A Case for Eliminating Quarterly Periodic Reporting: Addressing the Malady of Short-Termism in U.S. Markets with Real Medicine

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The author maintains that "short-termism" is a serious malady for which the only effective remedy is (1) elimination of quarterly periodic reporting on Form 10-Q, and the companion disclosure regime of quarterly earnings releases and conference calls, (2) conversion to annual-only periodic reporting on Form 10-K, coupled with a new annual earnings guidance requirement, and (3) retention of current interim disclosure of select material events on Form 8-K. The author reviews how the current quarterly disclosure regimes lead inevitably to short-termism behaviors, and are temptations to other problematic conduct, by corporate actors and market participants. The author contends that the proposed disclosure regime would reduce substantially such behavior and temptations, without compromising the quality of disclosures, protection of investors, or effectiveness of the capital markets system. The author argues that only such a fundamental change from the short-term timetable of the current disclosure regimes can curb short-termism, promote longer term and more strategic focus by corporate actors, and lead analysts, investors, and other market participants to focus on longer-term value propositions.

I. Introduction and Context

This article proposes eliminating the U.S. securities law requirement of quarterly reporting by public companies of financial and other operating results performance information, leaving only the requirement of annual reporting of such information and real-time interim disclosure of select material-event matters.[1] Until recently,

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1. This proposal would not eliminate the Current Report on Form 8-K, which requires immediate disclosure of a series of prescribed events or developments that are deemed to be material per se. These so-called "8-K material events" are not tied to any regularly recurring timetable; they can occur at any time. Accordingly, their potential disclosure would be episodic over the course of a fiscal year, and not on any periodic basis. Continuation of such real-time, interim disclosure of 8-K material events is an important element of this proposal and is discussed specifically in Part IV.F below.

such a proposal for the U.S. periodic reporting regime established under the Securities Exchange Act of 1934, as amended (the "1934 Act") would have been considered an outlier among U.S. securities law professionals,[2] notwithstanding occasional complaints by significant market participants and observers—which have included prominent public company executives, major investors, and high-profile politicians[3]—about the burdens and adverse impacts of quarterly reporting. Such complaints did not coalesce into a serious call to action.[4] Moreover, to address their concerns, most such critics of quarterly reporting have espoused a switch from quarterly to semi-annual reporting, and not conversion to an annual-only periodic reporting regime.

For example, the latter was the case when President Donald J. Trump stated on August 17, 2018 that he had asked the U.S. Securities and Exchange Commission (the "SEC") to study replacing quarterly reporting with semi-annual reporting.[5] In response to President Trump's statement, SEC Chairman Jay Clayton issued a short statement on the same day that included the following:

> Recently, the SEC has implemented—and continues to consider—a variety of regulatory changes that encourage long-term capital formation while preserving and, in many instances, enhancing key investor protections. In addition, the SEC's Division of Corporation Finance continues to study public company reporting requirements, including the frequency of reporting.[6]

Chairman Clayton's immediate statement did not indicate a substantive position on the frequency of periodic reporting, and the author has not found any subsequent indication that Chairman Clayton supports or expects the elimination of quarterly reporting by U.S. public companies in the foreseeable future. More-

2. The underlying concept for this proposal is not entirely novel. As discussed in Part IV, quarterly reporting has not been universal. Moreover, for a set of proposals made in 1991 that was much more aggressive in many respects than the proposal set forth herein, but which did not address eliminating quarterly reporting, see Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 225 (1991). The Lipton and Rosenblum article, despite the impressive pedigree of its authors, did not develop any real traction for public discourse about a change in periodic reporting in the United States.

3. Some prominent critics have included Blackrock CEO Larry Fink, corporate lawyer Martin Lipton, Pepsico CEO Indira Nooyi, former President Barack Obama, and former Secretary of State Hillary Clinton.

4. From time to time in public speeches, senior staff members of the U.S. Securities and Exchange Commission ("SEC") have referred to the SEC considering the pros and cons of less frequent periodic reporting by U.S. public companies. For example, in 2016, Keith F. Higgins, director of the SEC's Division of Corporation Finance, made such a reference, and he also referred to earlier remarks on the issue made in 2004 by a predecessor director of the Division of Corporation Finance, Allen Beller. *See* Keith F. Higgins, Keynote Address at PL1-Fifteenth Annual Institute on Securities Regulation in Europe (Jan. 21, 2016), www.sec.gov/news/speech/international-developments-higgins.html. It may be noteworthy that Director Higgins' 2016 remarks were made in London, England, and Director Beller's 2004 remarks were made in Berlin, Germany, and thus to international (rather than primarily U.S.) audiences. In any case, neither of those remarks (nor any others by senior SEC officials that the author has found) indicated that the SEC was or is actively considering the elimination of non-annual periodic reporting.

5. President Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 17, 2018, 7:30 AM), https://twitter.com/realDonaldTrump/status/1030416679069777921.

6. Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Statement on Investing for the Long Term (Aug. 17, 2018).

over, it is difficult to speculate about the motivation for President Trump's statements or the depth of his concern.

Before turning to the details of this proposal to eliminate quarterly reporting, some context about the historical norm for such reporting by U.S. public companies is in order.

Quarterly reporting of financial and other operating results performance information has been the norm for U.S. public companies since the 1950s, and it has been mandated by SEC rules under the 1934 Act since 1970. That quarterly disclosure timetable became a fundamental reference point for many other business transactions and rituals by U.S. companies. For a long period, any questioning of the merits of quarterly reporting, much less a proposal to move to an annual-only reporting regime, would not have been considered a respectable topic for professionals involved in the U.S. capital markets. That began to change in May 2005 when the then SEC Chairman, William H. Donaldson, made the following statement in his address to an annual conference of financial analysts:

> Over time, the key question has changed from "What is the best investment?" to "Where are the best short-term profit opportunities?" These are two different questions that more often than not will yield different answers.[7]

In his remarks, Chairman Donaldson criticized the short-term focus of investment activity and the implications of such "short-termism" for investors and managements of public companies. He admonished financial analysts, with an overture to investors and management of public companies alike, "to focus their talents on a company's fundamental value and its long-term prospects."[8] He expressed chagrin that "because of the considerable clout of the sell-side analyst, this shift from long-term thinking to short-term results has echoed through to company managements and to professional investors . . . [and] had a counterproductive influence on companies, on investors and on analysts themselves."[9]

Chairman Donaldson used his substantial platform as SEC Chairman to highlight a malady that afflicts our public equity capital markets, although the remedy he appeared to prescribe was not an effective cure. His exhortation to analysts to behave differently was akin to a physician telling a patient to "stop manifesting the symptoms of your illness, act healthy, and you will be cured."[10] Nonetheless, his statement, made publicly to a high-profile audience, was impactful.

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7. William H. Donaldson, Chairman, U.S. Sec. & Exch. Comm'n, Keynote Address at the 2005 CFA Annual Conference (May 8, 2005), www.sec.gov/news/speech.html.

8. *Id.*

9. *Id.*

10. Chairman Donaldson was not the first to make the above diagnosis. *See, e.g.*, David Millon, *Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?*, 70 GEO. WASH. L. REV. 890 (2002) (recognizing that management's focus on short-term investment activity has led to an unhealthy focus on the company's quarter-to-quarter earnings). But, his doing so, while serving as chairman of the SEC, had the potential to provide validation and support for others who might want to express similar or more expansive views. Regrettably, however, shortly after his May 2005 speech, Chairman Donaldson resigned.

Since Chairman Donaldson's 2005 remarks, additional concerns about short-termism in the U.S. equity markets increased and a potential causal nexus to the prevailing U.S. reporting and disclosure regimes began to be referenced. To date, however, there has not been, to the author's knowledge, a serious proposal to address the malady of short-termism by limiting required periodic reporting to annual reports, as set forth herein.

II. Short-Term Reporting Leads to Short-Termism

There is an inherent tension between the short-term aspects of the disclosure regimes of U.S. securities law and trading markets, on the one hand, and the stated desire for (and putative imperative of) long-range strategic planning by the managements of public companies in order to create and enhance long-term shareholder value, on the other hand. That tension is unhealthy, because it inevitably translates, in practice, into an actual *conflict* for a company's management between two competing interests, each of which can be legitimate on its own terms. More than anything else, such tension (if not outright conflict) is at the root of most problems that have led to both corporate scandals involving misstated earnings (or other operating results) and short-sighted, speculation-driven trading behavior in the public markets for equity securities.[11]

The two competing interests alluded to above are (a) building and enhancing real shareholder value, as measured by the intrinsic and long-term strength (or worth) of a company,[12] and (b) lawfully promoting and sustaining the day-to-day trading prices of the company's publicly held equity security. The author believes there is a fundamental disconnection between these interests and their respective resulting measures, and that the U.S. disclosure regimes[13] for public

11. *See, e.g.*, *American Prosperity Project: A Non-Partisan Framework for Long-Term Investment*, Aspen Inst. (Dec. 2016), https://www.aspeninstitute.org/programs/business-and-society-program/american-prosperity-project/; Dominic Barton, James Manyika & Sarah Keohane Williamson, *Finally, Evidence that Managing for the Long Term Pays Off*, Harv. Bus. Rev. (Feb. 7, 2017), https://hbr.org/2017/02/finally-proof-that-managing-for-the-long-term-pays-off; John R. Graham, Campbell R. Harvey & Silva Rajgopal, *The Economic Implications of Corporate Financial Reporting*, 40 J. Acct. & Econ. 3 (2005); McKinsey Glob. Inst., Measuring the Economic Impact of Short-Termism: Discussion Paper (Feb. 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; Alana Semuels, *How to Stop Short-Term Thinking at America's Companies*, Atlantic (Dec. 30, 2016), https://www.theatlantic.com/business/archive/2016/12/short-term-thinking/511874/; Lynn A. Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public (2012).

12. For purposes of this article, unless otherwise expressly stated, the author uses the term "shareholder value" as a proxy to connote the fundamental health and strength of a company and its business. This term is not used to mean squeezing out every possible penny of increased profit or stock price in the trading market.

13. As explained in Part III, the plural term "regimes," when used herein, refers to both the SEC-administered (and legally mandated) disclosure regime and the parallel disclosure requirements that are imposed by listing standards of the New York Stock Exchange and the Nasdaq Stock Market (which are the major U.S. trading markets for equity securities) as a contractual condition for a public company to have its publicly held securities listed for trading on such markets. Such listing is not required by law, and thus the decision to list and trade one's securities on such a market is voluntary

companies (based upon the quarterly reporting requirement imposed by the SEC) accentuate that gap. Those regimes fail to acknowledge and address that disconnection, and they even appear to treat the two measures as if they are synonymous or at least two sides of the same coin. In any event, the United States disclosure regimes focus primarily—or if not primarily, then undeniably too much—on short-term results to the detriment of sound strategic planning for long-term value creation.[14]

That short-term focus, and its myriad manifestations in the behaviors of corporate actors and the investment community, is at the core of what has come to be called "short-termism," regardless of whether one sees short-termism as a pervasive problem or as an essentially benign phenomenon.[15] The author believes such a focus is a pervasive problem and a malady, but that it is neither inevitable nor a prerequisite for an efficient or effective capital markets system. Rather, it is a consequence of how U.S. securities laws and regulations have chosen to organize (and continue) the disclosure regime for public companies.[16]

Other thoughtful observers have also decried the prevalence of the short-term focus, or short-termism, that Chairman Donaldson highlighted in 2005, and

for a public company. However, as a practical matter, for any public company that desires an *active* trading market for its publicly held equity security—which most public companies emphatically desire—obtaining and maintaining such a listing is imperative. Accordingly, the market's listing standards are tantamount to legal requirements. In any event, the resulting disclosure protocols they establish as a condition to maintaining a public company's listing status is considered by the author to be a "regime."

14. This proposal to eliminate quarterly reporting is not intended to enter the debate of what should be considered by managements and boards of directors of public companies in discharging their respective fiduciary duties under applicable corporate and/or securities laws. That said, the author notes with favor the position taken by Professor Lynn Stout that we have long been misled in believing that "maximizing shareholder value" is the preeminent legal duty of executives and directors, after attending to other applicable legal obligations. *See, e.g.*, STOUT, *supra* note 11.

15. Among the prominent commentators who deny that short-termism is a malady is Professor Robert C. Pozen of the Massachusetts Institute of Technology, who has been prolific in writing on the subject. *See, e.g.*, Robert C. Pozen & Mark Roe, *Keep Quarterly Reporting*, CFO.COM (Aug. 27, 2018), http://ww2.cfo.com/regulation/2018/08/keep-quarterly-reporting/; Robert Pozen, Suresh Nallareddy & Shivaram Rajgopal, Consequences of Mandatory Quarterly Reporting: The U.K. Experience (Mar. 1, 2017) (unpublished manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817120); Robert C. Pozen & Mark Roe, *Those Short-Sighted Attacks on Quarterly Earnings*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 8, 2015), https://corpgov.law.harvard.edu/2015/10/08/those-short-sighted-attacks-on-quarterly-earnings/. There are other notable deniers or doubters as well. *See, e.g.*, George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107, 1109–11 (2008); Lawrence H. Summers, *Is Corporate Short-Termism Really a Problem? The Jury's Still Out*, HARV. BUS. REV. (Feb. 16, 2017), https://hbr.org/2017/02/is-corporate-short-termism-really-a-problem-the-jurys-still-out; Luigi Zingales, *The Future of Securities Regulation*, 47 J. ACCT. RES. 391, 415 (2009). The author suspects, however, that Professor Summers might not be a doubter, but rather is a scholar who demands more empirical evidence.

16. The Lipton and Rosenblum article noted earlier, *see supra* note 2, resonated with such a view as early as 1991, although it had a different motivation and did not address the problem of quarterly periodic reporting per se. That article was inspired primarily by perceived adverse implications for corporate governance and corporate behavior of the hostile takeover phenomenon of the 1980s, and it suggested moving to a "quinquennial system" that would continue to require annual reporting on operations but, among other things, would shift to a five-year cycle for the election of directors and the preparation by public companies of a major and detailed report to the SEC on corporate strategic planning and operational results that would be similar to a "blue book" evaluation of such companies. That suggestion, however, did not develop any traction.

short-termism and its implications have been subjects for myriad surveys, analyses, and discussions. Many such observers and their respective analyses go beyond discussing the implications for investment activity per se and explain actual or potential adverse consequences for the American economy itself.[17] Several commentators have proposed regulatory changes or initiatives to address aspects of the problems.[18] As best the author can tell, however, none of those who are participants or facilitators in the U.S. capital markets system have dared (1) to identify the root cause of short-termism as being the short-term focus of the quarterly U.S. disclosure regimes and (2) to suggest that the most effective medicine is to change the frequency for periodic reporting to annual-only (with continuation of interim, episodic disclosure of so-called "material-event" matters under the 1934 Act's Current Report on Form 8-K ("8-K material events")) as proposed herein.

A. Illusions of Efficient Capital Markets Theory

It is possible that President Trump's August 17, 2018 request to the SEC, and Chairman Clayton's responsive statement, referenced above[19] may lead to serious consideration of such a change. That outcome is far from inevitable, however. Inertia is a powerful force, and the current U.S. quarterly disclosure regimes would appear to be supported by the tempting illusions of the efficient capital markets theory. The author believes, however, that the health of the U.S. capital markets requires us to question the practical implications of that theory for short-termism and our disclosure regimes.

Developed by Professor Eugene Fama of the University of Chicago during the 1960s,[20] the efficient capital markets theory has taken on multiple lives beyond its initial conception. To understand its implications for the matters discussed here, it is appropriate and sufficient to distill the essence of the complex theory

17. *See, e.g.*, sources cited at *supra* note 11; Roger L. Martin, *Yes, Short-Termism Really Is a Problem*, Harv. Bus. Rev. (Oct. 9, 2015), https://hbr.org/2015/10/yes-short-termism-really-is-a-problem.

18. *See, e.g.*, Semuels, *supra* note 11 (discussing proposals such as increasing the required holding period for receiving long-term capital gains treatment, and instituting a special financial transactions tax to curb high frequency trading); *American Prosperity Project: A Non-Partisan Framework for Long-Term Investment*, *supra* note 11 (discussing proposals such as tax law changes to encourage multinational companies to repatriate more of their foreign income that could be used for strategic long-term investments; revising the fiduciary duties for financial intermediaries and certain large institutional investors); Marc Jarsulic, Brendan V. Duke & Michael Madowitz, *Long-Termism or Lemons: The Role of Public Policy in Promoting Long-Term Investments*, Ctr. Am. Progress (Oct. 21, 2015, 6:00 AM), https://www.americanprogress.org/issues/economy/reports/2015/10/21/123717/long-termism-or-lemons/ (discussing proposals such as granting proxy access to long-term shareholders, providing more transparency on share buybacks, and time-based vesting of shareholder voting rights); Mike Konczal, J.W. Mason & Amanda Page Hoongrajok, *Ending Short-Termism: An Investment Agenda for Growth*, Roosevelt Inst. (Nov. 6, 2015), http://rooseveltinstitute.org/ending-short-termism-investment-agenda-growth/ (discussing proposals such as limiting company buybacks, promulgating a proxy access rule, permitting alternative share approaches such as loyalty shares, and providing board representation to non-executive workers).

19. *See supra* notes 5 & 6 and accompanying text.

20. *See* Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383 (1970); *see generally* Eugene F. Fama, The Theory of Finance (1972).

into the following statement: At any given time, the price of a company's equity securities fully reflects the available information about the company.[21] The efficient capital markets theory is used to drive, while it simultaneously relies upon, an ethos of near-immediate disclosure of virtually all material information about the performance of public companies.

Belief in or acceptance of the soundness of the theory—whether such belief or acceptance is explicit, implicit, or tacit—leads to promoting more (and more immediate) disclosures of all types of information. It also conditions us to believe several things that are syllogistic for maintaining the status quo—i.e., that market participants who are armed with such information will use it rationally in making investment decisions to buy or sell the securities of public companies; that such investments reflect and yield logical allocations of capital; that such allocations, in turn, will yield a rational and value-based pricing of the securities of public companies; and that good things otherwise have followed (and will continue to follow) in the wake for the U.S. capital markets system and the American economy. As an aspirational model or reference points for developing the *substance* of public company disclosures, such beliefs in the efficient capital markets theory do no harm. As the fundamental justification or premise for maintaining the short-term *frequency* with which such disclosures are required, however, those beliefs are seriously flawed.

B. Disclosure Regimes Drive the Short-Term Focus and Behaviors

The norm of quarterly reporting and disclosure in the United States preceded the development of the efficient capital markets theory, but the latter has enabled perpetuation of the former, virtually without serious questioning of the logic and rationality of the quarterly disclosure regimes. The theory has served to mask what otherwise would be an obvious fact—i.e., a short-term disclosure regime for public companies leads inevitably to short-term corporate planning and short-term behavior by managements and investors. Regardless of whatever virtue or merit one may ascribe to the efficient capital markets theory,[22] it should not be posited as an insurmountable obstacle to a de novo objective examination of our short-term disclosure regimes. It should not be allowed to prevent a change

21. The three forms of the efficient capital markets theory are: (1) the "Weak" form, which states that securities prices fully reflect all past market prices and data; (2) the "Semi-Strong" form, which holds that securities prices fully reflect all publicly available information; and (3) the "Strong" form, which holds that securities prices fully reflect all information—both public and private. *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 552, 555 (1984).

22. It is undoubtedly apparent that the author is not a fan of the efficient capital markets theory. But, fighting with the theory per se is not a purpose here, because that fight is a red herring with respect to this proposal. One need not reject the theory wholesale in order to recognize that it does not compel continuation of the current quarterly disclosure regimes. If you are interested in such a fight for other reasons, or just for sport, see generally Andrew W. Lo, Adaptive Markets: Financial Evolution at the Speed of Thought (2017).

to a disclosure regime that reflects more accurately what we have come to know about the reality of behaviors by corporate managements and investors.

Chairman Donaldson did not go this far in his 2005 remarks, and so did not identify a problem with the quarterly disclosure regimes. Rather, in denouncing short-termism behavior by securities analysts, Chairman Donaldson suggested that they could change to a more long-term focus by simply *doing it*.[23] He also intimated that, if the analysts were to do so, they could and would lead the managements of public companies to take such a perspective as well. With all respect to Chairman Donaldson and others who have wished for such a behavior change over the years,[24] wishing will never make it so. Only a concrete change in the fundamental nature of the U.S. public company reporting requirements can change market participants' behavior in this regard. To President Trump's credit, regardless of his motivation, his August 17, 2018 request that the SEC study replacing the quarterly reporting requirement with a semi-annual requirement at least acknowledged publicly the potential causal nexus between certain short-termism behavior and the current U.S. quarterly disclosure regimes.

There is a very good reason why analysts, managements, and investors are captive to the short-term focus and, in Chairman Donaldson's own words as to many analysts, feel pressure to "justify their existence on a quarterly—if not daily—basis."[25] The reason is that the fundamental U.S. disclosure regimes for public companies *make* them do it.

Before further elaboration on the proposed move to an annual-only periodic reporting requirement, this article will review briefly the structural elements of the quarterly U.S. disclosure regimes and key aspects of the resulting behaviors among corporate actors and market participants. It will note how such elements have engendered and accentuated the short-termism problems and malady that this paper's proposal aims to change.

III. Overview of Quarterly Disclosure Regimes

A. SEC and Trading Markets Requirements

The principal U.S. disclosure regime for public companies is based on federal securities laws administered by the SEC. The principal two federal statutes are the Securities Act of 1933, as amended (the "1933 Act"), and the aforementioned 1934 Act, pursuant to each of which the SEC has promulgated extensive rules and regulations over the years. The 1934 Act, and the SEC rules and regulations

23. Donaldson said: "I recognize that analysts are not wholly to blame for this short-term outlook . . . . The challenge for analysts, companies and investors is to turn this ship around." Donaldson, *supra* note 7.

24. *See, e.g.*, Michael T. Jacobs, Short-Term America: The Causes and Cures of Our Business Myopia (1991); David Millon, *Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?*, 70 Geo. Wash. L. Rev. 890, 890 (2002) (recognizing that management's focus on short-term investment activity has led to an unhealthy focus on the company's quarter-to-quarter earnings); *see also* Thomas Lee Hazen, *The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and for Corporate Law*, 70 N.C. L. Rev. 137, 140 (1991).

25. Donaldson, *supra* note 7.

pursuant to it (which include a series of forms that prescribe the content for certain disclosures), comprise the cornerstones of the legally mandated regime for ongoing disclosures by most public companies. That SEC-administered regime requires quarterly disclosures of financial and certain other operating results performance information about what and how well the company is doing.[26] These are the quarterly reports on Form 10-Q that must be filed with the SEC after each of the first three quarters of a company's fiscal year. No Form 10-Q is required for the fourth quarter; instead, the fourth quarter's results are addressed as part of the company's considerably more detailed annual report on Form 10-K that is required to be filed following the end of a fiscal year.

Quarterly reports on Form 10-Q are required to include unaudited quarterly financial statements (which are nonetheless subject to review by the company's outside auditor), along with the company's management's analysis of those quarterly financial results and discussion about the company's operating performance and financial condition as of the end of (and during) that quarter.[27] That analysis and discussion (commonly referred to as the "MD&A") must also compare those quarterly results (as well as the results for the six-month or nine-month year-to-date period for the second quarter or third quarter Form 10-Q, respectively) with the corresponding quarterly period (and the six-month or nine-month period, as the case may be) of the prior fiscal year.[28]

Form 10-Q also requires a company to report certain "other information" (deemed by the SEC to be material per se) that may have occurred during the quarter, such as legal proceedings, the unregistered sales of equity securities (and use of the resulting proceeds), defaults with respect to certain senior securities, and any shareholder vote.[29] Beyond that, a company is required by antifraud provisions of the federal securities laws and Rule 12b-20 under the 1934 Act to provide such additional information as necessary to make the required disclosures not misleading.[30] Various SEC rules and/or interpretive pronouncements also call for companies to disclose additional information that would be material from a reasonable investor's perspective, such as the seasonality of the company's business, major uncertainties, and backlog information.[31]

The annual report on Form 10-K, quite appropriately, requires disclosure about a company that is conceptually equivalent to the disclosure required in

26. *See* 17 C.F.R. §§ 240.13a–13, 240.15-d (2018).

27. *See* Items 1 and 2 of Part I of Form 10-Q.

28. *See* Item 303 of Regulation S-K, 17 C.F.R. § 229.303 (2018).

29. *See* Items 1, 2, and 3 of Part II of Form 10-Q.

30. *See* 17 C.F.R. § 240.12b-20 (2018).

31. *See, e.g.*, Items 101(c)(1)(v) and (viii) and Item 303 of Regulation S-K, 17 C.F.R. §§ 229.101(c), 229.303 (2018); Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC Release No. 33-8350 (Dec. 19, 2003); Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC Release No. 33-8056 (Jan. 22, 2002); Management's Discussion and Analysis of Financial Condition and Results of Operations: Certain Investment Company Disclosures, SEC Release No. 33-6835 (May 18, 1989); Concept Release on Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC Release No. 33-6711 (Apr. 17, 1987).

a registration statement prospectus under the 1933 Act.[32] That is to say, Form 10-K requires detailed and de novo information about the company's business, properties, risks, financial and operational performance, trends, accounting changes, management, executive compensation, related party transactions, etc., as well as audited financial statements for the year, that is comparable to what would be required in the prospectus of the company if it were registering securities for an initial public offering. Of course, unlike a 1933 Act prospectus for the sale of securities, Form 10-K does not require information relating to a proposed sale of securities, such as the terms of the offering, the use of proceeds from the offering, and the sales and distribution process.

The disclosure requirements imposed by the respective listing standards of the New York Stock Exchange and the Nasdaq Stock Market, which are the major U.S. trading markets, tie directly into the SEC-administered disclosure regime. As noted earlier, the author considers the practical implications of these erstwhile voluntary contractual requirements to be tantamount to a "regime."[33] In any event, they have introduced an additional layer of quarterly disclosure rituals for public companies. If one accepts the fundamental premise that "quarterly" is the best or appropriate frequency for periodic disclosures, then those additional rituals are admirable, because they seek to enhance dissemination of the resulting information to the public.

These additional rituals include the quarterly "earnings press release," which for most companies of any meaningful size and/or trading market is coupled with the post-earnings release "conference call." Prior to the SEC's promulgation of Regulation Fair Disclosure ("Regulation FD") in 2000,[34] such conference calls were a tacitly endorsed medium for selective disclosure by companies of useful information to financial analysts who followed the companies' securities. The calls allowed company management to share selected bits of otherwise non-public information with analysts, who then used the information to develop their firm's earnings forecasts about the company to share with the firm's clients, and perhaps to be released later to others in the financial community as a means of promoting the desired interest in the company's securities and/or developing new business for the firm.[35]

32. Such conceptual equivalency is the intended (and desirable) outcome of the multiple initiatives that led to the adoption in 1982 of the integrated disclosure system, which has Regulation S-K as the central repository for the substantive content of non-financial statement disclosures required in registration statements under both the 1933 Act and the 1934 Act and in ongoing periodic disclosures on SEC forms under the 1934 Act. *See generally* Adoption of Integrated Disclosure System, SEC Release No. 33-6383 (Mar. 3, 1982). Accordingly, in substantial part, the items of Form 10-K and the items in a 1933 Act registration statement form for a general purpose offering of securities refer to many of the same items of Regulation S-K for their respective substantive disclosures about the company making the filing.

33. *See supra* note 13.

34. 17 C.F.R. §§ 243.100–243.103 (2018).

35. *See* Jerry Duggan, *Regulation FD: SEC Tells Corporate Insiders to "Chill Out,"* 7 WASH. U. J.L. & POL'Y 159, 183 n.29 (2001); see *also* Karl A. Groskaufmanis & Daniel H. Anixt, *The Twilight Zone of Disclosure: A Perspective on the SEC's Selective Disclosure Rules*, *in* 33d ANN. INST. ON SEC. REG. 435 (PLI

Concerns that the anti-fraud provisions of section 10(b) and Rule 10b-5 under the 1934 Act were not sufficient to deter selective disclosure of *material* non-public information pursuant to such practices prompted the SEC to impose a duty under Regulation FD on public companies (and persons acting on their behalf) to disclose material non-public information to the investing public at least simultaneously with any selective disclosure thereof to certain market participants. In any event, after the enactment of Regulation FD, while conference calls continued to be held to discuss quarterly results with analysts and investors, companies were required by Regulation FD to provide both advance public notice of the calls and a means for any interested member of the public to access the calls.

The earnings conference call is now a staple quarterly ritual of most public companies, and it derives from the quarterly disclosure regimes. During the conference call, a company's management repeats and elaborates upon what was said in the earnings press release, but not too much.[36] That press release is always disseminated in advance of the conference call and is a condensed version (typically with some personal quotes by select senior executives) of what will be forthcoming shortly in the company's quarterly Form 10-Q or annual Form 10-K report to be filed with the SEC.

Participants in the trading markets for the securities of public companies *are expected* to react based upon the disclosures made as part of those quarterly rituals. If they were not expected to do so, then surely the quarterly disclosure regimes would be open to fair questions about their relevance and rationality. Indeed, trading market participants do react based on such quarterly information,[37] resulting in the concerns sought to be addressed by the proposal herein. Such reactions, more often than not, are not as logical or rational as anyone desires or as the efficient capital markets theory postulates.

Nov. 8–10, 2001); Michael Morano, *Reg. FD: Its Effects on the Role of Analysts, Market Volatility on Wall Street, and Information Flow from Issuers*, 54 RUTGERS L. REV. 535, 546 (2002).

36. The "not too much" constraint reflects continued concern about avoiding "selective disclosure" issues, even though the conference calls are now required by Regulation FD to be open to the public. Selective disclosure—which is when a public company provides *material* non-public information to a select person or small group, such as key analysts or large institutional investors, without providing the information to the public—had long been unlawful under federal securities laws, *see, e.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 596 (1976), but it was arguably insufficiently regulated until the promulgation of Regulation FD. Notwithstanding that complying with the notice and access requirements of Regulation FD will avoid possible selective disclosure problems, most companies prudently avoid discussing matters during the earnings conference call that have independent materiality potential if those matters were not covered in the earnings press release or another written public announcement. A notable common exception to this cautious approach is that most companies that provide earnings guidance do so during the conference call, but not in any written public announcement.

37. Because the earnings press release (and the accompanying conference call) typically occur before the Form 10-Q is filed with the SEC, it is arguable (and likely) that the reactions by most market participants are based on the former rather than the latter. Whether or not that is the case is inconsequential to the rationale for the proposal advocated herein. If it were possible to eliminate the quarterly earnings press release and conference call, and only the quarterly SEC-administered disclosure regime were retained, the author believes the short-termism malady that leads to the proposal herein would remain.

Taking the above premise farther—again intending to do good—the SEC's disclosure regime requires even more immediate disclosure reporting by companies of certain prescribed operational, performance, or governance information that is deemed to be extraordinary, using the SEC's Current Report on Form 8-K ("Form 8-K"). A Form 8-K report is typically required to be filed within four business days of the occurrence of any of the prescribed events.[38] The major trading markets weighed in again, and they require many of the disclosures made on Form 8-K to be included in a press release (or posted to the company's website) to expand distribution of the information.

The current disclosure regimes impose great pressure on companies to give quarterly guidance about anticipated earnings, and very few companies are sufficiently strong and independent to resist those pressures and still be ensured of an *active* market for the trading of their securities. An "active" trading market for a stock means that there are large numbers of investors interested in becoming buyers or sellers of the stock on a constant basis, so that any investor who desires to effect a trade in the stock can do so readily, assuming that the desired volume and price are not extraordinary. In an active market, prices are assumed to adjust immediately to reflect new information available to the market.[39] In any event, creating an active trading market for their equity securities is a paramount objective of most public companies. Success with facilitating that outcome is a hallmark of the U.S. capital markets system and is properly perceived as a virtue in its own right.

Reacting to all of the above—and prudently recognizing the likely impact of an upcoming quarterly disclosure that will deviate from the prevailing "consensus" estimate of the earnings that market participants are expecting a company to report[40]—many companies sometimes issue a so-called "pre-release" about such upcoming earnings. Often, but not always, a pre-release decision derives from a

38. The reporting events prescribed by Form 8-K are discussed in Part IV.F.

39. As discussed in Part II, the efficient capital markets theory holds that traders will promptly adjust the price of a stock to reflect the available information and that investors will be unable to systematically take advantage of the market. For discussions that question the accuracy of the efficient capital markets theory, see generally Stout, *supra* note 11; Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 Mich. L. Rev. 613, 619 (1988). The author believes the arguments for the proposal to eliminate quarterly reporting are unaffected by whether the efficient capital markets theory is accurate.

40. So-called "consensus" earnings estimates are cloaked in more than a bit of mysticism, and they certainly carry the impact one would expect of pronouncements by an oracle. They emerge with respect to a company based on the aggregation (or perhaps it is more of a distillation) of the earnings estimates reached by varied analysts who follow the company, typically using the guidance given by the company and cranking it (together with other information) through the analysts' respective "models" for assessing and/or predicting operating performance by the company.

The details of how the consensus emerges are relatively inconsequential to the fact that, when and if a consensus estimate emerges, it pressures company management to meet the consensus estimate, because a failure to do so virtually ensures that the price of the company's stock will suffer a significant drop. *See, e.g.*, Harvey J. Goldschmid, *Materials on Disclosure and Governance*, *in* Ninth Ann. Corp. Governance Inst. 293, 310 (ALI-ABA May 9–10, 2002) (citing Arthur Levitt, Chairman, U.S. Sec. & Exch. Comm'n, The Numbers Game, Address at NYU Center for Law and Business (Sept. 28, 1998), www.sec.gov/news/speech.shtml).

company having previously given quarterly earnings guidance that the company now anticipates it will miss.

B. All Eyes on the Quarterly Reports

As should be manifest from even the above brief summary, the current disclosure regimes make the three-month quarterly cycle of disclosure reports and rituals a major (if not *the* major) touchstone for tracking and measuring performance by public companies. As a result, these regimes ensure that the behavior of managements of public companies will be influenced significantly (if not driven) by concern for achieving performance results that are favorable (or at least not disappointing) on a *quarterly* basis. It would be foolish to expect anything different, because no one seriously doubts the proposition that measuring performance (with accountability for the measured results) is the most effective way to influence behavior.[41]

Beyond the securities trading markets, important elements of the infrastructure for disclosure of corporate information in numerous business contexts have also been designed around the SEC's quarterly disclosure regime. For example, covenants in most bank loan documents and other financing agreements, provisions in major commercial contracts, financial reports to other federal regulatory agencies, such as the Federal Deposit Insurance Corporation and the Comptroller of the Currency, and numerous other business arrangements, typically require ongoing reports by a party on a quarterly basis in line with a public company's SEC reporting timetable.

There can be little wonder, therefore, why executives of public companies manage operations with at least one eye fixed on the performance report for the upcoming quarter and the likely reactions of trading market participants to what the companies will report. One is left with only hope that the executives will be sufficiently daring to focus the other eye (at least some of the time) on the longer-term horizon. The three months of a quarter is a very short time indeed, and it is virtually insignificant for implementing any meaningful strategic plan or initiative to create or enhance long-term shareholder value. As a result, such hope might more appropriately be called *wishful thinking*, if not *naïveté*.

The short-term pressures emanating from the quarterly disclosure regimes are simply too targeted and too blinding to permit much (and certainly not enough) focus on anything else, especially when other important forces within the corpo-

41. *See* Ronald J. Gilson, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 Stan. L. Rev. 863 (1991); Michael Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 Fla. St. U. L. Rev. 123, 171–74 (2004); Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 Colum. L. Rev. 1283, 1290–91 (1998); Adriaen Morse, Jr., *Breaking the Circle: The Problem of Independent Directors Policing Public Company Financial Disclosure Under the SEC's New Rules Governing Public Company Audit Committees*, 23 Ann. Rev. Banking & Fin. L. 673 (2004); Manuel A. Rodriguez, *The Numbers Game: Manipulation of Financial Reporting by Corporations and Their Executives*, 10 U. Miami Bus. L. Rev. 451, 480 (2002); Robert G. Vanecko, *Regulation 14A and 13D and the Role of Institutional Investors in Corporate Governance*, 87 Nw. U. L. Rev. 376 (1992).

rate world also manifest themselves. Predominant among such other important forces is the perception among U.S. capital market participants that the day-to-day trading prices of equity securities are the best measure of shareholder value.[42] It is an alluring perception, to be sure, and for a market participant to question its reality is tantamount to blasphemy. As discussed in Part II, the efficient capital markets theory essentially deems such prices to be tangible manifestations of what presumptively informed and willing buyers and sellers think about the value of companies.

The author concedes that trading prices resonate with the notion of fair market value, and that they are putatively objective, even if they are not necessarily rational. There is no problem per se with value analysis that proceeds with such a premise. The problem is that the current *quarterly* disclosure regimes skew the factors that are employed in the analysis, by focusing market participants on the short term and obscuring their vision of longer-term value propositions. That state of affairs is unhealthy per se, and arguably fosters irrationality. The author submits that the analytical processes could (and likely would) be the same, but the results derived would likely be different, if the disclosure focus for operating performance used in the analysis were longer than a single quarterly period.[43] The results would be more rational as well.

C. Addictive Temptation to Manage Earnings

Among the unhealthy consequences of the short-term, quarterly focus is the temptation for companies to attempt to manage earnings. Many (if not most) companies, in an understandable attempt to maintain a consistent, upward trajectory of reported earnings, develop strategies to achieve such results from reporting period to reporting period. When they employ artificial techniques to do so, it is pejoratively called "earnings management." When the line is crossed into either understating or overstating earnings in a particular quarter, it is fraud and illegal. However, there is considerable room on the legal side of the line for some amount of de facto management of earnings.

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42. *See* Lipton & Rosenblum, *supra* note 2, at 225 (as the stock portfolios of institutional stockholders have increased, they have been unable to adequately assess the business performance of each portfolio company. Therefore, the shareholders have used the market price of the corporation's stock as a measure of the company's performance.); *see also* Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. Pa. L. Rev. 851, 851 (1992); Millon, *supra* note 10, at 901 (maximizing shareholder wealth is accomplished through maximizing corporate profits); Millstein & MacAvoy, *supra* note 41, at 1302, 1305 (stock price measures shareholder value effectively, but it is not the best measure of corporate financial performance. Instead, economic value added to capital invested serves as a more accurate measure because it reflects what the company has actually accomplished in the past rather than what investors predict the company will do in the future.); *but see* Stout, *supra* note 39, at 616.

43. Chairman Donaldson essentially said as much in his 2005 remarks quoted in Part I, although he focused on the market participants and did not cast the disclosure regimes in the role of the villain, as the author does here. As argued herein, blaming participant behavior rather than the systemic structures that lead to the undesired behavior is not productive. *See* Ice-T, *Don't Hate the Playa*, Seventh Deadly Sin (Coroner Records 1999).

For example, there is a large gray area under generally accepted accounting principles ("GAAP") that virtually invites such behavior. According to a piercing statement by legendary SEC Chairman Arthur Levitt, it is within this area "[where] accounting is being perverted; where managers are cutting corners; and where earnings reports reflect desires of management rather than the underlying financial performance of the company."[44] While there have been several positive developments in accounting since Chairman Levitt made that statement in 1998, the gray area of GAAP remains substantial. This is not intended as a criticism, however, because the author believes such a gray area is (and always will be) a matter of necessity. It is simply not possible to develop accounting rules and principles that eliminate all flexibility and discretionary judgment from the reporting of financial results. Accordingly, some temptation will always be present to use that flexibility in a favorable manner. And, of course, the flexibility of GAAP is not the only temptation to engage in a bit of earnings management on the legal side of the line.

The SEC, other securities regulators, and market participants themselves properly condemn (and are prudently suspicious of) any contrivance that attempts to maintain a consistent upward earnings trajectory. What they fail to recognize—or at least refuse to acknowledge and address appropriately—is the logic and inevitability of the management of a public company doing just that, as management operates under the pressures of the current quarterly disclosure regimes.

Managing earnings should be seen, without any pejorative connotation, as a rational and understandable attempt by a company to smooth out its earnings performance over a period of time, rather than permitting earnings to fluctuate widely from one reporting period to the next. From the author's view, that is not a problem per se. Rather, the problem arises when the relevant reporting periods are so short such that all manner of stuff can cause blips in reported results, which those involved seek, understandably, to avoid. It is undeniable that the three months from one quarterly disclosure report and earnings release to the next quarterly disclosure report and earnings release is a very short period. Given what is at stake—i.e., the likely impact on trading prices for a company's securities based on each such quarterly disclosure—it is illogical and naïve to think that any sensible executive would be oblivious or indifferent to quarterly fluctuations in the company's earnings, unless such fluctuations (a) can be readily explained, (b) will be universally understood and accepted, and (c) will then be followed by rational market participants' behavior. That is a lot, too much in fact, to expect or presume.

To their credit, the current disclosure regimes both permit and encourage such explanations in pursuit of such understanding, acceptance, and rationality, as the SEC and the trading markets push companies for greater transparency and comprehensiveness in their disclosures. That is a laudable objective, but it has caused, unwittingly, a significant amount of the complexity in securities disclosure writ-

44. Matthew S. Mokwa, *Enron, Sarbanes-Oxley, and the End of Earnings Management*, 39 TEX. J. BUS. L. 325, 331 (2003) (quoting Chairman Levitt).

ing.[45] More importantly, it is also insufficient and misguided. It is tantamount to simply adding bandages to a gaping wound, instead of diagnosing the affliction accurately and administering real medicine as the necessary treatment.

The temptation to manage earnings is akin to an addiction, and it is being enabled by the quarterly disclosure regimes. More information about operating results on a quarterly basis, regardless of how transparent, is not effective treatment for the temptation to manage earnings or for any other manifestation of the short-termism malady. The addiction cannot be effectively treated by prescribing more of the same drug. Effective treatment requires the elimination of the quarterly measure, which requires the elimination of the quarterly report on Form 10-Q that is filed with the SEC and all the parallel disclosure requirements and rituals that currently flow from that quarterly reporting requirement. As discussed in Part IV.D, this article argues that the only way to eliminate the pressure and temptation to smooth out earnings results from quarter-to-quarter is to eliminate quarterly reporting itself, and that such a solution would likely lead to a substantial reduction in the pressure to do so with respect to longer periods of time as well.

IV. Proposed Annual-Only Disclosure Regime

Some readers will know, but most probably will not, that a requirement of *quarterly* reporting of financial and operating results performance information by public companies is not universal among countries with sophisticated securities laws and capital markets. For example, in Australia[46] and the United Kingdom,[47] the required frequency for periodic reporting of financial and other op-

45. *See generally* W. Randy Eaddy, *Principles for Drafting Disclosure Documents: Planning the Assault on Lugubrious Prolixity*, 32 Sec. Reg. L.J. 284 (2004) (lamenting the overblown complexity of some securities disclosure writing and describing how we can do better). The touchstone for that article was the following quote from remarks during the 1970s by another former chairman of the U.S. Securities and Exchange Commission, Ray Garret, Jr., who was chiding lawyers for the lugubrious prolixity of securities disclosure documents:

> The officers who planned this assault, including myself, have never before planned anything like this. In fact, I have never commanded troops in combat. The airborne and other methods being employed have never before been tried by our Army. The weather forecast is only slightly favorable and such forecasts have a high degree of unreliability. Therefore, there is no assurance that any of you will reach Normandy alive, or, if you do, that you will secure the beach.

See Louis Loss, Troy Paredes & Joel Seligman, Fundamentals of Security Regulation 286–87 (6th ed. 2011) (quoting from address of Ray Garrett, Jr. on Public Relations and Corporate Disclosures to Public Relations Society of America). It is a parody of the disclosure General Dwight Eisenhower might have been counseled to make to his troops during World War II, if he needed to get clearance for his D-Day invasion order under prevailing securities law practice.

46. *See* Australia Corporations Act 2001, s 285 (Austl.).

47. *See Rule 4, Disclosure and Transparency*, *in* Financial Conduct Authority Handbook (2016), https://www.handbook.fca.org.uk/. It is also notable that the United Kingdom experimented with mandatory quarterly reporting from 2007 to 2014 but eliminated it in 2014. Companies subject to the United Kingdom's regulatory jurisdiction may voluntarily make quarterly reports; it will be interesting to monitor which (and how many) companies actually do so. Professor Robert Pozen led a study that produced a research paper about the United Kingdom's experiment, *see* Pozen et al., *supra* note 15, that is impressive in its effort, but dubious in its implicit conclusion that eliminating quarterly reporting is not likely to cause a substantial change in investment decisions by public company executives.

erating results performance information by publicly traded companies is semi-annual; in New Zealand, the required frequency is annual.[48] The August 17, 2018 statements by President Trump and SEC Chairman Jay Clayton, referenced in Part I, have likely increased awareness of those facts; but, no U.S. reader should be blamed for assuming the universality of quarterly reporting by public companies in developed countries with a sophisticated capital market system.

That said, the capital markets systems in the above countries are not true rivals to the U.S. capital markets system, although the prominence of the London Stock Exchange makes the United Kingdom's capital markets system a major force. The author does not dispute that the U.S. capital markets system has enjoyed the greatest success by far, and that it deserves its preeminent position. Also, the U.S. quarterly disclosure regime is the mostly widely followed, undoubtedly because the U.S. capital markets system is preeminent. None of that means, however, that the quarterly feature of the U.S. disclosure regime is the basis for that preeminence and thus should be sacrosanct and immutable. Realistic change and improvement are possible, and it should be seriously considered.

A. Principal Components of Proposal

This article proposes that a company's fiscal year, rather than quarterly periods (or semi-annual periods as alluded to by President Trump), be the periodic reporting cycle for financial and other operating results performance information. To implement this proposal, the SEC-administered quarterly report on Form 10-Q would be eliminated. The SEC-administered annual report on Form 10-K would remain, essentially in its present form, but with modifications as necessary to remove any residual quarterly elements or references.[49] The parallel disclosure requirements of the U.S. trading markets would be adjusted commensurately to align with the new annual-only disclosure regime for public companies to report to the SEC. As a result, the quarterly earnings release and related quarterly conference call rituals discussed in Part III would be eliminated, along with any listing standard or criterion imposed by the New York Stock Exchange and the Nasdaq Stock Market (and any other trading market for equity securities that is subject to SEC regulation and oversight)[50] that would undermine the shift to the annual-only regime for periodic reporting of financial and other operating

48. *See* New Zealand Companies Act 1993, s 208 (N.Z.).

49. The author has not sought to ferret out such possible residual items, but based on his thrity-eight years of practicing securities law, he doubts there would be many of a substantive nature (as opposed to technical synchronizations) that would need to be eliminated. Accordingly, he is confident that their elimination would not be problematic for the integrity of the rest of Form 10-K.

50. As discussed in Part III, the New York Stock Exchange and the Nasdaq Stock Market are the major U.S. trading markets, but there are other markets on which equity securities may be traded in the United States that are also subject to the SEC's regulatory jurisdiction. The role of these other markets is essentially ancillary and minor for the trading of equity securities, but the rules for these markets should also be aligned with the new annual-only disclosure focus.

results performance information.[51] However, as alluded to above and discussed more specifically in Part IV.F, the SEC requirement for immediate disclosure of certain prescribed "material-event" matters via a Current Report on Form 8-K would remain, substantially unchanged.

The difference between three months versus twelve months as the baseline measure for financial and other operating results performance reporting by public companies is substantial. The author believes this difference has substantial implications for promoting and facilitating both (a) strategic planning to create or enhance shareholder value that is more likely to be long term and substantial and (b) more rational and logical assessments and trading activities by market participants based on such results. The proposal herein would activate that difference and would be real medicine for the malady of short-termism.

This article also proposes instituting the following requirement as an integral component of the new annual-only disclosure regime: All public companies would be required to give guidance about (i.e., their best estimate of) anticipated *earnings* for the upcoming *fiscal year* (although not for any interim period thereof) as part of each year's annual report on Form 10-K.

The new guidance requirement would be limited to earnings, but it would permit and facilitate *voluntary elective* guidance with respect to other potentially key performance measures on which analysts or other market participants may be focused with respect to a particular company. In any event, the guidance provided would then serve as the reference point for a company to assess developments over the course of that fiscal year in order to determine whether the company's operations are on track with the guidance. If some development indicates that a material deviation from the prior guidance is likely, regardless of whether the deviation is favorable or unfavorable, the company would be required to promptly disclose relevant information about that development and to adjust the prior guidance commensurately. This ongoing assessment aspect would help address a legitimate concern with the proposal herein, relating to the potential need for real-time disclosure of certain material operating developments; this issue is discussed more specifically in Part IV.E.

To be clear, both the original guidance and the ongoing assessment of developments would have the longer-term focus of a full fiscal year, rather than a short-term focus of quarter to quarter. As a result, the possible vagaries of performance in any one quarter would not automatically warrant any updating interim disclosure, if the company were otherwise on track with its guidance for the fiscal year. The relevant measuring period for performance and accountabil-

51. This article does not address the implications of state securities or so-called "blue sky" laws for the U.S. quarterly disclosure regimes, although this proposal also contemplates the elimination (or preemption) of any state law–based quarterly reporting requirement for public companies. To the extent that any such state-level requirement would survive the preemptive effect of a federal securities law change to an annual-only disclosure regime, the author believes the consequences should be *de minimus*. For a discussion about federal law preemption of state law with respect to the regulation of disclosures by public companies, see generally Rutherford B. Campbell, *The Role of Blue Sky Laws After NSMIA and the JOBS Act*, 66 Duke L.J. 605 (2016).

ity would remain annual, and so the interim assessment aspect of the requirement would not compromise the principal benefits of this proposal.

Under this proposal, companies would not be prohibited from voluntarily providing financial and other operating results performance information more frequently than the annual report on Form 10-K, just as the current quarterly disclosure regime does not prohibit companies from disclosing such results more frequently than quarterly. However, just as companies do not volunteer the latter disclosures under the current quarterly reporting regime, the author is hard-pressed to imagine why any company would choose to do the former under the annual-only reporting regime this article proposes.

Adoption and implementation of this proposal would follow a public review and comment process while the proposal is under consideration. As a result, companies that are addicted to the rituals and routine of the quarterly disclosure regimes would have a de facto transition period, during which they could wean themselves from old habits and develop resistance to possible informal pressures to continue the old quarterly disclosures practice. Of course, any practice by a company of voluntarily making discretionary interim disclosures of good news about operating results, but choosing to remain silent about interim bad news, would expose the company to potential claims of manipulation, just as such a practice would do under current law. The latter prospect should be an effective deterrent to pick-and-choose interim discretionary disclosures.

B. Rationale for Annual Earnings Guidance Requirement

This section specifically addresses the rationale for instituting annual earnings guidance as a *requirement*. Because there is no present requirement that public companies give guidance about their expected future operating performance, let alone about anticipated earnings, the rationale for the guidance requirement component of this proposal may not be immediately evident. However, as explained below, that component is an important element of the annual-only reporting proposal.

Investors and other capital markets participants will inevitably require certain forward-looking information about public companies in order to make strategic and rational investment decisions. As discussed in Part III, the informal, non-required practice of providing earnings guidance arose to address that practical reality, and there is no reason to believe that that reality would change under the proposed annual-only reporting regime.[52] Accordingly, the author believes it is better to embrace that reality and develop a system that can help guard against the emergence of behavior that undermines the benefits of changing to an annual-only from a quarterly regime. The author believes that instituting a formal, *annual* earnings

52. *See generally* Morano, *supra* note 35. Analysts and companies, prior to Regulation FD, often established mutually beneficial working relationships whereby a company would provide earnings guidance to an analyst and the analyst would generally be inclined to follow the company's securities and report more favorably regarding the company. This practice served to promote interest in the company's securities by investors generally.

guidance requirement will help prevent the emergence of an informal but widespread guidance practice that continues the current *quarterly* focus.

The proposed guidance requirement relating to future operating performance is not a long step from either the SEC's implicit position or the prevailing practice among public companies about disclosing forward-looking information. Historically, the SEC has been somewhat schizophrenic about disclosure of forward-looking information.[53] The SEC's current position, however, is to encourage—and, in some limited situations, to require[54]—disclosures that look into the future based on "trends" and certain other matters that companies know. While the SEC still does not explicitly encourage earnings guidance, it readily accepts the current informal practice so long as a company's disclosures comply with Regulation FD, other applicable SEC regulations, and the anti-fraud provisions of the federal securities laws. Even without a requirement or explicit SEC encouragement, many (if not most) public companies provide earnings guidance voluntarily (at least on an annual basis).

With respect to major public companies that do not presently provide earnings guidance,[55] the author believes their respective positions are likely based primarily on an aversion to the historical *quarterly* focus for which guidance is expected if it is given, and the resulting short-termism and other problems that flow from such a quarterly focus. The author also believes such companies would not necessarily oppose the type of *annual* guidance requirement proposed here, especially because it is a part of eliminating the quarterly reporting requirement.

Moreover, the author submits that the proposed annual guidance requirement is logical and reasonable. It is reasonable to require a public company to give its best estimate of what the upcoming fiscal *year* looks like with respect to earnings. It is also both logical and reasonable to expect and require the company (which has chosen to invite the public to invest in its securities and thus in its future prospects) to have thought seriously about the matter, and to have de-

53. For many years following the initial establishment of federal securities law disclosure requirements in 1933 and 1934, it was anathema to disclose projections or other future performance information. When the author began his securities practice in 1980, such information mostly appeared, as a routine matter, only in disclosures by companies involved in various syndication businesses, such as real estate development, the establishment cable television delivery systems, and oil and gas exploration. In those situations, the disclosures were usually made pursuant to a special set of SEC guidelines that were exceptions to the standard rules for disclosure. But, a shift in regulatory thinking led the SEC to promulgate rules and issue releases during the 1980s and 1990s that increasingly permitted, facilitated, and eventually encouraged certain forward-looking information disclosures. *See, e.g.*, Janet E. Kerr, *A Walk Through the Circuits: The Duty to Disclose Soft Information*, 46 MD. L. REV. 1071, 1071–76 (1987); Suzanne J. Romajas, *The Duty to Disclose Forward-Looking Information: A Look at the Future of MD&A*, 61 FORDHAM L. REV. 245, 248–261 (1993); Gregory S. Porter, *What Did You Know and When Did You Know It?: Public Company Disclosure and the Mythical Duties to Correct and Update*, 68 FORDHAM L. REV. 2199, 2242–46 (2000); Joel Seligman, *The SEC's Unfinished Soft Information Revolution*, 63 FORDHAM L. REV. 1953 (1995).

54. Pursuant to requirements applicable to both Form 10-Q and Form 10-K (and to most registration statements under the 1933 Act), a public company is required to provide its management's discussion and analysis of the company's financial condition and results of operation (commonly known as the "MD&A"), and to include therein disclosure of known trends and/or uncertainties, which may be forward-looking rather than historical.

55. At the time of this writing, such companies included these household name enterprises: AT&T, Berkshire-Hathaway, Coca-Cola, Costco, Ford, Google, Unilever, and UPS.

veloped an articulable view on it, as part of the company's prudent strategic planning for its operations. It is, therefore, reasonable and appropriate to expect and require the latter as a condition of public company status.

C. From "Guidance" to "Outlook" and Other Terminology

The term "guidance" is heavily laden with baggage, including its historical connotation of meaning *quarterly* earnings estimates. To help discard that baggage, the author recommends a more neutral term for this proposed requirement, such as the annual "outlook" assessment,[56] and the term "outlook" is used to refer to this requirement for the rest of this article. To be clear, however, the proposed outlook assessment falls squarely within what is now commonly understood to be guidance, except that the requirement proposed herein is focused *exclusively* on the *annual* period. Under this proposal, a company could choose voluntarily to look farther out in providing its outlook assessment, but nothing beyond the upcoming fiscal year would be required or expected.

The discussions in this article use some terms or concepts that are not specifically defined here. Most of them, however, have fairly well-established meanings in securities law or lore— e.g., terms such as "material," "reasonable," "good faith," and so on—and therefore they should be fairly easy to work with (and to refine as appropriate) in implementing this proposal. To the extent there are others, they do not have substantive implications for the proposal advocated herein.

D. Elaboration on Certain Benefits

In describing the malady of short-termism that has been inflicted and perpetuated by the quarterly reporting regimes, the author has indicated, in Part II and elsewhere above, the principal benefits that would flow from replacing those quarterly regimes with this proposed annual-only periodic reporting regime. Many such benefits (and derivative ones) should be now be manifest; however, a few particular benefits are highlighted below.

Reducing the Impetus to Manage Earnings

First, while an annual-only reporting regime would not eliminate all temptations to manage earnings or other operating results from period to period, it would greatly reduce the pressure to sacrifice longer-term strategic initiatives on the altar of the next quarter's stock price. There would likely still be some temptation to smooth out results from year to year, of course. But, it cannot be denied that the pressure would be less, and the potential distortions would be less significant, with a full year rather than three months as the next relevant measuring period.

56. The "outlook" terminology is not new; it is already used by many companies to convey the same information about anticipated earnings (or other key performance measures) without using the term "guidance."

Cost Savings

Second, there should be significant cost savings for public companies. Not all of the very expensive work currently required from lawyers, accountants, and other professional advisors to comply with requirements of the quarterly disclosure regimes would be eliminated, but a lot of it would be. The resulting cost savings would benefit any company's financial bottom line, and for many modest-size companies, this could increase shareholder value, regardless of how one chooses to measure such value. Even proponents of retaining quarterly reporting concede its costliness.[57] While likely cost savings are a benefit of the proposal to eliminate required quarterly reporting, cost savings alone do not constitute any part of the author's reason for proposing this change.

Eliminating the Need for Seasonality Disclosures

Third, eliminating quarterly disclosure of financial and other operating results performance information would eliminate the need for seasonality disclosures, which exist only because of quarterly reporting. By definition, seasonality disclosure is relevant only because operating results are being reported and analyzed with respect to quarterly periods that occur during the respective seasons of a fiscal year. If done well, seasonality disclosures are highly complex, as companies struggle to explain with precision and clarity how seasonal cycles affect the performance of businesses in their industry. Beyond rendering seasonality disclosure moot, it may be fair to expect that other disclosure complexities would be reduced under an annual-only regime, without suffering any diminution in investor protection.

Freeing Up Executive Time for More Productive Tasks

Fourth, much of the substantial time and effort now spent by company executives and other personnel on quarterly disclosures compliance could be deployed on other tasks, some of which might even be revenue-producing for a particular company. Even if such redeployment is not revenue-producing in a direct manner, it is inarguable that the resulting available time and resources could be beneficially employed by an efficient company. The resulting benefit might be intangible and difficult to quantify, but it would be real and potentially significant, especially for smaller public companies. Similar to the cost savings benefit, however, this benefit alone would not justify the proposed change, and it also is not a part of the author's reason for the proposal. Nonetheless, the benefit would be present, and it also warrants consideration.

E. Some Legitimate Questions and Concerns

Notwithstanding the compelling rationale, logic, and benefits of changing to an annual-only regime for the periodic reporting of financial and other operating

57. *See, e.g.*, Rosen & Roe, *supra* note 15.

results performance information, four legitimate questions and concerns arise under this proposal. They are first identified collectively in this section, and then each is discussed individually in Part IV.F, where it is shown that none of these concerns effectively counters or diminishes the rationale and logic for the elimination of quarterly reporting.

Timely Disclosure of Potential Interim Material Operating Developments

First, how would this proposed annual-only disclosure regime handle material operating developments that become known by a company's management during the current fiscal year, well before the time for the company's next required annual disclosure of operating performance, especially if the interim developments are unfavorable? Surely, no one benefits from (or should want) such information to be kept secret and sprung upon an unsuspecting investment community and public in a year-end catharsis.

Increased Potential for Material Information to Leak

Second, how would this proposal address the risk that information about such a development might be willfully or inadvertently leaked to, and then used by, a select few market participants to the detriment of the unsuspecting public? This concern might be even more compelling than the first one, because it would be naïve to expect that all such developments would remain truly "secret" for the possibly long periods of time that they may be known by a company before the end of its fiscal year.

Providing More Time to Conceal Corporate Misbehavior

Third, wouldn't allowing a full fiscal year before operating performance disclosures are required simply invite (and give more time to orchestrate) all manner of skullduggery by a company's management?

Semi-Annual Reporting May be Sufficient Remedy

Fourth, even if quarterly reporting is too frequent for all the reasons asserted above, wouldn't a semi-annual periodic reporting regime address those problems adequately and be more appropriate otherwise?

Each of these concerns warrant thoughtful analysis and must be examined as part of any process to eliminate the current quarterly disclosure regimes (and convert to an annual-only regime) as proposed herein.

F. Responses to the Legitimate Questions and Concerns

Real-Time Disclosure of Form 8-K Material Events Continues

As stated in Part III.A, the proposal to require periodic reporting on an annual-only basis would continue the 1934 Act's Current Report on Form 8-K, which requires immediate disclosure about several types of extraordinary events or developments that are deemed to be material per se. The reporting events currently prescribed by Form 8-K for immediate disclosure (which are called "8-K material events" herein) include: entering into or terminating an extraordinary material agreement; completing an extraordinary acquisition or disposition of a significant amount of assets; incurrence or acceleration of a material financial obligation; the sale of unregistered equity securities, or a material modification to the rights of existing security holders; a change in or dispute with the company's certifying accountant or a conclusion that any previously issued financial statement should not be relied upon; a change in control or departure of a director or principal officer; amendments to the company's articles of incorporation or bylaws, or code of ethics; or a waiver of a provision of the company's code of ethics.[58]

These 8-K material events are fairly well-conceived and provide important information and protection for investors. None of the 8-K material events would be changed as a result of implementing this proposal. The requirements of Form 8-K (with modest appropriate tweaking for technical synchronization) can address effectively the first concern in Part IV.E relating to a material operating development being allowed to fester, undisclosed, for long periods within a fiscal year.

Regulation FD and Private Litigation Are Deterrents to Leaking

Regulation FD—which is discussed in some detail in Part III.A—would also be unchanged under this proposal to move to annual-only periodic reporting. Regulation FD is an effective tool for regulating the leaking of material nonpublic information about interim developments, as it already does for other selective disclosure scenarios involving a material matter that is not kept secret. There is absolutely no basis for believing that Regulation FD would be less effective under an annual-only reporting regime. And, of course, private as well as administrative lawsuits remain as options to address and remediate unlawful trading on inside information. Together, these existing mechanisms would be effective to address the second concern in Part IV.E about the leaking of material information between required annual filings.

58. The scope of Form 8-K has evolved and expanded substantially over the years. *See* Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, SEC Release No. 33-8400 (Mar. 16, 2004). There is no commonly accepted definition of "8-K material events," and the above summary is not a comprehensive listing of all events for which Form 8-K requires current disclosure. It is, however, an illustrative distillation of Form 8 K's scope.

More Time to Conceal Is Not Likely to Increase Corporate Misbehavior

With respect to the third concern in Part IV.E, it is tautological that more time to hide something (or to dissemble with respect to it) increases the likelihood of success at doing so. However, as discussed in Part III.C, the author believes the greatest temptation for disclosure skullduggery is the shortness of the period for measuring and reporting on operating performance results. It should be possible for empirical analyses to be conducted that would validate that belief.[59]

Beyond that, it is sufficient to say that positing such potential unlawful behavior by companies as an insurmountable risk of implementing an annual-only reporting requirement would presuppose a level of inveterate unscrupulousness by corporate actors that is overly cynical and unwarranted. It would be tantamount to saying that unlawful behavior is innate, and so we should dispense with all law and embrace anarchy.

The true risk reflected by the concern about increased potential for misbehavior by corporate executives is small, and it does not offset the benefits that would be derived from an annual-only regime that allows and encourages companies to focus more strategically on the longer-term horizon.

Year-End Audit and Sarbanes-Oxley Protocols Are Effective to Deter Corporate Misbehavior

Further with respect to that third concern, it is also reasonable to believe and expect that the year-end requirement for an independent audit of the financial statements of public companies, along with the attendant year-end processes and the myriad corporate governance protocols imposed by the Public Company Accounting Reform and Corporate Responsibility Act of 2002 (commonly known as the Sarbanes-Oxley Act) and its progeny of reforms, would still operate to help keep corporate actors honest. And, there would be equal amounts of time, over the course of the fiscal year, for those processes to operate and ferret out possible skullduggery.

Semi-Annual Reporting Would Not Be Effective to Remediate Short-Termism

The fourth concern in Part IV.E—i.e., that it may be better to move from a quarterly to a semi-annual reporting requirement—is deceptively alluring. A semi-annual reporting regime may appear to be a reasonable compromise that captures well some of the rationale posited for and against quarterly periodic reporting. Even the author concedes that a semi-annual regime would be somewhat better than the current quarterly regime. However, semi-annual reporting would not remediate effectively the short-termism malady described herein. To continue the medical analogy, semi-annual reporting is not real medicine; it is just

59. *See, e.g.*, *American Prosperity Project: A Non-Partisan Framework for Long-Term Investment*, *supra* note 11; Graham, Harvey & Rajgopal, *supra* note 11; McKinsey Global Inst., *supra* note 11; Stout, *supra* note 11.

a larger and cleaner bandage. Only a conversion to annual-only, fiscal year, periodic reporting can begin to remediate the malady. Moreover, none of the three other concerns in Part IV.E gain new currency when comparing a semi-annual regime to an annual-only regime.

Prompt Disclosure of Trading by Insiders Would Not Change

It is also important to highlight that this proposal to eliminate quarterly reporting by public companies would not change the rules of the SEC and the trading markets that require management and other insiders of public companies to disclose promptly their trading activities with respect to their companies' securities. Those requirements do not cause or exacerbate any of the problems the author attributes to the short-term quarterly disclosure regimes for *companies* with respect to their operations, and the author heartily supports those trading activity reporting requirements. Market participants should be apprised of the trading activities by insiders sooner rather than later; indeed, disclosure of such information should be required as close to real time as practical.

G. Litigation Exposure from Outlook Requirement; Need for Safe Harbors

Because this proposal institutes a *requirement* to provide an earnings outlook, even though only annually, it will raise a specter of potential liability exposure for companies if their outlook assessment proves to be wrong. While such litigation exposure already exists for the many companies that already *elect* to provide earnings guidance, instituting a *required* annual outlook assessment is clearly a different matter, and it necessitates more specific analysis of the potential litigation risk. The role and implications of securities law–based litigation must always be considered when proposing a change in the U.S. securities regulatory environment.

It would be naive to presume that a company's missing of its outlook disclosure would not become fertile ground for litigation, if sensible and effective "safe harbor" standards are not established and enforced to protect reasonable and good-faith actions by companies and their managements in providing the outlook assessment and in tracking progress towards it. Such protection not only should include exculpation from liability if compliance with such standards is established, but it also should provide meaningful safeguards against (and effective recourse for) the costs of defending against spurious claims of non-compliance. At the same time, it is imperative, as part of an effective system of investor protections, that actions outside those parameters remain subject to accountability by private lawsuits filed by those who can establish harm as a result of such actions. Without taking either side of the debate about the merits of various kinds of securities litigation, developing appropriate safe harbor standards and safeguards against spurious claims will be necessary to assure the success of, and avoidance of unintended consequences due to, the outlook assessment component of the proposed annual-only reporting regime.

The proposed annual outlook assessment would be, by definition, a forward-looking statement. As such, it would be eligible for the safe harbor (and other protections against anti-fraud liability exposure) currently provided by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").[60] That recognition does not require entering the raging debate over the merits, demerits, effectiveness, or ineffectiveness of the PSLRA in general or its "safe harbor" in particular. This is because the proposed annual outlook assessment does not introduce any disclosure analysis or burden that public companies do not already have with respect to existing, important, forward-looking statements they make in order to file a fully compliant Form 10-K.

Moreover, it is important to emphasize, as discussed in Part IV.B, that it is logical and reasonable to expect and require a public company to develop and articulate its best estimate of what the upcoming fiscal year looks like with respect to earnings. And, a company should be able to track its progress toward that outlook assessment over the course of the ensuing year and to report promptly a development that indicates a material deviation from the outlook, as required by this proposal. Any well-run company should be able to provide that information with appropriate and sufficient qualifiers to both inform the investment community and protect itself and its management. If a company cannot do so, it is not worthy of (and should not be permitted) the privilege of public company status.

That said, it would be appropriate to augment or clarify the existing protections that would be afforded by the PSLRA to the outlook assessment disclosure. An intentional or recklessly false or misleading outlook disclosure (or the failure to update for a known development indicating a material deviation in progress) should not be protected by the PSLRA's safe harbor or otherwise. On the other hand, a company's good faith and timely disclosure of outlook information should be protected, both against liability and the expense of defending the same. It appears that neither of the above may be ensured under current legal standards;[61] if not, those standards should be augmented and/or clarified.

Another mechanism for discouraging meritless securities litigation due to the annual outlook disclosure requirement would be to establish a "loser pays" system, akin to the so-called "English model," for claims based on alleged non-compliance with that requirement. If it were to be coupled with a realistic litigation bond-posting requirement, such a rule may discourage the pursuit of spurious claims while not deterring meritorious ones. There is no need, of course, for a "one size fits all" approach to developing such a system. Claims that are based on the outlook disclosure requirement can (and probably should) be subject to their own, poten-

60. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

61. *See, e.g.*, Anand Das, *A License to Lie: The Private Securities Litigation Reform Act's Safe Harbor for Forward-Looking Statements Does Not Protect False or Misleading Statements When Made with Meaningful Cautionary Language*, 60 Cath. U. L. Rev. 1083 (2011); Marilyn F. Johnson, Karen Nelson & A.C. Pritchard, *Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act*, 23 J.L. Econ. & Org. 627 (2006); Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2013 U. Ill. L. Rev. 913.

tially different, set of rules. Developing such a set of rules is beyond the scope of this article; however, doing so would be a manageable project, if we believe in and want the benefits that an annual-only reporting requirement can produce.[62] The author hopes there are enough others of like mind to commence a serious public discourse about it.[63]

V. Concluding Observations

The author has not conducted any surveys or other empirical investigations for purposes of this article. But, over the course of thirty-eight years of practice, he has represented and otherwise observed and interacted with hundreds of executives and directors of public companies and investors in such companies. On that substantial albeit anecdotal basis, the author is highly confident that most executives and directors of public companies (and would-be public companies) would applaud a movement to an annual-only disclosure regime, after the possible taint of them being perceived as iconoclasts or mavericks has been removed.

The author also believes that most small investors—the prototypical "moms and pops" who may be at the top of the heap of casualties under the current disclosure regimes, despite the best intentions of the SEC and other regulators to protect them—and most of the investing public generally would likewise recognize and agree that the elimination of quarterly disclosure of financial and other operating performance results can actually lead to more meaningful and usable information for their investment activity.

Allowing that many may have a knee-jerk and negative initial reaction to eliminating quarterly reporting, it is hard to see how even those with an historical vested interest in the current quarterly reporting regimes can sustain an objection to reexamining systematically the logic and practical implications of those regimes. After all, the problem is *not* with the *substance* of the disclosures per se that are required by those regimes, but with the illogic and irrationality of the

62. Much has been written over the years, some of it practical and good, on the general topic of who should bear the costs of private commercial litigation. *See generally* Theodore Eisenberg & Talia Fisher, *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. Rev. 1452 (2013); Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule in Attorney Fees: An Empirical Study of Public Company Contracts*, 98 Cornell L. Rev. 327 (2013); Issachr Rosen-Zvi, *Just Fee Shifting*, 37 Fla. St. U. L. Rev. 717 (2010); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567 (1993).

63. Or, in the words of the hip-hop group The Black Eyed Peas, "let's get it started." The Black Eyed Peas, *Let's Get It Started*, Elephunk (A&M Records 2003).

On December 18, 2018, the SEC issued a release to request public comment on, *inter alia*, "whether our rules should provide reporting companies, or certain classes of reporting companies, with flexibility as to the frequency of their periodic reporting." Request for Comment on Earnings Releases and Quarterly Reports, SEC Release Nos. 33-10588 and 34-84842 (Dec. 18, 2018). The broad scope of the request may lead to some comments that touch on the proposal made in this article, which would be encouraging and might eventually lead to the type of fulsome consideration desired by the author. However, despite its broad scope and explicit reference to a consideration of semi-annual periodic reporting, the release does not refer or allude to consideration of an annual-only periodic reporting option. That is unfortunate.

frequency with which the disclosures are currently required, in light of the inevitable unhealthy consequences that such frequency produces.

The work to implement this proposed change—including the new annual outlook assessment component—would not be nearly as substantial as the benefits it portends for enhancing the integrity and rationality of our capital markets system. The author submits that, under the current quarterly disclosure regimes, U.S. companies and other market participants spend more collective time, energy, and dollars (a) applying new bandages on top of old ones, in order to cover the gaping wound of short-termism that our system is suffering; (b) exhorting the patient to get better, essentially on its own; and (c) suing one another because the patient is still sick, than would be spent to diagnose the malady honestly and accurately and to administer some real medicine by jettisoning the quarterly disclosure regimes.

If we want to promote longer-term and more strategic focus by public companies and their management; *if* we want analysts, investors, and other market participants to focus on long-term value propositions; *if* we want to curtail short-termism more generally; *and if* we want to shape and encourage such behaviors, *then* we must rethink and change the fundamentally short-term timetable we have established for our official disclosure regimes. On the other hand, when push comes to shove, if we do not really care that much about effectively reshaping and encouraging those behaviors, then we can continue with the current quarterly disclosure regimes and the current ineffective exhortations to the sick patient and wishful thinking that the patient will cure itself. Let's just not fool ourselves. We cannot expect long-term focus and accountability, while requiring short-term measures.[64]

64. As stated in the famed quote, once broadly credited to Albert Einstein, but now of questionable origins: "The definition of insanity is doing the same thing over and over again, but expecting different results." *See generally* Christina Sterbenz, *12 Famous Quotes that Always Get Misattributed*, Bus. Insider (Oct. 7, 2013), https://www.businessinsider.com/misattributed-quotes-2013-10.