

# **Guidelines Monitoring** GROUP

Private Equity Monitoring Group on Transparency and Disclosure

**GUIDELINES FOR DISCLOSURE AND TRANSPARENCY  
IN PRIVATE EQUITY, PART V**

JULY 2014

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# GUIDELINES FOR ENHANCED DISCLOSURE BY PORTFOLIO COMPANIES AND PRIVATE EQUITY FIRMS (PART V OF THE GUIDELINES)

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Part V of the Guidelines for Disclosure and Transparency in Private Equity (the "Guidelines") sets out Sir David Walker's final guidance on the enhanced disclosure obligations placed upon portfolio companies and private equity firms. This document sets out the full text of part V of the Guidelines incorporating amendments that have been implemented since the Guidelines were first issued in 2007, including those relating to the implementation of The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013. This document replaces part V and Annex D from the Guidelines issued in 2007.

## 1. Conformity with each of the Guidelines should be on a **comply or explain** basis.

Where an explanation is given for "non-compliance", this should be posted alongside other related relevant disclosures called for under these Guidelines on the website of the private equity firm or portfolio company.

## 2. Definition of a **private equity firm** for the purpose of the Guidelines:

A firm authorised by the FCA that is managing or advising funds that either own or control one or more UK companies or have a designated capability to engage in such investment activity in the future where the company or companies are covered by the enhanced reporting guidelines for portfolio companies.

## 3. Definition of a **portfolio company** to be covered by enhanced reporting guidelines

A UK company

- a) acquired by one or more private equity firms in a public to private transaction where the market capitalisation together with the premium for acquisition of control was in excess of £210 million and more than 50% of revenues were generated in the UK or UK employees totalled in excess of 1,000 full-time equivalents.
- b) acquired by one or more private equity firms in a secondary or other non-market transaction where enterprise value at the time of the transaction is in excess of £350 million and more than 50% of revenues were generated in the UK or UK employees totalled in excess of 1,000 full-time equivalents.

## 4. Content of enhanced disclosure by a portfolio company

A portfolio company should include as part of its audited annual report and accounts the following enhanced disclosures, none of which call for disclosures beyond those specified for quoted companies in the Companies Act 2006 or other disclosure requirements applicable to quoted companies. Such reporting should throughout focus on substance rather than form and on the economic reality of a company or group rather than its legal structure.

- a) The report should identify the private equity fund or funds that own the company and the senior executives or advisers of the private equity firm in the UK who have oversight of the company on behalf of the fund or funds.
- b) The report should give detail on the composition of the board, identifying separately executives of the company, directors who are executives or representatives of the private equity firm and directors brought in from outside to add relevant industry or other experience.

- c) The report should include a review that, subject to points i and iv below, meets the requirements of Section 414C of the Companies Act 2006 including sub-sections 7 and 8 (which are ordinarily applicable only to quoted companies). Section 414C is reproduced in Annex 1 of this document and replaces Annex D of the Guidelines.
- i. For a UK portfolio company, this review is required to be included in the strategic report under the Companies Act 2006. A non-UK portfolio company may include this review in a directors' report or equivalent in line with applicable legal requirements in the non-UK country.
- ii. When considering the level of detail and nature of information to be included in the review, the portfolio company should have regard to the guidance set out in the Financial Reporting Council's Guidance on the Strategic Report.
- iii. Section 414C(7) provides:

*(7) In the case of a quoted company the strategic report must, to the extent necessary for an understanding of the development, performance or position of the company's business, include—*

*a) the main trends and factors likely to affect the future development, performance and position of the company's business, and*

*b) information about—*

*(i) environmental matters (including the impact of the company's business on the environment),*

*(ii) the company's employees, and*

*(iii) social, community and human rights issues,*

*including information about any policies of the company in relation to those matters and the effectiveness of those policies.*

*If the report does not contain information of each kind mentioned in paragraphs (b) (i), (ii) and (iii), it must state which of those kinds of information it does not contain.*

When preparing disclosures in respect of environmental matters under section 414C(7)b)(i), a portfolio company may, to the extent it is significant, include in the directors' report the disclosures concerning greenhouse gas emissions as set in Part 7 of Schedule 7 of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008. This is not a mandatory requirement of the Guidelines.

- iv. Section 414C(8) provides:

*(8) In the case of a quoted company the strategic report must include—*

*a) a description of the company's strategy,*

*b) a description of the company's business model,*

*c) a breakdown showing at the end of the financial year—*

*(i) the number of persons of each sex who were directors of the company;*

*(ii) the number of persons of each sex who were senior managers of the company (other than persons falling within sub-paragraph (i)); and*

*(iii) the number of persons of each sex who were employees of the company.*

When preparing disclosures in respect of gender diversity under section 414C(8)c)(ii), a portfolio company may apply its own definition of "senior manager" that differs from the definition and requirement provided in sections 414C(9) and (10) as long as it is clearly explained. A reconciliation to the disclosure using the statutory definition will not be required.

- d) The financial review should cover risk management objectives and policies in the light of the principal financial risks and uncertainties facing the company, including those relating to leverage, with links to appropriate detail in the footnotes to the balance sheet and cash flow section of the financial statements.
- e) To the extent that the Guidelines at 4. a) and c) above are met by existing market disclosures in respect of debt or equity issuance on public markets, this should be explained with the relevant material made accessible on the company's website; and where compliance with these

Guidelines, in particular in respect of any forward-looking statement, might involve conflict with other regulatory obligations, the reason for non-compliance should similarly be explained on the company website.

- f) The report should include a statement by the directors of the portfolio company confirming compliance with the Guidelines or setting out explanations for areas of non-compliance.

## 5. Form and timing of public reporting by a portfolio company

- a) The audited report and accounts should be readily accessible on the company website.
- b) The report and accounts should be made available no more than 6 months after the company year-end.
- c) A summary mid-year update giving a brief account of major developments in the company (but not requiring updated financial statements) to be placed on the website no more than 3 months after mid-year.

## 6. Data input by a portfolio company to the industry association

As input for the enhanced role in data collection, processing and analysis to be undertaken on an industry-wide basis by the BVCA, portfolio companies should provide to the BVCA (or to a professional firm acting on its behalf) data for the previous calendar or company accounting year on:

- trading performance, including revenue and operating earnings
- employment
- capital structure
- investment in working and fixed capital and expenditure on research and development
- such other data as may be requested by the BVCA after due consultation and where this can be made available without imposing material further cost on the company.

## 7. Communication by a private equity firm

A private equity firm should publish an annual review accessible on its website or ensure regular updating of its website to communicate:

- A description of the way in which the FCA-authorized entity fits into the firm of which it is a part with an indication of the firm's history and investment approach, including investment holding periods, where possible illustrated with case studies.
- A commitment to conform to the Guidelines on a comply or explain basis and to promote conformity on the part of the portfolio companies owned by its fund or funds.
- An indication of the leadership of the UK element of the firm, identifying the most senior members of the management or advisory team and confirmation that arrangements are in place to deal appropriately with conflicts of interest, in particular where it has a corporate advisory capability alongside its fiduciary responsibility for management of the fund or funds.
- A description of UK portfolio companies in the private equity firm's portfolio.
- A categorisation of the limited partners in the funds or funds that invest or have a designated capability to invest in companies that would be UK portfolio companies for the purposes of these Guidelines, indicating separately a geographic breakdown between UK and overseas sources and a breakdown by type of investor, typically including pension funds, insurance companies, corporate investors, funds of funds, banks, government agencies, endowments of academic and other institutions, private individuals, and others.

## 8. Reporting to limited partners

In reporting to their limited partners on their interests in existing funds and for incorporation in partnership agreements for new funds, private equity firms should:

- a) follow established guidelines such as those published by the International Private Equity and Venture Capital Board ("IPEV") (or otherwise provide the coverage set out in such guidelines) for the reporting on and monitoring of existing investments in their funds, as to the frequency and form of reports covering fund reporting, a summary of each investment by the fund, detail of the

limited partner's interest in the fund and details of management and other fees attributable to the general partner.

- b) value investments in their funds using either valuation guidelines published by IPEV or the applicable accounting standards.

### 9. Data input by private equity firms to the industry association

Data to be provided on a confidential basis to an accounting firm (or other independent third party) appointed by the BVCA to cover:

- a) In respect of the previous calendar year
- the amounts raised in funds with a designated capability to invest in UK portfolio companies
  - acquisitions and disposals of portfolio companies and other UK companies by transaction value
  - estimates of aggregate fee payments to other financial institutions and for legal, accounting, audit and other advisory services associated with the establishment and management of their funds
  - such other data as the BVCA may require for the purposes of assessment of performance on an industry-wide basis, for example to capture any material change over time in the terms of trade between general partners and limited partners in their funds
- b) In respect of exits from UK portfolio companies over at least the previous calendar year to support the preparation on an aggregate industry-wide basis of an attribution analysis designed to indicate the major sources of the returns generated by private equity. In broad terms, these are the ingredients in the total return attributable respectively to leverage and financial structuring, to growth in market multiples and market earnings in the relevant industry sector, and to strategic direction and operational management of the business. The relevant data, which will unavoidably involve important subjective assessment, will involve content and format at the outset as in Annex F to the Guidelines (as published in 2007), to be reviewed and refined as appropriate in the light of initial experience and discussion between the BVCA, with the third-party professional firm engaged for this and related analysis, and the relevant private equity firms.

### 10. Responsibility at a time of significant strategic change

A private equity firm should commit to ensure timely and effective communication with employees, either directly or through its portfolio company, in particular at the time of a strategic initiative or a transaction involving a portfolio company as soon as confidentiality constraints cease to be applicable. In the event that a portfolio company encounters difficulties that leave the equity with little or no value, the private equity firm should be attentive not only to full discharge of its fiduciary obligation to the limited partners but also to facilitating the process of transition as far as it is practicable to do so.

### 11. Interaction with the Alternative Investment Fund Managers Directive

Private equity firms and portfolio companies covered by the Guidelines are not expected to provide disclosure in respect of the applicable additional transparency requirements in the Alternative Investment Fund Managers Directive (the "Directive") if they do not fall within the scope of the Directive. Having performed a gap assessment, the Group was of the view that the Guidelines include the information required under the Directive in respect of disclosure in the annual reports of portfolio companies except for details on transactions in own shares. The Group expects this information to be included in the financial statements of the portfolio company where significant.

The disclosures expected by private equity firms on acquisition of portfolio companies under the Directive are more prescriptive than those set out above. The Group has decided not to amend the Guidelines in respect of these specific requirements as they are still within the spirit of the Guidelines for this particular area. Firms that are covered by the Directive may find the Guidelines and examples of good practice reporting by portfolio companies published by the Group as a useful source of guidance but are responsible for taking appropriate advice to ensure they are fully compliant with their obligations.

The tables below set out examples of how the Guidelines interact with the AIFMD's transparency requirements in respect of the annual reports of portfolio companies and the disclosure expected on acquisition of control. The requirements apply to non-listed companies with registered offices in the EU.

## a) Annual report disclosures

<b>AIFMD requirements– annual report disclosures</b> <i>Regulation 42 of the AIFM Regulations (Annual report of AIFs exercising control of non-listed companies)</i>	<b>Guidelines requirements</b> <i>Part V Sections 4 and 5 of the Guidelines (Guidelines for enhanced disclosure by portfolio companies and private equity firms)</i>
<p>The following disclosures are required about each non-listed company over which an AIF individually or jointly has control. They can be included in the annual report of the AIF and/or the non-listed company.</p>	<p>The following disclosures are required to be included in the annual report of the portfolio company and not the private equity fund.</p>
<ul style="list-style-type: none"> <li>■ A fair review of the development of the company's business representing the situation at the end of the period covered by the annual report;</li> </ul>	<p>Part V section 4 requires portfolio companies to prepare a strategic report which includes provisions in the Companies Act 2006 normally applicable to quoted companies. The strategic report requirements set out in s414C(2) and s414C(3) of the Companies Act 2006 will assist firms to comply with this requirement. They require "a fair review of the company's business" and a "balanced and comprehensive analysis of the development and performance of the company's business" during the financial year and the position at the end of that year. s414C(4) also requires the disclosure of financial and non-financial key performance indicators to support the analysis.</p>
<ul style="list-style-type: none"> <li>■ Any important events that have occurred since the end of the financial year;</li> </ul>	<p>The Group expects this information to be included to comply with the requirements of the strategic report as the report should have forward looking orientation. Further, this information is expected to be disclosed under UK and international accounting standards.</p>
<ul style="list-style-type: none"> <li>■ The company's likely future development; and</li> </ul>	<p>The strategic report requirements set out in s414C(7) of the Companies Act 2006 will assist firms to comply with this requirement. It requires information on "the main trends and factors likely to affect the future development, performance and position of the company's business."</p>
<ul style="list-style-type: none"> <li>■ Details of any acquisitions or disposals of own shares.</li> </ul>	<p>The Group expects this information to be included in the financial statements of the portfolio company where significant and has chosen not to incorporate this disclosure requirement as it was removed by BIS from the directors' report as it was not considered a significant disclosure. This approach is in line with Guidelines which do not prescribe disclosures that go beyond those required of quoted companies.</p>
<p>The disclosures must be made within six months of the year-end of the AIF.</p>	<p>Part V, section 5b) of the Guidelines requires the annual report of the portfolio company to be made available no more than 6 months after the company year end. Where the year end of the portfolio company and the AIF are the same then the AIFMD requirement is likely to be fulfilled. Where the year end of the portfolio company differs to that of the AIF then firms may need to amend the timing of reporting of the portfolio company accordingly.</p>
<p>If the information is included in the AIF's annual report then the AIFM must use best efforts to ensure the board of the company makes the information available to all employee representatives or (where there are none) to the company's employees directly.</p>	<p>Part V, section 5a) of the Guidelines requires the annual report of the portfolio company to be readily accessible on the company website. This ensures that employees and other stakeholders are able to access this information publicly.</p>

## b) Disclosures required on acquisition of control

<b>AIFMD requirements – disclosures on acquisition of control</b> <i>Regulation 39 of the AIFM Regulations (Disclosure in case of acquisition of control)</i>	<b>Guidelines requirements</b> <i>Part V Sections 4, 5, 7 and 10 of the Guidelines (Guidelines for enhanced disclosure by portfolio companies and private equity firms)</i>
<p>When control is acquired, the AIFM must disclose its intentions to the regulator, the company and its shareholders about the future of the business and likely repercussions on employment by the company and material change in the conditions of employment.</p>	<p>Part V section 10 of the Guidelines sets out the responsibilities of the private equity firm at a time of significant strategic change. It requires a commitment to ensure “timely and effective communication with employees, either directly or through its portfolio company, in particular at the time of a strategic initiative or a transaction involving a portfolio company.” Although the precise wording is not the same, the AIFMD requirements are in the spirit of what is intended by the Guidelines. The Guidelines, however, do not include the obligation to disclose information to regulators.</p>
<p>Other areas where disclosure is required:</p>	
<ul style="list-style-type: none"> <li>■ The identity of the AIFM(s) with control.</li> </ul>	<p>Part V sections 4a) and 4b) of the Guidelines require disclosure of the fund(s) that own the company, details on executives or advisers of the private equity firm that have oversight of the company and details on board composition, identifying those directors from the private equity firm.</p>
<ul style="list-style-type: none"> <li>■ The policy for preventing and managing conflicts of interest and information about the safeguards established to ensure any agreement between the AIFMs or the AIFs and the company is at arm’s length.</li> </ul>	<p>Part V section 7 requires the private equity firm to disclose on its website (through an annual review or regular updates) a “confirmation that arrangements are in place to deal appropriately with conflicts of interest, in particular where it has a corporate advisory capability alongside” its fund management business.</p> <p>Details of the policy and applicable safeguards may be disclosed by the private equity firm although the Guidelines do not explicitly require this.</p>
<ul style="list-style-type: none"> <li>■ The policy for external and internal communication relating to the company, in particular as regards employees.</li> </ul>	<p>Part V section 4 requires portfolio companies to prepare a strategic report which includes provisions in the Companies Act 2006 normally applicable to quoted companies. Portfolio companies therefore include extended information about the company, and this occurs throughout the year. Section 5c) of the Guidelines requires the portfolio company to publish “a summary mid-year update giving a brief account of major developments in the company...no more than 3 months after mid-year.”</p> <p>s414C(7) of the Companies Act 2006 requires information to be disclosed on the company’s employees and the Group expects this to include policies related to employees. Further, Part V section 10 sets out the responsibilities of private equity firms in times of strategic change, including to employees.</p>
<p>This information should also be communicated to the employees themselves or their representatives, and the AIFM must use its best efforts to ensure the board of directors complies with its request.</p>	<p>The disclosures set out above in Part V sections 4, 5, 7 and 10 are all expected to be included on the company’s website so this information is publicly available to employees and other stakeholders.</p>



# APPENDIX 1: EXTRACT FROM THE COMPANIES ACT 2006 (ANNEX D OF THE GUIDELINES)

# A1

## 414C. Contents of strategic report

1. The purpose of the strategic report is to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company).
2. The strategic report must contain—
  - a. fair review of the company's business, and
  - b. a description of the principal risks and uncertainties facing the company.
3. The review required is a balanced and comprehensive analysis of—
  - a. the development and performance of the company's business during the financial year, and
  - b. the position of the company's business at the end of that year, consistent with the size and complexity of the business.
4. The review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include—
  - a. analysis using financial key performance indicators, and
  - b. where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters.
5. In subsection (4), "key performance indicators" means factors by reference to which the development, performance or position of the company's business can be measured effectively.
6. Where a company qualifies as medium-sized in relation to a financial year (see sections 465 to 467), the review for the year need not comply with the requirements of subsection (4) so far as they relate to non-financial information.
7. In the case of a quoted company the strategic report must, to the extent necessary for an understanding of the development, performance or position of the company's business, include—
  - a. the main trends and factors likely to affect the future development, performance and position of the company's business, and
  - b. information about—
    - i. environmental matters (including the impact of the company's business on the environment),
    - ii. the company's employees, and
    - iii. social, community and human rights issues,
 including information about any policies of the company in relation to those matters and the effectiveness of those policies.  
 If the report does not contain information of each kind mentioned in paragraphs (b)(i), (ii) and (iii), it must state which of those kinds of information it does not contain.
8. In the case of a quoted company the strategic report must include—
  - a. a description of the company's strategy,
  - b. a description of the company's business model,
  - c. a breakdown showing at the end of the financial year—
    - i. the number of persons of each sex who were directors of the company;
    - ii. the number of persons of each sex who were senior managers of the company (other than persons falling within sub-paragraph (i)); and
    - iii. the number of persons of each sex who were employees of the company.

9. In subsection (8), “senior manager” means a person who—
  - a. has responsibility for planning, directing or controlling the activities of the company, or a strategically significant part of the company, and
  - b. is an employee of the company.
10. In relation to a group strategic report—
  - a. the reference to the company in subsection (8)(c)(i) is to the parent company; and
  - b. the breakdown required by subsection (8)(c)(ii) must include the number of persons of each sex who were the directors of the undertakings included in the consolidation.
11. The strategic report may also contain such of the matters otherwise required by regulations made under section 416(4) to be disclosed in the directors’ report as the directors consider are of strategic importance to the company.
12. The report must, where appropriate, include references to, and additional explanations of, amounts included in the company’s annual accounts.
13. Subject to paragraph (10), in relation to a group strategic report this section has effect as if the references to the company were references to the undertakings included in the consolidation.
14. Nothing in this section requires the disclosure of information about impending developments or matters in the course of negotiation if the disclosure would, in the opinion of the directors, be seriously prejudicial to the interests of the company.



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