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March 21, 2019

VIA E-MAIL

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

Re: Request for Comment on Earnings Releases and Quarterly Reports (December 18, 2018), 83 FR 65601 (December 21, 2018) (File No. S7-26-18)

Dear Ms. Countryman:

On behalf of the NYSE Group, Inc.[1] ("NYSE") and the more than 2,300 public companies listed on the NYSE, we appreciate the opportunity to submit comments regarding the U.S. Securities and Exchange Commission (the "Commission") request for comment on earnings releases and quarterly reports filed on Form 10-Q (the "Release").[2]

The Release solicits "public input on the nature, timing, format and frequency of periodic reporting, as well as the relationship between the periodic reports that [Securities] Exchange Act [of 1934] reporting companies must provide and the earnings releases that they must furnish on Form 8–K, to the extent they choose to issue such releases."[3] To that end, the Release sets forth 46 questions on a range of aspects of periodic reporting.

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[1] NYSE Group, Inc. submits this letter on behalf of its subsidiaries the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE Chicago, Inc. and NYSE National, Inc. (collectively, the "NYSE Exchanges"). The New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC are listing exchanges.

[2] Request for Comment on Earnings Releases and Quarterly Reports (December 18, 2018), 83 FR 65601 (December 21, 2018) (File No. S7-26-18).

[3] Id. at 65604.

Early responses to the Release provide different perspectives on periodic reporting,[4] reflecting the fact that disclosure mandated under the Securities Exchange Act of 1934 ("Act") is not just used by investors and the Commission, but also by other constituents such as listed issuers, activists, the media, security research analysts—and exchanges.

Among these constituents, the NYSE Exchanges are in a unique position: they are both observers and consumers of disclosure. As national securities exchanges, the NYSE Exchanges create marketplaces for public companies and the investors that rely on those issuers' disclosure. As self-regulatory organizations with listing exchanges, the NYSE Exchanges rely on disclosure as an important tool in reviewing listed issuers' compliance with NYSE Exchange rules, a key aspect to promoting just and equitable principles of trade, encouraging free and open markets, and protecting investors and the public interest. From this position, the NYSE Exchanges have an important perspective on the usefulness—and challenges—of the current disclosure requirements, leading us to formulate a set of "Core Principles" with respect to disclosure issues. These Core Principles, set forth below, are designed to frame a meaningful discussion regarding the current disclosure regime as called for in the Release.

<u>The Core Principles</u>

A single concept underpins the Core Principles: that disclosure has benefits and costs for investors and issuers. The difficulty, of course, is to find an appropriate balance between the benefits and costs—in this context, the point where "we might enhance, or at a minimum maintain, the investor protection benefits of disclosure, while reducing the costs (including time) that companies spend complying with quarterly reporting requirements."[5] Finding balance is not an abstract concept: it only can be done through the difficult work of assessing the specific information investors and other constituents truly need and that issuers are required to disclose, together with the format and frequency of disclosure.

The NYSE Exchanges know that disclosure is a critical means of securities regulation. That does not mean, however, that the current structure of a quarterly Form 10-Q paired with an earnings release is sacrosanct. There is no reason to be overly wedded to the current version of the Form 10-Q simply because it has existed for decades if, on careful assessment of disclosure requirements, access to information and dissemination options, it can be improved to strike a

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4 <u>See, e.g.</u> Letter from Nate C. Carey, Vice President and Controller, Ball Corporation, to Brent J. Fields, Secretary, Commission, dated February 25, 2019; Letter from Jack T. Ciesielski, President, R.G. Associates, Inc., to Brent J. Fields, Commission, dated February 24, 2019; and Letter from James C. Kloss dated December 18, 2018.

5 Release, <u>supra</u> note 2, at 65604.

better pro-investor-decision-making balance. For example, relieving issuers of the requirement to repeat information in the Form 10-Q that is already publicly disclosed or to disclose information that is no longer timely, limiting disclosure to material changes from the prior period, and increasing the use of hyperlinks would streamline disclosure requirements and reduce needless duplication.

Reconceiving the current quarterly reporting structure to obtain the benefits of transparency while reducing the costs of disclosure would improve the efficiency of the capital markets and enhance capital formation by reducing the costs of capital. For that reason, we applaud the Commission's efforts underlying the Release.

The NYSE believes in the strength of the disclosure regime

- The disclosure philosophy of securities regulation works because it puts decision-making power in the hands of investors through access to material information, while giving the Commission the tools to require issuers to provide such information.
    - Briefly put, "[i]nvestors expect, and rely on, full and accurate disclosure to make investment decisions and take risks; the Commission, in turn, is charged to act sharply to stop fraud and prevent unfair and dishonest practices, including misleading disclosures." [6]

Disclosure requirements should strike a balance between the value and cost of information: otherwise, the disclosure regime will work against investors

- At one level, investors need transparency, while the issuer side needs disclosure standards that focus on material information and are not unduly burdensome. These two needs are not in opposition.
    - At first glance, the issuer bears the burden of disclosure requirements, having to expend human and financial capital to comply with reporting requirements. However, investors bear a burden as well, not least as the expense of producing disclosure can divert issuer resources from other valuable and productive efforts.

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6 Chair Mary Jo White, *The SEC after the Financial Crisis: Protecting Investors, Preserving Markets*, January 17, 2017, at https://www.sec.gov/news/speech/the-sec-after-the-financial-crisis.html. See also Commissioner Tory A. Paredes, *Remarks at the SEC Speaks in 2013*, February 22, 2013, at https://www.sec.gov/news/speech/2013-spch022213taphtm ("investors, when armed with information, are well-positioned to evaluate their investment opportunities and to allocate their capital as they see fit").

Indeed, if disclosure is too burdensome it will discourage companies from going public, reducing opportunities for retail investors to share in the growth of companies.[7]

  - Similarly, while investors benefit from issuer transparency, so does the issuer that enjoys efficient capital markets and reduced costs of capital by virtue of the investor confidence that transparency brings to bear on the marketplace.

  - For example, quarterly disclosure demands may distract an issuer's management and board of directors from putting their time and capital to use for the long term growth of the company. Such "managing to the Q" may harm investors by leading to the reduction of growth and/or value as management and the board work from the perspective of a 90 day term and earnings results. It can also skew investors towards undue focus on the short term. The long term investor ("Mr. and Mrs. 401k") may pay the consequences.

- In striking the needed balance, disclosure requirements should be focused on the ultimate benefits to issuers and investors and be careful not to embolden a specific industry around disclosure (e.g., proxy advisory firms).

[7] See FAST Act Modernization and Simplification of Regulation S-K (October 11, 2017), 82 FR 50988, 51016-51018 (November 2, 2017) (File No. S7-08-17).

Disclosure requirements should make sense now, not reflect where we were years ago

- Disclosure requirements should be flexible, so that disclosure can adjust to new contexts without requiring lengthy Commission rulemaking processes.

  - Prescriptive disclosure requirements can be overly rigid and force issuers to provide information that is not, in fact, material or even of interest to the reasonable investor. Indeed, "imposing specific bright-line requirements can increase the costs associated with being a public company and yet not deliver the relevant and material information that market participants are seeking." [8] Principles-based disclosure requirements are more flexible and so can adjust to evolving markets more easily.[9]

Today investors receive and ingest information in ways that did not exist 20—or even 10—years ago, and the options for disclosure should reflect that reality

- Investors may review formal Commission filings, but they will also access information from earnings releases, press releases, websites, and social media postings. Compared to Commission filings, these sources can be more timely, easily available and written in plain English that is easier for an investor to understand.

- In this context, the value of the Form 10-Q should be viewed in light of the total mix of available information—which includes more than what the Commission mandates be disclosed, not just each quarter, but each week, day, hour, and even minute. Ultimately, the Form 10-Q may not be as valuable a means of imparting information to investors today as it was historically, when less information was available in a timely fashion.

- Amending Form 10-Q reporting requirements in recognition of the informational changes would benefit investors and issuers.

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[8] William Hinman, Director, Division of Corporation Finance, *Applying a Principles-Based Approach to Disclosing Complex, Uncertain and Evolving Risks*, March 15, 2019, at https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519.

[9] See Business and Financial Disclosure Required by Regulation S-K (April 13, 2016), 81 FR 23916, 23927 (April 22, 2016) (File No. S7-06-16).

Proposals to reduce the frequency of periodic reporting must be considered carefully

- As self-regulatory organizations, the NYSE Exchanges utilize issuers' public disclosure to monitor for compliance with our rules and the federal securities laws.
    - For example, we review issuers' earnings releases, Form 10-Qs, and other periodic filings to monitor for compliance with our exchange listing standards.
- Robust periodic reporting requirements provide us access to quantitative and qualitative information needed to help identify bad actors: they are valuable tools for fulfilling our regulatory obligations.
    - If the Commission elected to make reporting requirements less frequent, giving public issuers the option to report two or three times a year, the NYSE Exchanges believe we could comply with our regulatory duties by adapting our rules and practices accordingly.

Investors are empowered by getting streamlined, focused information, not by getting excessive amounts of it

- If a company is required to provide too much disclosure, the Commission reporting regime works against the investor it is meant to help because the material information can be harder to identify or even lost in the weeds, and the small investor may not review formal disclosure if it finds it too complex or difficult. [10]
- Earnings releases benefit investors because for many companies they are more timely and in plain English.
    - Normalized data can help in some respects, but plain English is key for retail investors.

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10 See id., at 23919 ("There is … a possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities"); see also Paredes, supra note 6 ("Ironically, if investors are overloaded, more disclosure actually can result in less transparency and worse decisions, in which case capital is allocated less efficiently and market discipline is compromised"); and 82 FR 50988, supra note 7.

- Having shorter, more focused mandatory disclosure documents may strengthen investor confidence that they can find the information they need in materials filed, or incorporated into documents filed, with the Commission, and thereby encourage investors to read them.

- Mandated disclosures should be those that are aligned with helping investors assess a business's financial and operational performance, as compared to "merit-based" disclosures advancing social/political objectives of specific political groups.

    - For example, issuers expend substantial resources to comply with the Congo conflict minerals disclosure requirements, yet the disclosure has a high risk of being inaccurate and is arguably not material to the reasonable investor.[11]

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The NYSE applauds the steps the Commission has taken, announced yesterday, to modernize and simplify certain disclosure requirements.[12] Ultimately, as it continues this review and evaluates the responses to the Release and changes to the disclosure regime more generally, the Commission should keep its focus on its mission and the purpose behind the federal securities laws. As Chairman Clayton recently stated,

> [a]s stewards of this powerful, far reaching, dynamic and ever evolving system, a key responsibility of the [Commission] is to ensure that the mix of information companies provide to investors facilitates well-informed decision making. The concepts of materiality, comparability, flexibility, efficiency and responsibility (i.e., liability) are the linchpins of [its] approach.[13]

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11 See Letter from Thomas Farley, President, New York Stock Exchange LLC, to Brent Fields, Secretary, Securities and Exchange Commission, dated March 20, 2017, at https://www.sec.gov/comments/statement-013117/cll2-1655385-148667.pdf.

12 *SEC Adopts Rules to Implement FAST Act Mandate to Modernize and Simplify Disclosure*, March 20, 2019, at https://www.sec.gov/news/press-release/2019-38.

13 Chairman Jay Clayton, *Remarks to the SEC Investor Advisory Committee*, December 13, 2018, at https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-meeting-121318 (stating that "[d]isclosure is at the heart of our country's and the SEC's approach to both capital formation and secondary liquidity.").

The NYSE hopes that the above discussion and set of Core Principles will be of help to the Commission in its evaluation and appreciates the opportunity to submit comments to the Commission regarding the Release and the disclosure regime more generally.

Very truly yours,

Stacey Cunningham
President, NYSE Group