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March 19, 2019

Ms. Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Request for Comment on Earnings Releases and Quarterly Reports; File Number S7-26-18

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee") of the Business Law Section of the American Bar Association (the "ABA") with respect to the request by the Securities and Exchange Commission (the "Commission") for public comment pursuant to the above-captioned release (the "Release") on the nature and timing of the disclosures that reporting companies are required to provide in their quarterly reports filed on Form 10-Q, including when the disclosures mandated by the quarterly report overlap with disclosures these companies voluntarily provide to the public in the form of an earnings release furnished on Form 8-K, as well as other related matters.

The comments set forth in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and should not be construed as representing the policy of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

The Committee thanks the Commission for this opportunity to comment on the Release.

I. Observations on Quarterly Reporting and Earnings Release Practices

As the Commission notes in the Release, many companies required to file Form 10-Q also voluntarily communicate certain quarterly financial information through other methods, such as by means of an earnings release.[1] In addition to communicating such information through an earnings release, we also observe that companies may voluntarily communicate such information through other channels,

[1] *Request for Comment on Earnings Releases and Quarterly Reports*, Release No. 33-10588; 34-84842; File No. S7-26-18 (Dec. 18, 2018) [83 FR 65601 (Dec. 21, 2018)]. The Release defines "earnings release" as "a public announcement or release by a company, or person acting on its behalf, of material non-public information regarding a company's results of operations or financial condition for a completed quarterly or annual financial period."

such as a presentation accompanying an earnings call with investors and analysts, management's oral comments during such calls, supplemental information accompanying an earnings release, or information posted on the company's investor relations website, among other channels.

We believe that a reporting company's particular circumstances shape the reporting practices that the company adopts, including the nature and scope of the information that it discloses to the market, as well as the channel of such communication. When deciding whether to voluntarily communicate information beyond the regulatory requirements found in the Commission's rules and forms, companies consider a variety of factors, including economic, commercial and legal considerations, many of which may be unique to the company. These factors include, but are not limited to:

- the company's size, maturity and historical disclosure practices;
- the industry in which the company operates;[2]
- the company's competitors and their disclosure practices;
- analyst expectations and modeling;
- liability concerns, including whether information included in a Form 8-K or Form 10-Q will be incorporated by reference into filings under the Securities Act of 1933, as amended;
- considerations relating to forward-looking information and prior company guidance, including any "color commentary" by management;
- the status of the auditor review process;
- stock exchange listing requirements;
- the limitations imposed by the Commission's rules relating to non-GAAP financial measures, such as Regulation G and Item 10(e) of Regulation S-K;
- an understanding of investor expectations based on investor outreach and other communications with investors;
- Regulation FD considerations and the desire to release certain material non-public information as soon as possible; and
- the composition of the company's investor base.

We believe that each individual reporting company is in the best position to consider the above factors, and others that may be relevant to its particular situation, and determine whether to voluntarily communicate information to the market, beyond that specifically required by Form 10-Q and the Commission's rules, including what additional information should be communicated and how. Given the diversity in circumstances among companies, we believe that a "one-size-fits-all" approach to the process could hinder innovation in communication practices, as well as the ability of companies to timely and clearly communicate material information to investors. We are of the view that the current system appropriately permits companies to communicate with their investors and research analysts in a timely and efficient manner, thus contributing to an efficient marketplace.

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[2] For example, financial institutions frequently provide supplemental information about their liquidity and capital requirements. Further, issuers operating in certain industries are generally expected to release certain non-GAAP financial measures (funds from operations and adjusted funds from operations in the case of REITs and non-GAAP net income in the case of social media companies).

We believe there is a broad-based perception among most market participants that the benefits of transparency in connection with voluntary communications outweigh concerns over costs and burdens and the impact of such voluntary communications on "short-termism," at least for most issuers. Moreover, we believe that other factors are more significant in driving whatever "short-termism" may exist in the market, such as investment bias, analytic structure and pressure from short-term activist investors, and that those factors should be addressed through means other than regulation or deregulation by the Commission. Stated differently, we believe that "short-termism" is largely a governance rather than a disclosure issue, and that the Commission should not seek to address this topic, which is essentially choosing certain investors over other investors, without a specific Congressional mandate to do so, given the disclosure-focused nature of the Commission's regulatory regime.

II. Information Content Resulting from the Quarterly Reporting Process

As noted in the Release, certain material information required by Form 10-Q is frequently provided in earnings releases. Companies often report in earnings release packages financial (and statistical) information such as net income, earnings per share, and net sales, and some may include condensed income statements, balance sheets, and cash flow statements along with segment information. This information is often accompanied by condensed, narrative explanations, including explanations of drivers of changes from the prior year period, or in some cases on a sequential quarter-basis.

The earnings release package is also often the preferred means for companies to present and discuss certain non-GAAP financial information, which is frequently utilized by investors and research analysts to analyze underlying or longer-term trends, as well as forward-looking information such as expectations related to earnings performance in future periods (i.e., earnings guidance). Companies may prefer to publish this information outside of the Form 10-Q reporting regime because, aside from requirements related to Regulation G and antifraud rules, federal securities laws do not regulate the disclosure of specific information in this voluntary reporting process nor the structure of such information. This allows companies significant flexibility to communicate this information to the marketplace in the company's discretion and based on its unique circumstances.

To the extent the quarterly reporting process could be improved, we believe that the Commission's focus should be on improving the "mandatory" quarterly reporting regime of Form 10-Q, rather than the voluntary disclosure that companies may provide through the earnings release process. In this regard, we refer the Commission to the comment letter, dated December 15, 2017, to the Commission by the Disclosure Effectiveness Working Group (the "Working Group") of the Federal Regulation of Securities Committee and the Law and Accounting Committee of the Business Law Section of the ABA, with respect to the Commission's concept release and request for comment on the business and financial disclosure requirements in Regulation S-K.[3]

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[3] *Business and Financial Disclosure Required by Regulation S-K*, Release No. 33-10064; 34-77599; File No. S7-06-16 (Apr. 13, 2016) [81 FR 23916 (Apr. 22, 2016)].

III. Timing of the Quarterly Reporting Process

For those companies that choose to issue earnings releases, there is a diversity of practice on the timing of the earnings release relative to the filing of the Form 10-Q. Some companies choose to issue an earnings release a meaningful period of time prior to filing the associated Form 10-Q, and others choose to issue an earnings release at or about the time of the Form 10-Q filing. We believe the Commission should not take any action with respect to the timing of the quarterly reporting process because reporting companies are in the best position to determine the disclosure timeline in light of their particular circumstances. For example, companies may seek to release earnings information as soon as reasonably possibly after the quarter end, which could be a meaningful period of time prior to the associated Form 10-Q deadline, in order to inform the market of its results on a timely basis, particularly if its results of operations vary significantly from market expectations. Alternatively, companies that are working through complex accounting adjustments or fair value considerations may determine to wait until the status of the auditors' review process is relatively finalized prior to issuing earnings information to investors.

In this regard, there is already tremendous pressure on companies during the quarterly reporting process to report information timely and accurately in the earnings release, even though the disclosure is voluntary. These pressures may result from concerns related to reputation, reaction of research analysts, private litigation, and investor confidence. The pressures may also arise from proposed public or private securities offerings or business combination transactions. As a result, it is extremely rare in our experience for a company to make a material correction to information that is presented in an earnings release that will subsequently be presented in the company's Form 10-Q filing.

IV. Reporting Frequency

As a general matter, we believe that quarterly reporting by companies provides significant benefits to investors and the market. The alignment of a series of mandated disclosures with a quarterly reporting schedule is a key element that underpins the quality and efficiency of the U.S. capital markets. A move away from mandated quarterly reporting would raise a number of concerns, such as:

- a potential lack of comparability and consistency in quarterly earnings releases;
- material information possibly remaining unreported for a longer period of time;
- market pricing inefficiency arising from the lack of mandated quarterly disclosures;
- greater potential for insider trading arising from a "timed" rather than mandated disclosure schedule;
- reporting by issuers that is driven more by reaction to sudden or unanticipated events rather than on a scheduled basis;
- a potential reduction in available information; and
- over-reliance on alternative sources of information.

A benefit of quarterly reporting is that one of the fundamental concepts underlying GAAP and Regulation S-X is to ensure that there is comparability in the financial information that is disseminated by reporting companies. Were the Commission to move to semi-annual reporting, the opportunity for assessing comparability would be reduced from quarterly to twice yearly, which could hamper meaningful comparisons, especially in the case of companies in operating in volatile or highly competitive market environments, or which are subject to technological or other changes or operate in changing economies, or which are in extreme growth patterns. In precisely those situations where greater information would be most useful to investors, a shift away from quarterly reporting to semi-annual reporting would deprive investors of the information they most need. An effort to supplement semi-annual reporting with mandated financial reporting standards for earnings releases would, in our view, stifle the flexibility necessary for effective investor communications.

As stated above, a reduction in available information resulting from a move to semi-annual reporting would logically be expected to lead to less efficient trading in a company's securities and a potentially higher cost of capital to the company, as market participants react to greater uncertainty by applying greater valuation discounts. While recognizing that some newer or smaller companies may be willing to accept a higher cost of capital and less efficient trading market in their securities in exchange for fewer burdens on their access to public markets and reporting company status, we are skeptical that any economic benefit would outweigh the numerous concerns raised by a regulatory shift to semi-annual reporting. Moreover, we are skeptical that a shift to semi-annual reporting would have any tangible effect on investment decisions of public filers.[4] In any case, such a determination would be better made on the basis of a careful economic analysis.

Our concerns are generally supported by the CFA Institute Research Foundation's report, which followed the UK's regulatory shift away from quarterly reporting.[5] While acknowledging many of the previously listed concerns, the report found that there was no material impact on levels of corporate investment and that the quality of research analyst coverage declined in connection with a shift away from quarterly reporting. And even though U.S. reporting companies could continue quarterly reporting without a requirement to do so (and research indicates that most would continue some form of quarterly reporting),[6] we are not aware of any particular rationale for removing such disclosure from the scope of liability provisions that cover periodic filings. In addition to the considerations discussed above, because we operate in a litigious environment, we are concerned that the elimination of mandated quarterly disclosures could potentially give rise to an increase in claims arising from trading during the three month period prior to semi-annual disclosure.

V. Conclusion.

The Commission has identified four broad areas relating to earnings releases and quarterly reporting that we believe would benefit from further review. The Commission recognizes that its current periodic reporting requirements represent only a subset of the more comprehensive investor communications process in which most public companies are involved. The recommendations and considerations set forth in this letter are intended to highlight the complex set of factors that companies consider as part of their periodic reporting and quarterly earnings processes. In our view, the current mix of mandated periodic disclosures and a range of elective disclosures provide companies significant flexibility to fashion their communications to investors, achieve significant investor benefits, and constitute a key element underpinning the quality of U.S. capital markets.

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[4] Robert C. Pozen, Suresh Nallareddy & Shivaram Rajgopal, *Impact of Reporting Frequency on UK Public Companies*, CFA Institute Research Foundation (Mar. 2017), at 6.
[5] *See id.* at 16-18.
[6] *Id.* at 12.

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We appreciate the opportunity to comment on the Release, and respectfully request that the Commission and the Staff consider our recommendations and suggestions. We are available to meet and discuss these matters with the Commission and/or the Staff and to respond to any questions.

Very truly yours,

Robert E. Buckholz
Chair, Federal Regulation of Securities Committee
ABA Business Law Section

Special Thanks to:

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