

December 20, 2018

Periodic Reporting

The SEC Requests Comment on the Nature, Timing and Frequency of Periodic Reporting, and on Earnings Release and Earnings Guidance Practices

SUMMARY

On December 18, 2018, the Securities and Exchange Commission ("SEC") issued a release (the "Release") seeking public comment on the nature, timing and frequency of periodic reporting (including the relationship between periodic reports on Form 10-Q and earnings releases) and on how the current periodic reporting system, and earnings release and earnings guidance practices, may affect corporate decision making and strategic thinking. The SEC is requesting comment on these matters as part of its efforts to enhance or maintain the investor protection attributes of the existing periodic disclosure requirements while also reducing the administrative and other burdens on reporting companies associated with quarterly reporting.

Comments are due by the date that is 90 days after publication of the Release in the Federal Register.

REQUEST FOR COMMENTS

The Release requests comments with respect to four main topics:

- The information content presented in earnings releases and periodic reports on Form 10-Q, including typical information overlap and investor use of such information;
- Potential alternative quarterly reporting regimes under which a reporting company may use the earnings release as a core quarterly disclosure document in conjunction with its Form 10-Q;
- Timing considerations with respect to the issuance of earnings releases relative to the filing of reports on Form 10-Q; and
- Frequency of periodic disclosure, including the costs and benefits of an alternative semi-annual reporting model.

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The Release includes 46 numbered questions, most of which contain multiple parts. Some of these are summarized in this memorandum. The Release notes, however, that its “request for comment is not intended to limit the scope of comments, views, issues or approaches to be considered” and further notes that the SEC “welcomes . . . in particular statistical, empirical and other data from commenters that may support their views and/or support or refute the views or issues raised [in the Release].”

The Release also reviews the evolution of periodic reporting requirements in jurisdictions outside of the United States and discusses the current reporting regime under the Securities Exchange Act of 1934 (the “Exchange Act”) for foreign private issuers. Under current Exchange Act requirements, foreign private issuers are required to file annual reports, but are not specifically required to file quarterly reports. Rather, a foreign private issuer must furnish reports on Form 6-K to provide information that it: (i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or organization; (ii) files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange; or (iii) distributes or is required to distribute to its security holders. The Release does not request comment on the reporting regime for foreign private issuers.

Information Content

Although the federal securities laws do not require reporting companies to publish earnings releases, conduct earnings calls with investors and analysts or issue forward-looking earnings guidance, reporting companies often provide a range of financial and other information in their earnings releases and on earnings calls. The practice and information content varies widely among reporting companies. The SEC notes that often, the information provided in quarterly earnings releases duplicates required Form 10-Q disclosures or may omit certain required Form 10-Q disclosures. Some reporting companies also include certain information in their quarterly earnings releases that they do not include in their reports on Form 10-Q, such as forward-looking earnings guidance. In light of these significant overlaps and divergence in practices, the SEC is seeking comment on the information content included in earnings releases and in reports on Form 10-Q generally, in order to consider potential changes that may improve investors’ ability to access, process and evaluate such information. Among the SEC’s questions in this area are the following:

- Why do some reporting companies choose to issue quarterly earnings releases while others only file a Form 10-Q? Would companies stop issuing earnings releases if disclosure of quarterly results was not required on Form 10-Q, or would this provide them with a greater incentive to issue earnings releases?
- What benefits, if any, do investors, companies and the marketplace derive from the issuance of earnings releases separate and apart from the Form 10-Q?
- How do reporting companies determine the information to present in earnings releases, and are there meaningful differences between the financial information typically provided in earnings releases versus that required by Form 10-Q? How would the content of earnings releases change if they were required to be filed with the SEC and become subject to applicable liability provisions?

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- Is the Form 10-Q or the earnings release the primary document upon which investors rely when a company provides both? When there is substantial duplication in the information provided in an earnings release that is issued before the Form 10-Q is filed, is the Form 10-Q still useful? Are there any benefits to investors and other market participants from having two sources of historical quarterly financial information?
- Does quarterly forward-looking earnings guidance create an undue focus on short-term financial results?
- What is the impact of the existing auditor review requirement of quarterly financial information, and do investors value those reviews?
- Are there approaches the SEC should consider to help alleviate the burden of preparing Form 10-Qs without adversely affecting the total mix of information available to investors?

Earnings Release as Core Quarterly Disclosure Document

Noting the substantial overlap in information presented in earnings releases and reports on Form 10-Q, the SEC is considering alternative approaches to reporting that would permit reporting companies to satisfy the core financial disclosure requirements of Form 10-Q with information that is included in earnings releases. Specifically, under these alternatives, a reporting company would be permitted to incorporate portions of its earnings release by reference into a report on Form 10-Q where financial disclosure is duplicative or to use the Form 10-Q to supplement the Form 8-K earnings release with additional material and required information (collectively, the “alternative approaches”). The SEC suggests that such alternative approaches may significantly reduce the costs and burdens associated with preparing periodic reports on Form 10-Q while maintaining the overall mix of information available to investors. In connection with these alternatives, the SEC seeks comment on various questions, including the following:

- Should information in an earnings release submitted on Form 8-K be permitted to satisfy the Form 10-Q disclosure requirements? If so, to what extent?
- Should the SEC rules, accounting standards and auditing standards allow for the separation of a reporting company’s interim financial statements so that certain parts of the financial information may be presented only in the earnings release?
- Are there issues or concerns with the alternative approaches in relation to Securities Act [defined?] registration statements and the ability to incorporate information by reference into Securities Act filings?
- Under the alternative approaches, should reporting companies be required to subject the financial information included in earnings releases to auditor review procedures?

Timing of the Quarterly Reporting Process

The SEC notes that some reporting companies issue earnings releases prior to filing the associated Form 10-Q, while others issue earnings releases concurrently with the filing of their Form 10-Q reports. The SEC is seeking general comment on the timing of earnings releases relative to Form 10-Q filings. Among the questions posed in the Release in this area are:

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- Should the SEC take action to address time lapses between issuance of earnings releases and filing of Form 10-Qs?
- What is the impact on investors and others participating in earnings calls when a company publishes its earnings releases before filing its Form 10-Q?
- To what extent are auditors involved in the earnings release process, and does auditor involvement contribute to any delay between publication of an earnings release and the filing of Form 10-Q?

Reporting Frequency

Following the receipt of mixed comments¹ on the frequency of periodic reporting and considering the ongoing debate regarding the adequacy and appropriateness of mandated quarterly reporting, the SEC is seeking further comment on these matters. The SEC is continuing to consider whether alternative approaches to reporting frequency would adequately address the informational needs of investors while also reducing costs and burdens associated with the current quarterly reporting regime. The SEC seeks comment with respect to the following specific questions, among others:

- What are the costs and benefits of the current reporting frequency model, which requires domestic reporting companies to file quarterly reports on Form 10-Q, annual reports on Form 10-K and current reports on Form 8-K? Does the frequency of reporting lead managers to focus on short-term results to the detriment of long-term performance? Would less frequent reporting change management decision-making or otherwise positively affect investors?
- Should the SEC adopt a semi-annual reporting model for all or certain categories of reporting companies? How would a semi-annual reporting model affect the general use of Form 8-K, and should the SEC consider additional Form 8-K requirements or triggers if it were to adopt semi-annual reporting?
- If the semi-annual reporting model were adopted, should earnings releases be required to be filed rather than furnished?
- Should the SEC provide for a flexible frequency reporting model (under which reporting companies could select an approach to periodic reporting that best suits their needs and the needs of their investors), and what would be the costs and benefits, accounting and auditing changes, or other concerns in providing for such a model?
- How would a semi-annual reporting model affect a reporting company's ability to effect offerings of securities under the Securities Act, where under the existing reporting regime, Form 10-Q reports are often incorporated by reference?

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¹ The SEC has previously requested comment on the appropriate frequency of interim reporting in a Concept Release. See *Business and Financial Disclosure Required by Regulation S-K*, Release No 33-10064; 34-77599 (Apr. 13, 2016) [81 FR 23916 (Apr. 22, 2016)] available at: <https://www.sec.gov/rules/concept/2016/33-10064.pdf>.

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