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March 21, 2019

Re: Request for Comment on Earnings Releases and Quarterly Reports
Release No. 33-10588; 34-84842
File No. S7-26-18

via e-mail: rule-comments@sec.gov

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

Dear Ms. Countryman:

We are submitting this letter in response to the above-referenced request for comment. We appreciate the Commission's willingness to solicit a broad range of views on how to achieve the goal of increasing efficiency in periodic reporting while continuing to maintain the flow of material information to investors. We believe there may be ways to streamline the reporting required by public companies while ensuring investor access to critical information.

As lawyers we are not in a position to say whether the current quarterly reporting requirement may contribute to a deleterious short-term view in corporate decision-making. Therefore, except for a small category of companies (discussed below), we have no opinion on whether the current reporting frequency should be reduced in order to encourage companies to take a longer view. We do however have suggestions on certain technical aspects of the quarterly reporting regime that we believe could help ease the burden now imposed on public companies while maintaining the existing information level for investors in all material respects.

The release asks for comment, among other things, on the relationship between the quarterly report on Form 10-Q and the earnings release voluntarily published by most public companies. Most investors rely, directly or indirectly, on information provided in a company's earnings release when making investment decisions. For the first three quarters of the company's fiscal year, much of this information is then repeated in the company's subsequently filed Form 10-Q, albeit in a different format. We believe companies should have the option to utilize the earnings release as the core quarterly disclosure, to be supplemented by filing only financial statements and executive officer certifications in the subsequent Form 10-Q. We believe this change would

fulfill the Commission's stated goal of maintaining "the investor protection benefits of disclosure, while reducing costs (including time) that companies spend complying with quarterly reporting requirements."

The main purpose of corporate disclosure is to provide investors with information needed to make informed investment and voting decisions. Like the information required to be included in the Form 10-Q, an earnings release typically contains material financial and operational information about the most recently completed fiscal quarter. The information presented in the earnings release, however, is often more concise than that found in the Form 10-Q and contains information the company believes is most important to investors. Instead of full financial statements with footnotes, an earnings release that contains financial statements would typically limit such statements to a balance sheet, income statement and, possibly, a statement of cash flows. Instead of a full MD&A, which is required to include a discussion of items in addition to results of operations, such as liquidity, capital resources and off-balance sheet arrangements, an earnings release will usually contain an abbreviated version of results of operations, focusing on that information which is most meaningful to investors. This discussion would usually include results of operations, segment data and key performance metrics that management understands from experience is important to the investment community. In addition, an earnings release often includes forward-looking earnings, cash flow and operational guidance.

While not required by any rule of the Commission, the issuance of earnings releases has become an important part of the actual, if not formal, disclosure regime and we believe most investors have come to rely on companies' earnings releases and related conference calls or webcasts when making investment decisions. This is borne out by the fact that there can be a significant movement in a company's stock price immediately after publication of the earnings release, with little or no movement upon filing of the Form 10-Q. As a result, we think a public company should have the option to include some or all of the quarterly MD&A in the earnings release, and then incorporate that, without repetition, into the Form 10-Q. To help facilitate this optionality, we believe that the Commission should eliminate the requirements found in Part II to Form 10-Q (other than Item 6 Exhibits), as that information, to the extent material, is generally provided in the footnotes to the interim financial statements. These changes would provide companies with flexibility and help eliminate the publication of duplicative information while at the same time providing investors with the information they need on a timely basis.

Streamlining the information required to be included in the Form 10-Q would support the Commission's goal of simplifying and updating required disclosure. Preparing disclosure is a costly endeavor for registrants which requires significant expenditures of both time and money. By eliminating the duplication of information in the earnings release and the Form 10-Q, the Commission would be mitigating a significant burden to companies.

If the Commission does decide to streamline the requirements of Form 10-Q as discussed above, we would support adding a requirement that companies publish earnings reports within the timeframe required to file the Form 10-Q. As previously noted, most large public companies already do publish earnings releases, so we believe introducing a requirement would not cause a significant burden to large reporting companies as a whole. Requiring companies to publish earnings releases would dovetail with our proposal to allow companies to choose whether to include the MD&A in an earnings release or a Form 10-Q. We do believe, however, that, if required, the earnings release should not have a prescribed format, as the current formats have evolved organically with the information needs of the marketplace.

In addition, should the Commission require companies to publish an earnings release and permit it to be incorporated into the Form 10-Q, we believe that companies should also be permitted to deem a portion of the earnings release “furnished,” not “filed,” with the Commission to the extent of information other than the MD&A. For the portion of the earnings release deemed “furnished,” Item 10(e)(i) of Regulation S-K would continue to apply when the earnings release is filed in accordance with Item 2.02 of Form 8-K and subsequently incorporated into the Form 10-Q. In this way, companies would continue to be encouraged to provide guidance and other forward-looking information to their investors without incurring additional securities law liabilities.

Finally, regardless of whether a quarterly reporting cadence fosters short-term behavior, we do think it would make sense to reduce the quarterly reporting requirement to a semi-annual requirement for pre-commercial enterprises that do not yet have significant product revenue, such as young biotech companies. These companies typically have raised money in the public market to fund research and development efforts, with the understanding that they might not have a commercially viable product for a number of years. As a result, investors in these types of companies are not basing their investment decisions on revenues and current earnings, but rather on material developments such as completion of research studies (all of which are typically disclosed through Form 8-K rather than Form 10-Q). We believe the burden on these companies of preparing quarterly disclosure is not outweighed by a benefit to investors.

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We appreciate the opportunity to participate in the process, and would be pleased to discuss our comments or any questions that the Commission or its staff may have, which may be directed to Bruce K. Dallas, Joseph A. Hall, Michael Kaplan, Byron B. Rooney or Richard D. Truesdell, Jr., of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP