March 21, 2019

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Request for Comment on Earnings Release and Quarterly Reports (Release No. 33-1058; 34-84842; File No. S7-26-18)

Dear Mr. Fields:

Better Markets[1] appreciates the opportunity to submit this letter in response to the Securities and Exchange Commission's ("SEC" or "Commission") above-captioned request for comment ("Proposal" or "Release"). The Release discusses and raises more than 160 questions regarding the current regulatory requirements as they relate to periodic reports public companies file with the SEC, including SEC's Form 10-Q, Form 8-K, and the voluntary forward-looking earnings guidance, and whether these reporting requirements and practices lead companies to unduly focus on short-term results (also referred to as "short-termism").

While we recognize that this Release does not propose to amend any Commission rules regarding periodic reporting requirements and seems to have been spurred by a presidential tweet, we nonetheless have serious concerns about its focus and direction. Moreover, if the Commission is seriously concerned about short-termism – as we are – the Commission should boldly (1) address compensation schemes that reward short-termism and (2) require companies to disclose more information, and not less, about a company's risks and strategic direction and how the company, under the watchful and engaged direction of its board of directors, plans on achieving these goals that would benefit long-term investors and contribute to the sustainable growth of the economy. Depriving investors of timely and meaningful information is not the solution to short-termism.

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

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SUMMARY

Investors are owners of public companies, and quarterly reports and other mandated disclosures provide those investor-owners with material information that they use to make informed investment decisions. Ending quarterly reports and the information they provide would put these investor-owners at a disadvantage vis-à-vis company insiders and more connected investors (such as large investors and hedge funds) who have access to other sources of information and to the executives of the companies. Reducing content from quarterly reports or discontinuing their filing are not solutions for the short-termism infecting corporate America. It may, as the Release discusses,[2] marginally reduce the costs companies spend complying with quarterly reporting requirements, but that benefit would be far outweighed by the harm suffered by investors, investment professionals, and other third-party analysts that use and rely upon these filings.

Instead, the Commission would do better by long-term investors if it trains its focus and devotes its limited resources to addressing executive compensation practices (including, performance-based incentives) that contribute to short-termism. Secondly, the Commission should maximally empower long-term investor-owners by requiring public companies to disclose comprehensive, comparable, and reliable data and information relating to environmental, social, and governance risks.

The one area regarding periodic reports on which we would welcome increased Commission focus – and the Release itself asks several questions about – is the voluntary earnings guidance that companies provide in addition to Form 8-K and Form 10-Q. These quarterly earnings-per-share guidances are major contributors to short-termism. As others have argued, companies often "hold back on technology spending, hiring, and research and development to meet quarterly earning forecasts"[3] that the executives themselves have made in the previous quarter. This issue is ripe for an SEC pilot study.

COMMENTS

Securities regulation is at its core a disclosure regime. Its bedrock premise is that reporting companies must disclose publicly and in a timely fashion all material information investors need to make informed decisions. Our securities laws and the rules by which they are administered have been built on that foundation.

Generally speaking, investors operate at a considerable informational disadvantage in the marketplace. The federal securities laws provide an important corrective to this dynamic by mandating corporate reporting, recognizing that companies have a natural inclination to withhold embarrassing and damaging information from investors. This is the fundamental dynamic underlying the Commission's disclosure regime: Investors generally want more information about public companies, and public companies want to disclose less information.

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2 Release at 65,604.

3 *See*, Jamie Dimon & Warren E. Buffett, Opinion, *Short-Termism Is Harming the Economy*, WALL ST. J. (June 6, 2018), https://www.wsj.com/articles/short-termism-is-harming-the-economy-1528336801.

The Proposal seems to treat reporting companies and investors similarly, asking in many instances if quarterly filings should be reduced for the benefits of registrants or enhanced for the benefit of investors. This approach has a built-in bias and will likely produce one-sided outcomes that will *not* serve the public interest or the Commission's mission. Further, since compliance costs and the substantive burdens of compliance with disclosure rules fall in concentrated fashion on issuers and preparers, and the benefits of disclosure are widely diffused among the investor community and the public at large, issuers and preparers are likely to be more motivated to advocate for reduced disclosure. The Commission must take this asymmetry into account and correct for it by protecting the interests of investors above all. That is, after all, the Commission's primary mission.

While we recognize that this Proposal is more akin to a "request for information," and does not propose to amend any rules, it nonetheless should have included a more detailed analysis to help commenters better appreciate the problems the Commission is aiming to solve. The Commission has not come close to demonstrating that quarterly reports represent a genuine burden for preparers and issuers, or that reducing the frequency of these reports would meaningfully impact short-termism. It is certainly true that complaints of onerous reporting requirements and unwieldy financial statements are so common in the preparer community that they run the risk of being accepted as dogma. But widespread complaints about disclosure requirements are not the same as actual evidence that proves a problem actually exists regarding overly burdensome disclosure requirements.[4]

There are many reasons to believe that investors are not overwhelmed, confused, or ill-served by the contents or frequency of financial disclosure statements. The SEC's own Investor Advisory Committee (IAC) has made it plain that investors believe the "current degree, quality and frequency of disclosure for U.S. issuers overall is appropriate and a source of strength for the U.S. capital markets," and that "the current system greatly benefits retirees, pension funds, endowments and households that are directly and indirectly market participants."[5] The SEC has not demonstrated that there is an outcry from any part of the investor community for reduced disclosure.[6] Indeed, Better Markets is unaware of even a single retail or institutional investor that has identified excessive or too-frequent disclosure as a genuine problem, much less an urgent one.

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4 As we understand, most companies, and indeed most businesses with minimal bookkeeping resources, conduct internal financial reporting and accounting on monthly, if not weekly, basis. These internal reporting help companies project sales, plan for purchases and manufacturing, make compensation decisions, etc. Porting these internal reporting into SEC quarterly reports is minimally burdensome, and in any case, is factored into the prices of goods and services these companies offer.

5 *See* Letter from SEC Investor Advisory Committee to SEC Division of Corporate Finance (June 15, 2016), https://www.sec.gov/comments/s7-06-16/s70616-22.pdf.

6 Iinvestors can, and are able to, be discerning in their consumption of financial reporting and other disclosure. If there is indeed a deluge of disclosures, investors, and those who serve them, can separate the material information from the trivial.

To the contrary, as demonstrated by a recent petition for rulemaking on ESG disclosure (and the thousands of comments it has attracted), investors are demanding more disclosures.[7] Another study analyzed the 26,512 comments that were filed in response to SEC's 2016 Concept Release on "Business and Financial Disclosure Required by Regulation S-K," and it concluded that more than 99% of these comments requested the SEC to **expand** disclosures.[8] Better Markets also commented on that Concept Release arguing against reduction of disclosures in the name of disclosure effectiveness, and, instead, argued for expansion of disclosure in certain areas. [9]

Quarterly Reports Contain Material Information Necessary for Informed Investment Decisions.

Quarterly reports filed by public companies to SEC's EDGAR system contain important information for long-term investors. These reports allow for investors to review the health of a company's finances throughout the year, at regular and predictable intervals. Because of the frequency and the requirement to structure the reports in interactive data format, these quarterly reports make it possible for investors to more easily compare companies, their financial performance, future profitability, and other objective factors. These reports allow for more sophisticated investors to create forecast and valuation models and make informed decisions regarding allocation of capital across their portfolios.

Quarterly reports are further useful for investors to assess current risks regarding companies that are in the growth stage and which sometimes have significant transactions or strategic shifts in intervals that are more frequent than annual.[10] These growing companies can also be less stable and more susceptible to changes in industry, public policy, economic conditions, weather events, and other unexpected developments. Providing quarterly reports to investors and keeping them informed of current business developments in fast growing and less stable companies would help mitigate informational disadvantages and contribute to more informed investment decisions. While production of quarterly reports may be disproportionately costly for growing and smaller companies, the harm born out of keeping their investors less-informed still outweighs such compliance costs. We therefore urge the Commission to maintain a level-playing field and continue requiring the same reports from all publicly traded companies.

Quarterly Reports are Particularly Useful to Financial Professional- and Third-Party Analysts and Advisors who Serve Investors.

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7 *See* Petition for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure, SEC File No. 4-730 (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf. The comments on the petition are available at https://www.sec.gov/comments/4-730/4-730.htm.

8 *See* TYLER GELLASCH, JOINT REPORT: TOWARDS A SUSTAINABLE ECONOMY: A REVIEW OF COMMENTS TO THE SEC'S DISCLOSURE EFFECTIVENESS CONCEPT RELEASE (2016), https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5866d3c0725e25a97292ae03/1483133890503/S ustainable-Economy-report-final.pdf.

9 *See* Better Markets, Comment Letter on Concept Release on Business and Financial Disclosure Required by Regulation S-K (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-312.pdf.

10 *See* Chris Cancialosi, *What Are The Greatest Priorities For Rapidly Growing Companies?* FORBES (Mar. 7, 2016), https://www.forbes.com/sites/chriscancialosi/2016/03/07/what-are-the-greatest-priorities-for-rapidly-growing-companies/#3207a7d150c7.

Given the structured format that is both human- and machine-readable, their predictable schedule and general reliability, quarterly reports are particularly useful to financial professionals, third-party analysts, "fintech" providers, and financial and investigative journalists. These consumers of information create innumerable other tools and products, including research platforms, benchmarking tools, analysts' reports, screening reports, and news reports, all of which can and do aid investors to make more informed investment decisions.

Limiting Quarterly Reports Would Give Advantage to Sophisticated Investors at the Expense of Non-Sophisticated Investors.

Limiting quarterly public disclosure of corporate information risks giving an advantage to some investors while hurting others. The big Wall Street banks, the big mutual fund companies, and other sophisticated financial institutions with substantial research departments will continue to have ready access to corporate officers and corporate information. In an environment with less-frequent reporting, these sophisticated and deep-pocketed investors would likely still gain access to information while the less-sophisticated and -resourced investors would be left in the dark, awaiting semi-annual or other disclosures. Due to this informational disadvantage, this latter group would likely suffer by getting "picked off" in the market as those with better information would be better positioned to trade against them.

The Commission Should Focus on Compensation Practices that Contribute to Short-termism.

Instead of limiting the frequency of quarterly reports, the Commission should devote its limited resources and attention to boldly addressing compensation practices and policies that contribute to corporate short-termism. The compensation and other performance incentives created by, or allowed by, boards of directors result in executives focusing on short-term results rather than long-term performance. As has been well-documented, executive compensation policies have encouraged short-sighted and high-risk corporate behavior.[11] Another study reflecting on the financial crisis described the harmful impact of poorly designed compensation systems in the following terms:

> Compensation systems—designed in an environment of cheap money, intense competition, and light regulation—too often rewarded the quick deal, the short-term gain—without proper consideration of long-term consequences. Often, those systems encouraged the big bet—where the payoff on the upside could be huge and the downside limited. This was the case up and down the line—from the corporate boardroom to the mortgage broker on the street.[12]

To address this problem, the Commission should complete the executive compensation related rulemakings mandated by the Dodd-Frank Wall Street Reform and Consumer Protection

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11 *See* H.R. Rep. No. 111-236, at 6 (2009), https://www.congress.gov/111/crpt/hrpt236/CRPT-111hrpt236.pdf.

12 *See* FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT xix (2011).

Act of 2010. Almost eight and half years after the passage of the Act, the Commission is yet to finalize rules mandated under Sections 954 and 956 ("Recovery of Erroneously Awarded Compensation" and "Enhanced Compensation Structure Reporting," respectively). Completion and enforcement of these rules would do far more to address corporate short-termism than reducing the frequency of periodic reporting.

The Commission Should Require Disclosure of New Information to Address Short-termism.

As cited above, investors representing trillions of dollars of investable assets have been petitioning the SEC and demanding from companies information through standardized and regular disclosures that demonstrate a company's commitment to long-term value creation, sustainability of growth, accounting of risks emanating from the changing environment, and other material information.[13] These investors recognize how short-termism has negatively impacted investments in human capital, research and development spending, and capital spending in general.[14]

Conversely, companies with long-term focus have stronger financial performance over time, and their total returns to shareholders are greater than short-term focused companies.[15] Between 2001-2015, long-term companies "added nearly 12,000 more jobs on average than other firms," and if other firms had followed the job creation levels of long-term companies, this would have added more than $1 trillion to the U.S. GDP.[16] To encourage companies to become more long-term oriented, the SEC should mandate the disclosure of information that speaks to a company's long-term performance and risks, including the disclosure of environmental, social, and governance risks. These disclosures could also provide an opportunity for companies to explain to investors how they are meeting long-term oriented challenges. These explanations and disclosures would serve the basis of more informed investor decisions, including the decision to commit to the company for the long-term or divest and seek other investment opportunities.

The Commission Should Consider Conducting a Pilot Study on Forward-Looking Earnings Guidance.

In the Proposal, the Commission briefly discusses the voluntary quarterly forward-looking earnings that companies and their executives provide, and asks several questions whether the forward-looking earnings guidance "create undue focus on short-term financial results and thereby

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13 For a discussion showing the broad interest among investor organizations for new disclosures, *see* U.S. SIF, Comment Letter on Concept Release on Business and Financial Disclosure Required by Regulation S-K (July 14, 2016), https://www.sec.gov/comments/s7-06-16/s70616-107.pdf.

14 *See* DOMINIC BARTON ET AL., MCKINSEY GLOBAL INSTITUTE, MEASURING THE ECONOMIC IMPACT OF SHORT-TERMISM (2017), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/long%20term%20capitalism/where%20companies%20with%20a%20long%20term%20view%20outperform%20their%20peers/mgi-measuring-the-economic-impact-of-short-termism.ashx.

15 *Id.* at 2.

16 *Id.*

negatively affect[] the ability of companies to focus on long-term results."[17] There is evidence that these voluntary earning guidances contribute to short-termism.[18]

The SEC could provide valuable insights that could in turn be used for further policymaking by conducting a pilot study of publicly traded stocks that permit forward-looking earnings guidance and those that do not. While the details can further be developed, the SEC could design the Pilot to divide all publicly traded stocks – through stratified sampling by market capitalization, share price, and liquidity – into two buckets: (1) a control group (which would maintain the status quo); and (2) a group prevented from issuing any forward-looking earnings guidance. The SEC could then test for short-termism through quantitative and qualitative measures.

CONCLUSION

Claiming to address short-termism by reducing publicly disclosed information is treating a symptom rather than the disease itself. If the Commission is sincere in its desire to pursue what is in the interest of long-term investors, the protection and empowerment of these investors, the sustainable growth of the economy, and the reduction of risks from the markets, then the Commission should focus on the incentives that contribute to short-termism. Key among these incentives are compensation arrangements, including performance-based compensation policies. And if the Commission is serious about empowering and maximally informing investors, it should require the disclosure of more information that today's investors find material, and *not* reduce the frequency or the content of quarterly reports.

Sincerely,

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17 Release at 65,605.

18 *See* DIMON & BUFFET, *supra* note 2; *see also* ARIEL FROMER BABCOCK & SARAH WILLIAMSON, THE CONFERENCE BOARD, QUARTERLY EARNINGS GUIDANCE – A CORPORATE RELIC? (Mar. 2018), http://www.shareholderforum.com/access/Library/20180300_ConferenceBoard-DirectorNotes.pdf.

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