on CEO and CFO officer certifications, see CEO-CFO Certification Preparation, Sarbanes-Oxley Section 302 Certification, and Sarbanes-Oxley Section 906 Certification.

1.6. **Director and Officer Liability for Company Filings**.

As a director or officer of a public company, you will be subject to potential liability (including under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder) for material misstatements or omissions in the Company's SEC filings described above, as well as in any offering documents or materials used by the Company to offer and sell its securities to investors. In addition to private rights of actions by shareholders, you may also be subject to SEC civil penalties or fines or criminal prosecution, which currently can include:

- Civil penalties of up to $207,183 **per violation** –and–
- Criminal penalties for willful violations of up to $5 million **per violation** in some cases and **up to 20 years of imprisonment per violation**

The standard for liability in public securities offerings is very high (i.e., strict liability for material misstatements in or omissions from the offering document) and does not require intent, although there are certain defenses available to officers and directors.

Liability for ongoing SEC filings requires scienter or intent to deceive. Although overall you will be held more accountable for documents that you sign than for documents you do not sign, in matters of fraud the knowledge of the director or officer is more important than the technicality of who signed a particular document.

This is a very general summary of liabilities and facts and circumstances vary. The important point to note is that the integrity of the Company's public disclosure is of personal significance to each director and officer, and it is incumbent on each of you in your review of the Company's public disclosures or your submission of information for inclusion therein to ensure that you are aware of no material misstatements in or omissions from such disclosures.

Drafting Note to Section 1.6.

Liability under the Federal Securities laws. For further information on this topic with a focus on securities offerings, see Liability under the Federal Securities Laws for Securities Offerings.

PART II. **PROXY RULES AND REQUIREMENTS.**

2.1. **Proxy Statement.**

For the annual meeting and solicitation of shareholder votes, the Company must prepare and file a proxy statement that complies with Sections 14 and 14A of the Exchange Act and the related SEC rules.

In advance of the annual shareholders meeting and in connection with soliciting proxies or votes, the company must provide shareholders with a definitive proxy statement on Schedule 14A and file the proxy statement electronically on the SEC's electronic filing system ("EDGAR") with the SEC.

The information required in a proxy statement includes, among other things:

- A description of the matters to be voted upon, including the election of directors and a say-on-pay advisory vote regarding executive compensation as required by Dodd-Frank
- Extensive executive compensation information for directors and officers, particularly the CEO, CFO, and the three other most highly compensated executive officers, as well as stock ownership information for directors and officers –and–
- Detailed corporate governance information about the Company and its board of directors, including committees and policies.

The proxy statement must also contain a Compensation Committee Report signed by the members of that committee, stating that they have reviewed the Compensation Discussion and Analysis ("CD&A") included in the proxy statement, met with management to discuss the CD&A, and recommended the CD&A for inclusion in the proxy statement. The requirements for the CD&A, which include an explanation of the material aspects of the Company's executive compensation program, are found in Item 402(b) of Regulation S-K.

Emerging growth companies and smaller reporting companies are not required to include a CD&A in their proxy statements but may choose to do so on a voluntary basis.

The above is only a brief description of the proxy requirements and the Company should consult its counsel when preparing its proxy materials.

Drafting Note to Section 2.1.

Drafting Proxy Statements. For more information on drafting the proxy statement, see Proxy Statement and Annual Meeting Resource Kit, Proxy Statement and Annual Report: Drafting, Solicitation, and Distribution, and Top 10 Practice Tips: Proxy Statement and Annual Meeting.

2.2. **Preliminary Proxy Statement.**

The Company must file a preliminary proxy statement with the SEC if the subject matter of the annual meeting relates to a subject other than:

- Election of directors
- Election, approval, or ratification of accountants
- A shareholder proposal pursuant to Rule 14a-8
- A shareholder nomination pursuant to Rule 14a-11, applicable state law, or the company's governing documents, as these relate to the inclusion of a shareholder director nominee
- The approval, ratification, or amendment of an employee benefit plan, as defined in Item 402 of Regulation S-K
- A shareholder vote to approve or to determine the frequency of shareholder votes to approve executive compensation, or any other advisory vote on executive compensation, as required by the proxy rules (including §§ 14(a)(1) and 14(a)(2) of the Exchange Act and related rules thereunder) –or–
- Certain investment company matters

If other matters are to be acted on, a preliminary proxy statement must be filed with the SEC at least 10 calendar days prior to the date on which the Company intends to distribute the definitive proxy statement to the shareholders. The SEC will review and may comment on the preliminary proxy statement, which may delay distribution of the proxy statement. The Company should strive to file the preliminary proxy statement well in advance of the required 10-day period, particularly if it anticipated receiving any SEC comments on the proxy statement.

Drafting Note to Section 2.2.

Preliminary Proxy Statements. For more information on preliminary proxy statements, see Proxy Statement and Annual Report: Drafting, Solicitation, and Distribution.

2.3. **Annual Report.**

If the Company solicits proxies from its shareholders for use at an annual or special meeting called to elect directors of the company (as most companies do), Rule 14a-3(b) of Regulation 14A requires that the Company must, in addition to providing shareholders with a proxy statement, provide its shareholders with an annual report containing the information specified in the rule, including consolidated audited balance sheets as of the end of the two most recent fiscal years and audited statements of income and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S-X.

Rule 14c-3(a)(1) of Regulation 14C similarly provides that if an information statement relates to a shareholders' meeting at which directors will be elected, or to a written consent in lieu of a meeting, shareholders must receive an annual report containing the information in Rule 14a-3(b).

The disclosure requirements for an annual report are similar to those for Form 10-K, but also require the inclusion of a share performance graph.

Drafting Note to Third Paragraph of Section 2.3.

Drafting Annual Reports. For more information on annual reports, see Annual Report to Shareholders and Annual Meeting Logistics and Proxy Statement and Annual Meeting: Creating a Timeline and Checklist.

The Company may choose one of four formats for its annual reports:

- ***Glossy annual report.*** A standalone report printed on high quality paper with pictures and including a letter from the CEO or chairperson of the board of directors (or both) of the Company, as well as the SEC required information.
- ***Integrated annual report and Form 10-K.*** This report uses the Form 10-K (with an added share performance graph) as the annual report.
- ***10-K wrap.*** A 10-K wrap consists of the Company's Form 10-K (with a share performance graph included in either the Form 10-K or the wrapper, but not including the exhibits to the Form 10-K), around which the Company wraps several glossy pages (the wrapper) that typically include a cover page, letters to the shareholders from the CEO or chairperson of the board (or both), and an inside back cover providing certain corporate information (e.g., the names of the company's independent accounting firm and the transfer agent for its shares), and perhaps some limited state of the Company information of the kind typically provided in the glossy annual report.
- ***Summary annual report.*** A glossy annual report that contains only a chairperson's letter (if the Company chooses to provide one), summary financial data, some product information and management communications, and the report from the Company's independent accounting firm. The other information required for the annual report is provided in an appendix to the proxy statement.

2.4. **Notice and Delivery of Proxy Materials and Annual Reports.**

The Company must send a Notice of Internet Availability to shareholders at least 40 calendar days in advance of the meeting and mail a proxy card at least 10 days later.

The Company must deliver copies of its proxy materials (including annual reports) to:

- ***Shareholders.*** The Company may deliver proxy materials, including annual reports, to shareholders, either electronically by using the "notice only" model (which requires delivery of a Notice of Internet Availability of Proxy Materials) or the "full set delivery" model (which involves delivery of hard copies of the proxy materials). Regardless of the delivery method selected, Exchange Act Rule 14a-16(b) requires the Company to post its proxy materials, including its annual reports, on a publicly available website (which cannot be the EDGAR website). Exchange Act Rules 14c-2(d) and 14c-3(d) require that Company post its information statements and accompanying annual reports on a publicly available website in accordance with Rule 14a-16.
- ***SEC.*** The Company must mail seven copies of its annual reports to the SEC "solely for its information" not later than (1) the date the report is first sent or given to shareholders or (2) the date on which the company files a preliminary (or definitive, if no preliminary) proxy statement with the SEC. The Company may also deliver its annual reports to the SEC electronically through EDGAR, but this will require conversion of the annual report to the EDGAR format. The SEC staff stated in 2016 that it will consider such a report "available for its information" if a company posts its annual report on its website in lieu of mailing paper copies or submitting it on EDGAR if the report is posted by the applicable date as required by the rules and remains available for at least one year after posting. However, the SEC has recently proposed to amend this requirement to do away with paper submissions and mandate electronic submissions of annual reports in PDF.

- ***National Securities Exchanges.*** If the proxy statement is filed electronically, neither the New York Stock Exchange nor The Nasdaq Stock Market require hard copies.

Drafting Note to Section 2.4.

For more information about distributing proxy materials and annual reports, see Proxy Statement and Annual Report: Drafting, Solicitation, and Distribution.

PART III. **CORPORATE GOVERNANCE CONSIDERATIONS.**

Sarbanes-Oxley and Dodd-Frank implemented changes, either directly or through rules adopted by the national securities exchanges, to public company governance and disclosure intended to enhance independent auditing, make boards of directors more independent, empower shareholders, and provide increased transparency in disclosure, primarily regarding executive pay and accounting matters. Some of these reforms, to which the Company is currently subject, include:

- ***Audit committee requirements.*** The audit committee is responsible for, among other things, the appointment, compensation, and oversight of public accounting firms engaged audit or review the Company's financial statements and issue an audit or a similar report. Such firms must report directly to the committee. Each member of the audit committee must be an independent director. However, both the Nasdaq and NYSE rules allow the Company to "phase-in" or gradually adopt the independence requirements as follows: Under the Nasdaq rules (1) one member must satisfy the requirement at the time of the Company's listing of securities, (2) a majority of members must satisfy the requirement within 90 days of listing, and (3) all members must satisfy the requirement within one year of listing. Under the NYSE rules, the Company must have (1) at least one independent member on its audit committee by the listing date, (2) at least a majority of independent members on its audit committee within 90 days of the effective date of its registration statement, and (3) a fully independent audit committee within one year of the effective date of its registration statement. The Company must also disclose whether at least one member of the audit committee qualifies as a financial expert or why it has no such member.

Drafting Note to Audit Committee Requirements

Audit Committee Requirements. For more information on audit committee requirements, see Audit Committee Resource Kit, Audit Committee Standards Chart, and NYSE and Nasdaq Board of Directors and Committee Governance Requirements Under Sarbanes-Oxley and Dodd-Frank — Audit Committee Standards.

- ***Whistleblower protections.*** The Company is prohibited from retaliation against employees by discharging, demoting, suspending, threatening, harassing, or otherwise discriminating against an employee's terms and conditions of employment for lawfully providing information or assistance in an investigation by the SEC or other federal regulatory or law enforcement agency, any member or committee of Congress, or person with supervisory authority over the employee into any conduct that the employee reasonably believes constitutes a violation of SEC rules, any federal law prohibiting securities fraud, or various other federal statutes.

Drafting Note to Whistleblower protections

For more information about whistleblower protections, see Whistleblower Protections under Dodd-Frank and Sarbanes-Oxley and Market Trends 2020/2021: Whistleblower Protections. For a template whistleblower policy, see Whistleblower Policy.

- ***Code of ethics disclosure.*** The Company should adopt a code of ethics for its senior financial officers (i.e., its principal financial officer and controller or principal accounting officer, or persons performing similar functions) and disclose the policy in its annual report. If the Company does not adopt a code of ethics, it must explain in its annual report why it has not done so. [The Company's Code of Ethics is available at [_____]].

Drafting Note to Code of Ethics Disclosure

Code of Ethics. For more information on a code of ethics, see Code of Ethics Disclosure Requirements and Principal Executive and Senior Financial Officers Code of Ethics. If you already have a code of ethics, you may wish to direct the directors and officers to it.

- ***Compensation committee requirements.*** The compensation committee evaluates and determines compensation for the Company's senior management. Although a compensation committee is not required, if the Company has such a committee or a committee that performs such functions, it must be composed entirely of independent directors.

Drafting Note to Compensation Committee Requirements

Compensation Committee. For more information on compensation committee requirements, see Compensation Committee Resource Kit, Compensation Committee and Consultant Disclosure Requirements, and NYSE and Nasdaq Board of Directors and Committee Governance Requirements Under Sarbanes-Oxley and Dodd-Frank — Compensation Committee Standards.

- ***Executive compensation issues, including:***
  - Proposed pay-for-performance disclosure tying executive pay to a company's financial performance,
  - Pay ratio disclosure of the CEO's total compensation to the median total compensation of all Company employees other than the CEO –and–
  - Claw back of stock sale profits and bonuses received by the CEO and CFO in the 12 months following the filing of periodic reports necessitating restatement of the Company's financial statements. Note that the SEC has issued for public comments proposed rules that would require the national securities exchanges to require public companies to adopt, disclose, and comply with a compensation clawback policy as a condition to listing.

Drafting Note to Executive compensation issues

Executive compensation issues. For more information on executive compensation issues, see Dodd-Frank Act Executive Compensation, Executive Compensation Considerations in IPOs, Executive Compensation Disclosure and Governance Resource Kit, Dodd-Frank Executive Compensation: Key Provisions Q&A, Dodd-Frank Act Proposed Executive Compensation Rulemaking, Market Trends 2020/21: Pay Ratio Disclosures, Pay Versus Performance, and Incentive Compensation: Clawback Provisions.

- ***Prohibitions of loans from a company to its directors and officers.*** Under Section 13 of the Exchange Act, as amended by Sarbanes-Oxley, it is illegal for any company "directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of the" company.

Drafting Note to Prohibition of loans

Prohibition on director and officer loans. For more information, see SOX's Prohibitions against Loans to Directors and Officers.

PART IV. **REPORTING BENEFICIAL OWNERSHIP AND CHANGES IN BENEFICIAL OWNERSHIP UNDER SECTION 13 OF THE EXCHANGE ACT.**

Sections 13(d) and 13(g) of the Exchange Act mandate that beneficial owners of more than five percent of the Company's equity securities disclose information relating to their beneficial ownership by filing a Schedule 13D (or Schedule 13G, available in limited circumstances) with the SEC (and sending a copy to the Company). Under Exchange Act Rule 13d-3, beneficial ownership for these reporting purposes generally means having or sharing the power to vote or dispose of the securities.

Drafting Note to First Paragraph of Part IV.

Section 13 Reports. For further information on this topic, see Beneficial Ownership under Section 13 of the Exchange Act and Schedule 13D or 13G Filing Chart.

The triggering event for an initial Schedule 13D is an acquisition that results in a beneficial owner exceeding the 5% threshold. Upon a triggering acquisition, Rule 13d-1(a) requires that the beneficial owner file a Schedule 13D within 10 days after the acquisition. The 10-day period begins on the date of the acquisition (i.e., the trade date rather than the settlement date). During the 10-day filing window, the beneficial owner is not prohibited from acquiring additional securities of the same class. On the date of filing, the reporting person should disclose the current holdings as of that day (as well as recent acquisitions and dispositions as required by Schedule 13D). Note that in February 2022 the SEC proposed to shorten the filing period from 10 days to 5 days after the triggering acquisition.

A beneficial owner must amend a Schedule 13D if any material change occurs in the information provided in the preceding Schedule 13D or amendment. The obligation to amend a Schedule 13D arises not just from material changes in the percentage of securities beneficially owned by the reporting person, but from any other material change in the information set forth by the reporting person in the most recent Schedule 13D. In February 2022 the SEC proposed that the deadline to amend a Schedule 13D be one business day after the material change.

Drafting Note to Third Paragraph of Part IV.

For more information about the amendments proposed by the SEC in February 2022, see SEC Proposes Rule Amendments to Modernize Beneficial Ownership Reporting: Client Alert Digest.

The requirements of Section 13(d) also apply to the Company, and it will be required to report acquisitions of more than 5% of the securities of another public company.

PART V. **OBLIGATIONS UNDER SECTION 16 OF THE EXCHANGE ACT.**

Under Section 16 of the Exchange Act, Section 16 Reporting Persons (as defined below) are subject to the reporting requirements of Section 16(a) of the Exchange Act, civil liability for short-term profits under Section 16(b) of the Exchange Act, and criminal liability for short sales under Section 16(c) of the Exchange Act.

5.1. **Section 16 Reporting Persons.**

All of the Company's officers, directors, and 10% beneficial owners are reporting persons for purposes of Section 16 of the Exchange Act ("Section 16 Reporting Persons").

For purposes of Section 16 reporting, an officer is defined as the Company's:

- President
- Principal financial officer
- Principal accounting officer (or, if there is no accounting officer, the controller)
- Any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance) –and–
- Any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer

An officer of a subsidiary of the Company may be a Section 16 officer and executive officer for the Company if that person performs significant policy-making functions for the Company.

5.2. **Section 16(a) Reporting Requirements.**

Section 16(a) of the Exchange Act requires all Section 16 Reporting Persons to report their direct and indirect beneficial ownership (further discussed below) of the Company's securities to the SEC. Company securities include any equity

securities registered under Section 12 of the Exchange Act, any rights to equity securities (such as options, warrants, and restricted stock), or any instruments which derive their value from equity securities (such as phantom stock or restricted stock units). The rules do not apply to debt securities, which do not need to be reported unless they are convertible into equity securities.

(a) ***Determining Beneficial Ownership.***

Beneficial ownership for Section 16 reporting is broad and hinges on whether a person has a pecuniary interest in the securities, which means the opportunity to profit directly or indirectly from a transaction in the securities.

Although it may be relatively easy to determine your direct pecuniary interests (e.g., you hold shares in your name), determination of an indirect pecuniary interest can be complex and unintuitive. Indirect pecuniary interest often means you must report securities that you do not necessarily think of as owned by you.

For example, indirect pecuniary interests include:

- Shares held by immediate family members living in the same household
- A general partner's proportionate interest in the portfolio securities held by a general or limited partnership
- A person's interest in securities held by a trust under certain circumstances –and–
- A person's right to acquire equity securities through the exercise or conversion of any derivative security, whether or not presently exercisable

You must report ownership of such shares and any transactions in such shares just as you would for shares held directly in your name (although the applicable form will indicate you hold the shares indirectly).

Determining an indirect pecuniary interest is a very fact-specific inquiry and you should consult [name of Section 16 contact] at [phone number] or [email address] to discuss any possible indirect pecuniary interests that you may have.

Drafting Note to Section 5.2.(a)

Determining beneficial ownership. For further information on this topic, see Section 16 Compliance, Insiders, and Liability.

(b) ***Section 16(a) Reporting Forms.***

Section 16 Reporting Persons have personal liability to file the following reports with the SEC:

- ***Form 3. Initial Statement of Beneficial Ownership of Securities***

  Form 3 is an initial report that must be filed when a person becomes a Section 16 Reporting Person. You must list all the Company's equity securities you own on the Form 3. You must file Form 3 even if you do not own any Company securities.

  Form 3 must be filed within 10 calendar days of becoming a Section 16 Reporting Person (or, if a company is private at such time, then on the day that the company's registration statement for its IPO is declared effective).

- ***Form 4. Statement of Changes in Beneficial Ownership of Securities***

  Form 4 must be filed each time there is a change in the beneficial ownership of Company securities by a Section 16 Reporting Person (subject to limited exemptions). Examples of changes in beneficial ownership include transactions (e.g., purchases or sales) in the Company's common stock, as well as acquisitions and exercises of derivative securities, such as options, warrants, and convertible securities.

  Form 4 must be filed before the end of the second business day after which the reportable transaction has been executed. For public market purchases and sales, this is measured from the trade date, not the settlement date.

- ***Form 5. Annual Statement of Beneficial Ownership***

  Form 5 must be filed no later than 45 days after the Company's fiscal year-end when there has been at least one transaction in the Company's securities by a Section 16 Reporting Person that was not reported earlier in the year on Form 4, either due to an exemption from filing or a failure to report.

  If there were no transactions required to be reported, then a Form 5 is not necessary. If in a given year you have no transactions to report on a Form 5, the Company will request a representation from you to that effect.

(c) *Filing Section 16(a) forms*

Forms 3, 4, and 5 must be filed electronically with the SEC through EDGAR and posted to the Company's website within the end of the business day after the form is filed, remaining on the site for 12 months. Filing through EDGAR requires SEC access codes (which you may already have if you are or have been a director or officer of another public company).

[Due to the short time periods involved in a Section 16 filing, its electronic filing basis, and the public implications of a failure to file on a timely basis (as discussed below), the Company is willing to assist you in your required filings as a Section 16 Reporting Person. For that purpose, we have attached a power of attorney, which allows designated individuals at the Company to make filings on your behalf.]

Drafting Note to Section 5.2.(c)

Company filing forms on behalf of insider. Many companies assist their officers and directors in the required Section 16 filings (without assuming any liability for their accuracy or timeliness). This is especially true after 2003 when Sarbanes-Oxley shortened the filing deadlines for Section 16 filings and required that they be filed electronically. This memorandum assumes that the filings will be made by the Company for its directors and officers. More than 10% shareholders are usually institutional investors or otherwise sophisticated and may make their filings on their own without assistance from the company. For an example of a power of attorney that can be used for Section 16 filings, see Power of Attorney (To File Forms 3, 4 and 5 under Section 16(a)). If the Company will not assist with the filing, delete this paragraph.

Filing Section 16(a) forms. For further information on this topic, see Section 16 Forms: Guidance for Completing, Filing, and Amending and Document Submission to the SEC. Note that the SEC has proposed certain amendments to Forms 4 and 5 and Exchange Act Rule 16a-3 (17 C.F.R. § 240.16a-3). For information about the proposed amendments, see SEC Proposes Rule 10b5-1 Amendments and Related New Disclosure Requirements: Client Alert Digest.

(d) *Ramifications of Late or Missing Filings*

Any failure to file a Section 16 reporting form on a timely basis must be disclosed in the Company's proxy statement under a prominent heading, naming the individual who had the late or missing filing.

Drafting Note to First Paragraph of Section 5.2.(d)

Late filings. For further information on this topic, see Section 16 Compliance, Insiders, and Liability.

In addition, the failure to comply with Section 16 could result in any or all of:

- A cease and desist order from the SEC
- Fines based on each violation
- Criminal prosecution for intentional misstatements or omissions

Please note that the responsibility for making a Section 16 filing is yours, not the Company's, and the Company assumes no liability for the accuracy or timeliness of your report.

5.3. **Short-swing Liability Under Section 16(b) of the Exchange Act.**

(a) ***Liability.*** Under Section 16(b) of the Exchange Act, any combination of a purchase and sale, or sale and purchase, of Company securities by a Section 16 Reporting Person within six months of each other requires the Company to recover any profits realized from the transactions. This is referred to as "short-swing liability" and applies to any purchase and sale (including deemed purchases of the underlying securities if you acquire an option) regardless of how long you have owned the securities or which transactions occurred first.

Short-swing liability is strict liability and is imposed even if a Section 16 Reporting Person accidentally makes such trades, or does so in good faith, or otherwise. You do not have to trade on inside information to be liable under Section 16(b). Although your liability under Section 16(b) is to the Company itself, the Company cannot waive its right to recover the short-swing profits and any Company shareholder may sue to recover the profits on behalf of the Company.

You should pre-clear any transaction in the Company's securities. See Part X.. Pre-Clearance of Transactions in Company Securities below. Although the Company will assist you in endeavoring to avoid short-swing liability, the Company assumes no liability if this effort is unsuccessful.

Drafting Note to Liability

Section 16(b) liability. For further information on this topic, see Section 16 Compliance, Insiders, and Liability.

(b) ***Purchase and Sale.*** Purchases and sales include entering into a contract to purchase or sell if there are no conditions precedent and the purchaser or seller is irrevocably committed to purchasing or selling. Transactions in the six months prior to the Company's IPO can be matched to transactions after the offering. In addition, any transactions in the six months after you cease to become a director or officer can be matched with transactions that occurred while serving in that capacity.

Acquisition of an option to purchase shares at a fixed price may be deemed to be a purchase of the underlying shares. The sale of the underlying security can be matched to the purchase or acquisition of the option and if the sale occurs within six months of acquiring the option, can result in short-swing liability. The exercise of an option, however, is generally considered an exempt transaction under Section 16(b) and cannot be matched with any other transaction. In addition, the acquisition of options and other compensatory equity awards from the company, if properly approved and meeting other conditions, can be exempt from short-swing liability.

(c) ***Exemptions.*** Under SEC rules, there is a limited class of transactions that may be exempt from Section 16(b) short-swing liability, such as regular transactions under a 401(k) plan. Section 16(b) exempt transactions (which may include approved option grants and certain employee benefit plan purchases or sales) cannot be matched with other transactions, though in most cases they will still need to be reported.

5.4. **Prohibition of Short Sales Under Section 16(c) of the Exchange Act.** Section 16(c) of the Exchange Act makes it unlawful for a Section 16 Reporting Person to sell the Company's equity securities, if the person selling the security or their principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within 20 days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation. Although not specifically defined as such in the statute, this type of transaction is commonly referred to as a "short sale."

Willful violations by any person of any provision of the Exchange Act, including the provisions of Section 16, or any rules or regulations thereunder can result in a fine of not more than $5 million, a maximum of 20 years imprisonment, or both.

Drafting Note to Section 5.4.

For further information on this topic, see Section 16 Compliance, Insiders, and Liability.

PART VI. **INSIDER TRADING.**

Under Rule 10b-5 under the Exchange Act, it is unlawful for you or any other director, officer, or employee of the Company to buy or sell the Company's securities while in possession of material nonpublic information about the Company. You are also barred from buying or selling the securities of another company while in possession of material inside information about that company if the information was learned in performing your duties with the Company.

This prohibition applies to all purchases and sales of the Company's securities, including derivative securities such as options and warrants. All that is required for liability is knowing possession (i.e., awareness) of the material nonpublic information, not proof that the transaction was made in reliance on or based on the information. You are also prohibited from disclosing material nonpublic information about the Company to other persons, including family members (so called "tipping"), even if you personally do not trade.

The penalties for violating insider trading laws are severe, for both you as an individual and for the company as a controlling entity. They can include imprisonment for up to 20 years and fines of up to $5 million (or $25 million for entities), as well as civil penalties of up to three times the profits made or losses avoided.

To assist you in complying with this serious prohibition, the Company has adopted a [name of insider trading] (the "Insider Trading Policy"), which will be distributed to you and which you should consult for further information.

Drafting Note to Part VI. Insider Trading

Insider trading policy. You may wish to circulate a separate detailed memorandum on insider trading to the board and senior management. For a template memorandum, see Insider Trading Memorandum. For guidance on how to draft insider trading and related policies, and other forms of these, see Insider Trading Policies, Insider Trading Policy, and Securities Fraud and Insider Trading Policy.

Note that in SEC v. Panuwat, 2022 U.S. Dist. LEXIS 39584, the SEC has alleged violations of Rule 10b-5 (17 C.F.R. § 240.10b-5) based on "shadow trading," that is, where an insider used material nonpublic information about his company (that it was negotiating to be acquired) to trade not in his company's stock or that of the potential acquiring company but in the stock of a different company that was a competitor of his company.

PART VII. **PENSION FUND BLACKOUTS.**

Under Sarbanes-Oxley and Regulation BTR directors and executive officers may not purchase, sell, or otherwise acquire or transfer any equity security of the Company during pension plan blackout periods if they acquired the security in connection with their service as a director or executive officer. There is a rebuttable presumption that all your securities were so acquired. Pension fund blackouts are periods in which a majority of the participants in all of the Company's pension plans are prohibited from transferring their equity securities.

The purpose of prohibiting your trading during pension fund blackouts is to equalize treatment of directors and executive officers with other employees, who generally own their shares through pension or retirement accounts, so that directors and officers may not benefit from trading during periods in which other employees are prohibited from doing so. The Company is entitled to recoup any profits a director or officer receives from any trade in violation of this prohibition.

You will be notified of any pension fund blackout periods in advance, generally within 30 days of commencement of the blackout.

Drafting Note to Part VII. Pension Fund Blackouts

Pension Fund Blackouts. Section 306 of Sarbanes-Oxley (15 U.S.C. § 7244) and Regulation BTR (17 C.F.R. §§ 245.100 –104) set forth the rules for pension fund blackouts. A blackout is defined as any period of more than three consecutive days during which more than 50% of the participants of all of a company›s U.S. individual account retirement plans are suspended from transacting in the company›s equity securities under their accounts. Plans outside of the United States which are primarily for non-U.S. participants are excluded from this calculation.

Pension plan administrators generally have 30 days to provide notice to a company of a planned blackout under Rule 101-3 (29 C.F.R. § 2520.101-3), and the company must notify not only the directors and officers and the SEC. Rule 104 of Regulation BTR (17 C.F.R. § 245.104) provides that the notice to the SEC must be filed under Item 5.04 on a Form 8-K no later than the fourth business day after receipt of the plan administrator's notice.

For more information about Regulation BTR, see Insider Trading Blackout Restrictions under SOX.

If the Company does not have a pension plan you may omit this section of the memorandum.

PART VIII. **RESTRICTIONS ON RESALES OF COMPANY SECURITIES.**

As a director or officer of a public company, you are considered to be an affiliate of the Company under federal securities laws and your resales of Company securities (however acquired) must either be registered or exempt from registration under the Securities Act. The statutory exemption that allows non-affiliates to resell shares acquired in a public offering is not available for affiliates. Affiliates can sell such shares (referred to as "control shares") and shares acquired from the Company or another affiliate in a transaction not involving a public offering (i.e., "restricted securities") under Securities Act Rule 144, which:

- Limits the volume of securities you may sell in any three-month period
- Requires a holding period for restricted securities
- Dictates the manner of sale (i.e., must be in ordinary broker's transactions) –and–
- Requires a notice filing on Form 144 for most sales

Drafting Note following bullet list

Restrictions on Resales. For more information on this topic, see Domestic Resales of Unregistered Securities: Rule 144, Section 4(a)(1½), and Section 4(a)(7).

Your broker can assist you in preparing a Form 144 for a proposed sale and complying with the volume and manner of sale limitations. Form 144 may currently be filed on paper but will, most likely at some point in 2023, be required to be filed electronically on EDGAR.

You should pre-clear any transaction in the Company's securities. See Part X. Pre-Clearance of Transactions in Company Securities below.

PART IX. **SELECTIVE DISCLOSURE OF MATERIAL NONPUBLIC INFORMATION.**

Under Regulation Fair Disclosure ("Reg FD") you may not disclose material nonpublic information to any of the following persons unless the information is previously or simultaneously disclosed to the public:

- Broker-dealers
- Analysts
- Investment advisers
- Investment companies (including mutual funds, hedge funds, and their fund managers)

- Shareholders who may trade based on the information

Reg FD applies to disclosures by any senior official, which includes executive officers and directors. Reg FD was adopted to ensure that specialized securities professionals or shareholders who have access to senior officials do not receive material information before it is widely disseminated to the public. Reg FD is an attempt to put all shareholders, large and small, on the same footing by eliminating selective disclosure. Consequently, whenever you are at a conference, in a phone call, at a meeting, or otherwise in the presence of security professionals or shareholders outside of the Company, you should not disclose material nonpublic information. There are limited exceptions to Reg FD, including if the party agrees to keep the information confidential, in which case a written confidentiality agreement is strongly recommended. Please note that even reiterating publicly announced guidance privately may be considered material and a violation of Reg FD, depending on how much time has passed since the public guidance was issued and other factors.

Reg FD is separate from the prohibition on insider trading and does not require that you or the person to whom you disclose the information trade. You have personal liability if you violate Reg FD.

[The Company has adopted a policy on Reg FD, which you should consult for further information.]

Drafting Note to Part IX. Selective Disclosure of Material Nonpublic Information

Reg FD Policy. Most companies have a policy on Reg FD and you should include the bracketed language if that is the case. For a template Reg FD policy, see Regulation FD Policy. For a discussion of Reg FD, see Regulation FD.

PART X. **PRE-CLEARANCE OF TRANSACTIONS IN COMPANY SECURITIES.**

It is imperative that you **pre-clear** any transactions you intend to make in the Company's securities at least [two] days in advance by contacting [name of Section 16 filing person] at [phone number] or [email address], or in such person's absence, [name of alternate Section 16 filing person] at [phone number] or [email address].

This pre-clearance requirement applies to any transactions involving Company securities, including purchases, sales, option exercises, gifts, pledges, or any other transaction that in any way involves ownership of the securities, whether owned directly or through family members, trusts, partnerships, or otherwise, and whether or not it is ultimately determined that a Section 16 filing is required. Please advise your family members, trustees, brokers, and any other individuals that may be involved in a securities transaction of this pre-clearance requirement. You should be aware as well that the [CFO] has the authority to deny or delay pre-clearance, so there can be no assurance that the transaction will be approved within your requested time frame. Denial may be based on:

- Whether you are in possession of material inside information
- [Whether the transaction would occur during a pension fund trading blackout, as discussed above]
- Whether you have complied with Rule 144, as discussed above
- Whether the transaction would result in short-swing liability, as discussed above
- [Whether the transaction would cause adverse publicity to the Company or result in adverse effects on the trading of the Company's stock] –or–
- [other relevant considerations].

[In addition, as required by the Company's Policy Against Pledging, Hedging and Short Selling of Company Securities, you may not short, hedge, pledge, or otherwise engage in transactions that hedge or offset, or are intended to hedge or offset, any decrease in the market value of the Company's securities granted as compensation to you, or otherwise directly or indirectly held by you.]

Drafting Note to Part X. Pre-Clearance of Transactions in Company Securities

Importance of Pre-clearing Process. Companies who will be making Section 16 filings on behalf of their insiders must require pre-clearing. The mechanics of filing and the short deadlines make this essential. The pre-clearing requirement should be broad, as it is in this form, and include all possible transactions. The length of the pre-clearance notification is at the discretion of the Company but is usually two to three days so as to leave enough time for the filer to gather information and not unduly impede the proposed transaction. Even if the Company is not making Section 16 filings on behalf of its insiders, it should still require pre-clearance to ensure there are no insider trading or short-swing trading concerns.

Policy against Pledging, Hedging and Short Selling. The bracketed text should be included if the Company has a policy against pledging, hedging or short selling. Note that Item 407(i) of Regulation S-K (17 C.F.R. § 229.407(i)) requires that a public company describe any practices or policies it has adopted regarding the ability of its employees (including officers) and directors to engage in transactions that hedge or offset, or are designed to hedge or offset, any decrease in the market value of equity securities granted as compensation to, or held directly or indirectly by, those persons. A company may satisfy this requirement by either disclosing the practices or policies in full, or, alternatively, providing a fair and accurate summary of the practices or policies that apply. If the company does not have any such practices or policies, the company must disclose that fact or state that hedging transactions are generally permitted. For more information about this disclosure requirement, see Securities and Exchange Commission Adopts Hedging Disclosure Rule: Client Alert Digest.

PART XI. **CONCLUSION.**

This memorandum is intended to give you a general overview of your obligations, responsibilities, and potential liabilities as a director or officer of the Company. It is not exhaustive and is not intended to be, nor should it be, construed as legal advice. If you have any further questions or concerns or would like any further information on these or other public company topics, you should contact the Primary Contact or your own legal advisor.

Anna Pinedo, Partner, Mayer Brown LLP

Anna Pinedo is a partner in Mayer Brown's New York office and co-leader of the Global Capital Markets practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products.

She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer and specialty finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

Anna regularly speaks at conferences and participates in panel discussions addressing securities law issues, as well as the securities issues arising in connection with derivatives and other financial products. She is the co-author of the leading capital markets treatise, *Corporate Finance and the Securities Laws*, published by Wolters Kluwer (6th Ed., updated 2020); co-author of *A Deep Dive Into Capital Raising Transactions*, published by the International Financial Law Review (2020); co-author of *JOBS Act Quick Start* (International Financial Law Review, 2013; updated 2014, 2016); contributor to *OTC Derivatives Regulation Under Dodd-Frank: A Guide to Registration, Reporting, Business Conduct, and Clearing* (Thomson Reuters, first ed. 2014, second ed. 2015, third ed. 2016, fourth ed. 2017, 2020-2021 ed.); co-author of *Considerations for Foreign Banks Financing in the US* (International Financial Law Review, 2012; updated 2014, 2016); co-author of *Liability Management: An Overview* (International Financial Law Review, 2011, updated 2015); co-author of *Structuring Liability Management Transactions* (International Financial Law Review, 2018); co-author of *Covered Bonds Handbook*, published by Practising Law Institute (2010, updated 2012-2014); co-author of the treatise *Exempt and Hybrid Securities Offerings*, published by Practising Law Institute (2009, second ed. 2011, updated 2014, third ed. 2017); and co-author of *BNA Tax and Accounting Portfolio: SEC Reporting Issues for Foreign Private Issuers* (BNA Accounting Policy and Practice Series, 2009, second ed. 2012, third ed. 2016, fourth ed. 2020). Anna is also a contributing author to *Broker-Dealer Regulation* (2011, second ed. 2012, updated 2020), published by Practising Law Institute. She co-authored "The Approaches to Bank Resolution," a chapter in *Bank Resolution: The European Regime* (Oxford University Press, 2016). Anna contributed to *The Future of Bank Funding and Capital: Solutions for Issuers, Opportunities for Investors* (IFR Market Intelligence, 2009). Additionally, Anna co-authored "The Ties that Bind: The Prime-Brokerage Regulation," a chapter in *Global Financial Crisis* (Globe Law and Business, 2009); "The Law: Legal and Regulatory Framework," a chapter in *PIPEs: A Guide to Private Investments in Public Equity* (Bloomberg, 2006); and "The Impact Security: Reimagining the Nonprofit Capital Market," a chapter in *What Matters: Investing in Results to Build Strong, Vibrant Communities* (Federal Reserve Bank of San Francisco and Nonprofit Finance Fund, 2017). Anna is a contributor to Practising Law Institute's "BD/IA: Regulation in Focus" blog.

Anna is a member of the American Bar Association's (ABA) Committee on the Federal Regulation of Securities, a member of the subcommittee on Disclosure and Continuous Reporting, chair of the subcommittee on Securities Registration, chair of the subcommittee on Annual Review, and a member of the task force on the future of securities regulation.

She has participated in the drafting committee for the ABA's comment letters on such topics as securities offering reform, revisions to the definition of accelerated filer and smaller reporting company, amendments to the accredited investor definition; amendments to the exempt offering framework; and various JOBS Act-related and disclosure effectiveness related matters. Anna also is a member of the ABA Committee on the Regulation of Futures and Derivatives Instruments. Anna is a chair of the Structured Products Association Legal, Regulatory and Compliance Executive Committee. She is a member of the Mortgage Bankers Association's Mortgage REIT Council and a member of the MBA's Secondary & Capital Markets Committee.

Anna is an adjunct professor at the George Washington University School of Law and member of the George Washington University Center for Law, Economics & Finance Advisory Board. She is a member of the Visiting Committee of the Law School of the University of Chicago. Anna was a member of the University of Chicago Legal Forum during her time at the University of Chicago Law School.

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