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Proposed End of Quarterly Reporting and Action on Shareholder Litigation

The U.S. Securities and Exchange Commission this week took steps toward modernizing the periodic reporting system for public companies, and also permitted issuers to include mandatory arbitration provisions in their charters and/or bylaws in connection with IPOs and other securities offerings.

In response to a social media post by President Trump calling for public companies to not be required to report on a quarterly basis, but to report on a six-month basis, an SEC spokesperson said that: "At President Trump's request, Chairman Atkins and the SEC is prioritizing this proposal to further eliminate unnecessary regulatory burdens on companies." As we reported in December 2018, President Trump had also advocated, and the SEC formally sought public comment on, this matter during his first term, although no reforms were then adopted.

We have long advocated for the rules governing public companies to promote a long-term approach to value creation. Among many others, the Commission on the Regulation of U.S. Capital Markets in the 21st Century and the Aspen Institute have explicated the logic of that line of thinking, as did Legal & General in their 2015 call for an End to Quarterly Reporting. As we wrote in 2018, in particular as to quarterly reporting:

> For most companies, quarterly reporting consumes substantial time and expense and imposes opportunity costs, as management teams focus on quarterly results. These quarterly cadences are often deeply disconnected from long-term business cycles, key business drivers, customer dynamics, innovation opportunities and market realities.

While it is unclear if Congressional action would be required to amend Section 13 of the '34 Act, or if the SEC could amend Rule 13a-13 to permit this increased flexibility in periodic reporting, the SEC's prioritization of President Trump's proposal could lead to meaningful reform in this area.

In an unrelated development this week, the SEC published a policy statement announcing that provisions in a company's charter or bylaws requiring arbitration of investor claims arising under the federal securities laws will not preclude the SEC from declaring the effectiveness of its registration statement. This policy statement reversed the SEC's longstanding previous, unwritten position that acceleration requests would not be granted under such circumstances. The Commission's previous policy was based on Section 8(a) of the Securities Act, which permits the SEC to refuse to accelerate a registration statement in light of, among other things, the public interest and the protection of investors. The SEC had viewed mandatory arbitration provisions as contrary to public policy and inconsistent with the so-called anti-waiver provisions of the federal securities laws. However, in its policy release, the SEC stated that it will now focus on the completeness and adequacy of a registration statement's disclosures with respect to mandatory arbitration provisions.

In a press release announcing the new policy statement, SEC Chairman Paul S. Atkins commented: "While many people will express views on whether a company should adopt a

mandatory arbitration provision, the Commission's role in this debate is to provide clarity that such provisions are not inconsistent with the federal securities laws." In response, another SEC commissioner criticized the policy change, noting "Mandatory arbitration forces harmed shareholders to sue companies in a private, confidential forum, instead of a court and without the benefit of proceeding in the form of a class action." Mandatory arbitration will also need to be evaluated under relevant state corporation law.

These developments regarding quarterly reporting and arbitration provisions are relevant with respect to effective long-term corporate governance, value creation, and capital formation. It remains to be seen whether these policy measures would reduce the long-term decline in the number of publicly traded companies in U.S. markets, or are optimally targeted to counteract the general (and correct) impression that the regulatory burden of being publicly listed in the U.S. is unattractive and disproportionate. But they are a welcome start towards an open dialogue around how best to make U.S. capital markets more efficient and attractive.

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