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March 7, 2019

Via E-mail: rule-comments@sec.gov

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

Attention: Brian Fields, Secretary

Re: Request for Comments on Earnings Releases and Quarterly Reports – File No. S7-26-18

Ladies and Gentlemen:

We appreciate the opportunity to respond to the Commission's request for comment on ways to enhance investor protection attributes of periodic disclosures while reducing the burden on reporting companies associated with quarterly reporting (the "Release").[1]

General Observations

In our experience, there are a wide variety of considerations that reporting companies take into account, in determining the timing, content and format of quarterly earnings disclosures. These include economic and commercial factors, as well as significant legal considerations, that apply to reporting companies generally. They also include a reporting company's particular circumstances – including the nature of its business, and the size, complexity and geographic scope of that business, but also its stage of development, the nature of its shareholder base and its degree of interaction with

[1] Release No. 33-10588; 34-84842 (December 18, 2018).

that shareholder base, research analysts and other constituencies, as well as the practices of other reporting companies engaged in similar businesses. These particular circumstances importantly shape the reporting practices that a company adopts, and how those practices evolve dynamically over time.

The observed diversity in quarterly earnings disclosure practices noted in the Release – such as the relative timing of the earnings release and the Form 10-Q, and the provision of forward-looking or non-GAAP information in these documents or by other means – reflects choices reporting companies make in response to their particular situations. Subject to appropriate "guardrails" – currently provided by the line-item requirements and filing deadlines of Form 10-Q, as supplemented by Rule 12b-20 – we think reporting companies are best positioned to make those choices for themselves, and that it would be a mistake for the Commission to seek to promote convergence in practice, under the auspices of uniformity or in an effort to reduce "unnecessary duplication". Reporting companies are generally free, under existing rules, to reduce such "duplication" in their different quarterly earnings disclosures, but for a complex set of reasons often choose not to do so. We review below some of the relevant considerations that we think drive reporting companies' choices in this area. While any of those considerations could be the subject of a separate policy review, if the Commission were so inclined, we think their number and complexity is a strong argument for leaving reporting companies at least the flexibility they currently have in designing and changing their particular quarterly reporting practices.

At the same time, we don't see the variation in disclosure practices as being detrimental to investors. Rather, we think that investors are looking for timely information, in the form that reflects the insights of management as the operators of the business, as soon as they can get it, and would not discount information actually released by an issuer based on the format in which that disclosure appears (unless and until the issuer loses credibility by releasing poor quality information that it must later correct or supplement). In addition to their interest in accommodating investors' desire for information, issuers have important interests in maintaining credibility with investors and avoiding liability. In our view, these factors provide an appropriate incentive structure; there is no further need to try to drive all reporting companies toward uniform disclosure practices. In a similar way, we do not think the Commission should attempt to police the relative timing of press releases, filings and earnings calls – though publicizing investors' concerns in this regard, and even suggesting (or encouraging investors or investor groups to suggest) "best practices," can only be constructive.

At the same time, there are clearly ways that the Commission's reporting process could be modified to promote prompt and easy-to-use access to information as made available, while at the same time simplifying the process for issuers. As we have previously suggested,[2] the EDGAR platform could usefully be updated to reflect a "company file" approach, presenting investors with a uniform and coherent presentation of basic information (in this case, in respect of a quarter's results), while permitting issuers to file the underlying information in increments, as and when ready. Alternatively, the recent rule changes requiring hyperlinking of exhibits may represent an approach to improving the investor user experience that could be useful in the context of quarterly reporting. For example, a later quarterly filing might be permitted to incorporate earlier-filed and now hyper-linked disclosure (e.g., from an earnings release); this would be consistent with the concept, discussed in the Release, of the earnings release as a core disclosure document, but in our view should only be done on an optional, voluntary basis.

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2 Letter submitted by Sullivan & Cromwell LLP (August 9, 2016), *available at* https//www.sec.gov/comments/S7-06-16/570616-354.pdf.

Factors that Affect Quarterly Reporting Practices

In our experience many considerations affect the timing, method and location (in the Form 10-Q vs. the earnings release vs. on an earnings call vs. website posting) of earnings-related disclosure. Relative timing of different disclosures may be affected by competitors' reporting practices; or a desire to release material non-public information as soon as possible, and thereby reduce the risk of leaks and minimize trading blackout periods; or by an interest in ensuring the accuracy of reported information (or different sorts of information). The relative timing of different disclosures may also be affected by the timing of completion of auditors' quarterly review, or by the extent and complexity of information required in the notes to the interim financial statements, which may not need to be completed in order to issue an earnings release. Variations in the method and location of released information may reflect the standard of liability that will apply to the information – especially where the Form 10-Q is incorporated by reference into Securities Act filings, and especially in respect of forward-looking information, and for the typical "color commentary" provided by management in earnings releases. It may also be affected by the need to comply with Item 10(e) of Regulation S-K in respect of non-GAAP measures included in a Form 10-Q. The relative significance of these different considerations varies widely among reporting companies, reflecting the wide variety of circumstances they face, as discussed above. Companies are in the best position to determine for themselves how to balance these considerations as they design their procedures for developing and releasing quarterly information.

Frequency of Reporting

As a general matter, we would not support elimination of the requirement to report historical earnings on a quarterly basis, which we see as a key element of the timely and accurate information flow that underpins the quality and efficiency of our capital markets. The current disclosure rules could be improved – most notably by subjecting all of the Form 10-Q line-item disclosure requirements to an over-arching materiality standard, as has been suggested (including by us) before. But we are very skeptical that an economic case could be made for eliminating the quarterly reporting requirement, and believe that doing so would raise significant compliance concerns, as well.

Reporting companies could always continue quarterly reporting, even though not required, but the policy question is rather: why might some issuers choose to stop quarterly reporting? As an economic matter, such a reduction in available information about a company would logically be expected to lead to less efficient trading in the company's securities and a higher cost of capital to the company, as market participants react to greater uncertainty by applying greater valuation discounts. Might the company expect to avoid this effect by supplying comparable information to the market by other means (like released but unfiled historical information, or earnings "guidance")? If so, what is the policy justification for moving that information flow outside the scope of the liability provisions that cover filings? And even if an issuer is willing to accept less efficient trading markets in its securities, why are its security holders allowed to suffer this impact? Frankly, we don't think there are satisfactory answers to these questions.

Again on the basis of economic analysis, it may be possible to conclude that for some category or categories of newer or smaller issuers, it is rational to accept a higher cost of capital and a less efficient trading market in the issuer's securities, in exchange for access to public markets and reporting company status with reduced out-of-pocket costs. It may also be possible to conclude for another category of companies – for instance, those with no expectation of near-term revenues – that reduced information would not lead to a higher cost of capital or a less efficient trading market in the issuer's securities. While we are skeptical that this would actually prove out upon a real economic analysis, the policy choice should in fact turn on a determination by economists, rather than a legal conclusion.

We also believe that less-than-quarterly reporting is likely to increase the risk of insider trading; a logical response from reporting companies would be to reduce their "trading windows" – the portion of the calendar during which insiders are allowed to trade – but companies may be reluctant to do this, or face resistance from their insiders, putting pressure on the efficacy of the "trading windows" approach. Companies (and their insiders) will continue to be aware of quarterly operating results, whether or not those results are reported externally, and so the temptation and opportunities to abuse material non-public information would be expected to grow, in a company that moves to semi-annual reporting.

We don't think that quarterly reporting of historical earnings information, in itself, is a significant contributor to the problem of "short-termism". For one thing, reporting companies' managements and boards will continue to have this quarterly information, whether or not they release it publicly. A much more significant contributor to "short-termism", we think, is companies' practices with respect to providing earnings guidance, and then focusing their reporting on that guidance. That said, we feel strongly that "short-termism" is fundamentally a governance, rather than a disclosure issue, and that absent any sort of direct mandate to address it (of the sort included in various Dodd-Frank Act and Sarbanes-Oxley Act governance mandates to the Commission), the Commission should very carefully consider what, if any, authority it has to address the topic. Moreover, reporting companies have many various and particular, even idiosyncratic reasons for their earnings "guidance" practices, and so any across-the-board approach to limit or discourage the giving of "guidance" – for example, by requiring that any guidance be either filed with or furnished to the Commission – – should be very carefully considered.

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If you would like to discuss our letter, please feel free to contact Robert E. Buckholz at [redacted] or Robert W. Downes at [redacted].

Very truly yours,

Sullivan & Cromwell LLP

Sullivan & Cromwell LLP