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SEC proposes making quarterly reporting optional

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In what could represent the most significant shift in periodic reporting obligations in decades for many companies, the SEC proposed new rules allowing domestic public companies to opt into semiannual reporting.

The SEC released its widely-anticipated rule proposal making quarterly reporting on Form 10-Q optional and instead allowing companies to opt into semiannual reporting. The SEC last considered potential changes to the quarterly reporting framework and quarterly earnings releases in a 2018 request for comment (we submitted a comment letter), but any rulemaking remained dormant until the Commission, under the leadership of Chairman Atkins, took it up again last year at the urging of President Trump. Importantly, the rule proposal changes only the cadence of reporting, not the substance of the disclosures.

The rule proposal is the first step in what is promised to be an ambitious SEC rulemaking agenda. There is a 60-day comment period, and we do not expect final rules to be adopted until the end of this year. It remains to be seen whether rule changes will be adopted in time to impact reporting in 2027 for companies on the calendar year (note the SEC is seeking comment on what the compliance date should be and whether a transition period is needed).

As this proposal moves forward, domestic public companies should consider whether a semiannual reporting framework is appropriate for them, including how moving to a semiannual reporting framework might affect ongoing communications with investors and the market and quarterly earnings releases and what the impact on their existing processes might be. Foreign private issuers, while not directly impacted by the rule proposal as the SEC rules already permit them to follow semiannual reporting, may want to monitor market practice and determine whether any changes to their own reporting cadence may be desired.

Moving to semiannual reporting

The rule proposal gives companies the choice to file interim reports on a semiannual basis rather than on a mandatory quarterly cadence, and makes corresponding changes to financial statement requirements in Regulation S-X to accommodate semiannual filers and to streamline and consolidate existing rules.

- **Semiannual reporting on new Form 10-S**. Companies that wish to opt into semiannual reporting would indicate their election on an annual basis by checking a box on the cover page of their Form 10-K for the most recently completed fiscal year.
  - A company that makes this election would file a single Form 10-S covering the first six months of its fiscal year, with the second six-month period effectively captured in the annual report on Form 10-K.
  - The proposed filing deadline for Form 10-S is 40 days after the end of the first semiannual period for large accelerated filers and accelerated filers, and 45 days for all other companies—mirroring the existing quarterly deadlines.

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    - Once a company makes its election for a fiscal year, it must maintain that reporting frequency for the remainder of that year, but can change its election in a subsequent year.
    - Companies previously not required to make Exchange Act filings, such as IPO companies, would check a box on the cover page of the registration statement. If they elect to report semiannually, the first semiannual report on Form 10-S would be due the later of 45 days after the effective date of the registration statement or the date that Form 10-S would otherwise have been due had the company been an Exchange Act reporting company.
    - The proposed Form 10-S would require the same narrative and financial disclosures as the current Form 10-Q, except that the information would cover a six-month period rather than a fiscal quarter.

- **Regulation S-X amendments and age of financial statements**. The SEC is proposing amendments to Regulation S-X to ensure that financial statements in registration statements filed by semiannual filers would not be considered "stale," as they would under existing rules built along a quarterly framework, if a company were to opt for semiannual reporting.
    - The proposed amendments are intended to align requirements for updating interim financial statements in a registration statement with the corresponding requirements for either Form 10-Q or Form 10-S.
        - A company would be required to include in a registration statement the same interim financial statements that have been filed or are required to be filed on or before the filing date of that registration statement in the applicable interim Exchange Act report. A company that is not subject to Exchange Act reporting, like a company seeking to go public, would apply this rule as if it were required to file Form 10-Q or Form 10-S.
    - The changes are also intended to streamline and simplify Regulation S-X requirements, for instance, doing away with certain day-count intervals that lead to unnecessary inconsistencies, in addition to aligning due dates for the second quarter Form 10-Q (for quarterly filers) and the Form 10-S (for semiannual filers).
    - The SEC recognizes that the proposed amendments could have the effect that a semiannual filer's interim financial statements may be considerably less current than those a quarterly filer would be required to include in a registration statement.
        - For example, as the SEC notes, a non-reporting company on the calendar year that elects semiannual reporting could in theory file a registration statement as late as August 13 without any interim financials in the filing.
        - This would include a company seeking to go public that elects semiannual reporting. Of course, there are market considerations that as a practical matter could mitigate that concern.

- **What does not change under the proposal?** The SEC's rule proposal is focused on cadence, not substance, of quarterly reporting — the proposal does not change the substantive requirements of Form 10-Q.
    - Companies that wish to continue reporting on a quarterly basis on Form 10-Q can do so – the proposed amendments do not require them to modify their reporting cadence or process. They just need to leave the semiannual reporting checkbox unchecked on the cover of Form 10-K.
    - Financial statements filed under cover of Form 10-S would still be required to undergo limited review by a company's auditors.
    - The proposed amendments do not change substantive Form 8-K reporting requirements, including those relating to earnings releases. As proposed, Item 2.02 would be triggered by any public announcement disclosing material nonpublic information (MNPI) regarding a company's completed quarterly, semiannual or annual fiscal period, so a quarterly earnings release generally will continue to trigger Item 2.02.

The SEC is seeking comments on several important topics, including whether it should consider revising the disclosure requirements of Form 10-Q rather than, or in addition to, the reporting frequency, whether the SEC should require earnings releases to be filed, whether auditors should have obligations to review quarterly information even if a company chooses semiannual reporting and whether PCAOB auditing standards should also be revised to allow auditors to provide negative assurance in comfort letters in the context of a company that opts for semiannual reporting, which we discuss below.

Key implications

The SEC's rule proposal provides public companies welcome flexibility to consider how they might change their quarterly processes and reporting cadence, if at all, based on a variety of considerations. Most companies will likely need to

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assess the reporting flexibility introduced by the rule proposal on a case-by-case basis, taking into account factors including investor expectations, quarter-to-quarter performance metrics variability, anticipated financing requirements, trading policy and buyback implications, and peer company practice.

Company profile

Are early-stage public companies most likely to take advantage of semiannual reporting?

It depends. Semiannual reporting could in theory be well-suited for companies without significant product revenue, such as early-stage biotech firms still in the research and development phase. Investors in these companies tend to base their decisions on milestones — such as clinical trial results, which are generally already disclosed on an event-driven basis through 8-K filings — rather than on quarterly revenue or earnings. For these companies, the burden of quarterly reporting, whether in the form of an earnings release or a 10-Q, may not be justified by a corresponding benefit to investors.

True semiannual reporting demands heightened disclosure discipline and robust internal controls to avoid any selective disclosure of MNPI. These companies will also want to consider the implications for their financing opportunities — particularly those relying on at-the-market (ATM) offering programs — and adapt any required diligence and comfort letter procedures accordingly. The implications discussed below for blackout windows and insider trading policies, as well as the effect on Rule 10b5-1 plans, will likewise require careful attention.

How are more seasoned companies impacted by the rule proposal?

Most public companies voluntarily publish an earnings release each quarter, in part driven by investor expectations. As a result, many companies are likely to continue quarterly financial and operating updates in some form to meet market demand.

The SEC has requested comment on whether earnings releases should be required to be filed and whether auditors should have to review the earnings information. The impact on a company and its ability to continue to issue earnings releases will depend on whether changes are made to how earnings releases are treated in the adopted rules. If no changes are made, the real impact of the rule proposal for seasoned companies may ultimately be one of form rather than substance.

That said, there could be cost-savings associated with preparing an earnings release and having an earnings call as a company normally does, but not expend time and resources on a 10-Q for the first and third quarters. For example, a company may not need to prepare financial statements with footnotes and have those undergo limited review by its auditors, in particular if it does not foresee any need to access capital markets in the relevant off-cycle timeframe. In addition, while the additional disclosures in a 10-Q may not be incrementally material to an investor beyond what they learn from an earnings release, they do require a company to spend time and resources to prepare.

Much of this depends on a company’s existing internal processes and expectations, as well as financing needs, and, as we discuss below, capital markets financings generally require reviewed interim financials with footnotes.

Selective disclosure

Does doing away with first and third quarter 10-Qs raise selective disclosure concerns?

If a public company continues to voluntarily issue a quarterly earnings release, selective disclosure concerns with respect to quarterly financial and related material information are likely mitigated. Most public companies voluntarily publish an earnings release each quarter, and most investors rely on that earnings release along with the related earnings call — rather than the subsequently filed 10-Q — for their investment decisions. An earnings release typically contains material financial and operational information about the most recently completed fiscal quarter, including key financial information and an abbreviated analysis of results of operations, focusing on that information which is most meaningful to investors.

While the proposal acknowledges that if a company elects to report on a semiannual basis and stops reporting quarterly earnings or holding quarterly earnings calls, then Item 2.02 of Form 8-K would not be triggered, the proposal also notes that the SEC expects “that a company’s individual characteristics, facts, and circumstances will determine whether it would make quarterly earnings releases or announcements after electing to report semiannually,” suggesting the possibility that companies could continue quarterly reporting even if they forgo doing so on a 10-Q.

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There may also be information that is material for Regulation FD purposes that is not included in an earnings release, and public companies would need to review their Regulation FD policies to identify potential situations in which Regulation FD compliant disclosures may need to be made apart from earnings releases.

Would we need to amend our trading policies and blackout windows?

A change in reporting cadence or content could have implications for trading windows and company share repurchase programs, particularly to the extent that MNPI impacts the ability of a company to effect buybacks or permit trading by insiders. If a company continues its cadence of quarterly earnings reporting but does not file a 10-Q for the first and third quarters, the need to reconsider blackout windows, including to effect share buybacks, could be mitigated. As discussed above, companies typically convey information material to investors in their earnings releases and a 10-Q that generally follows soon after is unlikely to add new material information or move the needle on stock prices.

Nonetheless, companies considering opting for semiannual reporting should consider any implications for their trading windows including that the contents of a 10-Q are broader than what would be contained in an earnings release, which generally focuses on financial performance, and there could be material information that would have otherwise been disclosed in a 10-Q that would go undisclosed for a company opting for semiannual reporting.

Capital markets financing considerations

How does reporting on a semiannual cadence impact a company’s ability to raise capital?

Whether interim financial statements would be required for an offering is keyed to the filing requirements and deadlines of Form 10-Q or Form 10-S based on the rule proposal. This alignment means semiannual filers would not be required to update their offering document with quarterly financial data, but rather only with semiannual-period financial statements. Of course, a company could include quarterly information in an offering document if it wishes to do so, driven for example by marketing considerations, without the SEC requirement to have that information undergo auditors’ limited review.

However, companies and underwriters would still need to contend with auditors’ 135-day comfort letter limitation under PCAOB Auditing Standard 6101 because auditors will only provide a standard comfort letter including negative assurance if the audited annual or limited-review interim financials included or incorporated by reference in the offering document are less than 135 days old at the time of the offering. This standard, if left unchanged, could effectively push semiannual filers that access the capital markets frequently to continue obtaining voluntary interim reviews of their quarterly financials to accommodate auditors’ requirements. The SEC is soliciting comments on whether changes need to be made to SEC rules or PCAOB auditing standards if semiannual filers are pressured to continue to retain auditors to conduct quarterly financial statement reviews.

The discipline and additional controls associated with quarterly reporting will likely continue to remain critical for any company seeking to maintain open market windows for capital markets financings. For example, although foreign private issuers are not required to prepare or file 10-Qs, many voluntarily undertake substantially similar work to produce reviewed quarterly reports, enabling continuous access to the U.S. capital markets — particularly those with shelf registration statements.

As a result, many companies anticipating the need to raise capital on a regular basis, no matter their profile, will likely need to retain their quarterly reviews, disclosure controls and procedures, and existing audit committee calendars, as well as auditor interim reviews — not least for comfort letter purposes — absent additional changes like auditor procedures.

Impact on private companies

How does the rule proposal impact reporting obligations for private companies?

The rule proposal does not impact private companies that voluntarily file quarterly and annual reports with the SEC or any quarterly reporting obligations private companies may have that are not mandated by the periodic reporting requirements of the Exchange Act. This means, for example, that private companies that are not SEC reporting companies but have reporting obligations under Rule 144A(d)(4) because they have bonds issued under Rule 144A that are outstanding or because of analogous reporting obligations in indenture or credit agreement covenants will continue to be subject to those obligations.

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Flexibility on the content of the Form 10-Q

Could the SEC consider further changes to provide public companies additional flexibility?

The proposal makes clear that the new Form 10-S would require the same narrative disclosures and financial information as the existing Form 10-Q, covering the semiannual period. The SEC is seeking comment on whether the substantive requirements of Form 10-Q should be changed, a question echoed in Commissioner Hester Peirce's statement in connection with the rule proposal asking commenters whether an approach that focuses on reducing the content requirements of the Form 10-Q would be preferable to only adjusting the cadence of reporting. It remains to be seen if and how this will be addressed in future rulemaking, whether as part of this proposed rulemaking on semiannual reporting or the SEC's broader efforts to reform Regulation S-K.

Looking ahead

Public companies should begin evaluating how the rule proposal could reduce complexity and introduce cost savings in their reporting practices, and weigh the benefits against other implications including capital markets access, investor demands and analyst coverage, buyback programs and an updated reporting controls framework, among others. While many companies will likely maintain quarterly reporting in some form to meet market expectations, the rule proposal may offer welcome flexibility for certain categories of companies.

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