

Will the Earnings Release Be the New 10-Q?

The Commission's Request for Comment on Earnings Releases and Quarterly Reports

As far back as 2015, the US Securities and Exchange Commission's (the Commission) Advisory Committee on Smaller and Emerging Companies considered, in the context of the Commission's disclosure effectiveness initiative, the merits of a quarterly filing requirement for U.S. reporting companies.¹ Off and on since, other Commission Staff representatives have considered publicly whether the semi-annual reporting approach popular in Europe had certain merits compared to a quarterly filing requirement.² More recently, various business and industry leaders have spoken out against the perceived short-termism affecting U.S. public companies and the role played by earnings guidance.³ Commentary regarding the issuance of earnings guidance, which has become less and less common for U.S. public companies particularly following the financial crisis, has often been conflated with discussions regarding quarterly reporting requirements. Earlier in the year, a Presidential tweet contributed to this dialogue.

On December 18, 2018, the Commission published a Request for Comment on Earnings Releases and Quarterly Reports (the Request)⁴, which solicits public comment on both earnings releases and the frequency of periodic reporting. In the Request, the Commission notes that it is seeking to reduce administrative and other burdens for U.S. public companies without compromising investor protection. In so doing, the Commission poses 46 questions that request comment on a number of different areas, including, but not limited to the following:

- The nature and timing of the disclosures that companies are required to provide in their quarterly reports on Form 10-Q
- Whether these disclosures are repetitive of the disclosures made voluntarily by companies in the form of earnings releases that are furnished on Form 8-K
- Whether the duplication that exists in the information furnished in earnings releases and filed in Forms 10-Q might be reduced including by allowing companies to issue earnings releases that would comply with the core disclosure requirements of Form 10-Q
- Whether the Commission's rules should provide all or certain reporting companies with flexibility regarding the frequency of their periodic reporting
- Whether and how periodic reporting and earnings releases may affect corporate decision making or strategic thinking

The Commission also solicits information regarding corporate decisionmaking regarding whether to publish an earnings release, the type of information included in an earnings release, the ways in which market participants use earnings release information, the impact that Form 10-Q requirements for CEO/CFO certification and auditor review has on investors, and related matters. The Request also considers the costs and benefits associated with producing a Form 10-Q.

The Commission advances for discussion an approach referred to as the "Earnings Release as Core Quarterly Disclosure" approach, wherein a

reporting company might be given an option to use its earnings release in order to satisfy the core financial disclosure requirements of Form 10-Q. In such situations, the Form 10-Q would

- supplement the earnings release filed on a Form 8-K with any supplemental information required by the Form 10-Q and not already presented in the Form 8-K, or
- incorporate by reference disclosure from the earnings release filed on Form 8-K into the Form 10-Q.

The Request solicits comment on the merits of these alternatives, including on whether they present issues in relation to incorporation by reference into registration statements and whether financial statements included in an earnings release should be subject to auditor review procedures at the time the Form 8-K is filed.

The Commission also asks whether particular types of companies should be subject to different periodic reporting requirements. It is interesting to note that there is relatively little discussion regarding this point. Earlier in the year, a series of trade groups had published a report titled “Expanding the On-Ramp,” which recommended that regulators and legislators consider a number of measures in order to promote the number of US public companies.⁵ Among the measures referenced in the trade group report was allowing emerging growth companies the opportunity to satisfy their quarterly reporting requirements through the issuance of a press release instead of a full Form 10-Q. Legislation was subsequently introduced in the House of Representatives titled “Modernizing Disclosures for Investors Act,” which was later subsumed into the “JOBS Act 3.0” package of legislation that would have required the Commission to report to Congress on a cost-benefit analysis regarding the requirement imposed on emerging growth companies to report on Form 10-Q and suggesting alternative quarterly reporting formats for emerging growth companies. Clearly, many market participants associated the quarterly reporting requirement as more burdensome for smaller or newer public companies.

Finally, the Request solicits comment on the impacts on capital formation, if any, of changes to the quarterly reporting requirements.

Comments may be submitted for a 90-day period following publication of the Request in the Federal Register.

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Endnotes

- ¹ U.S. Securities and Exchange Commission, transcript from meeting of Advisory Committee on Small and Emerging Companies, Sept. 23, 2015, available at <https://www.sec.gov/info/smallbus/acsec/acsec-transcript-092315.pdf>.
- ² See, for example, remarks given by Keith F. Higgins, Director, Division of Corporation Finance, titled, “International Developments—Past, Present and Future,” Jan. 21, 2016, available at <https://www.sec.gov/news/speech/international-developments-higgins.html>.
- ³ See, for example, Jamie Dimon and Warren E. Buffett editorial titled, “Short-Termism is Harming the Economy: Public companies should reduce or eliminate the practice of estimating quarterly earnings,” Wall Street Journal, June 6, 2018.
- ⁴ See Request here: <https://www.sec.gov/rules/other/2018/33-10588.pdf>.
- ⁵ See report here: <https://www.sifma.org/wp-content/uploads/2018/04/Expanding-the-On-ramp-Report.pdf>.

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