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Does No 10-Q Mean More 8-K?

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As has been recently widely reported, President Donald Trump has called for an end to quarterly reporting with the Securities and Exchange Commission (SEC) in favor of a biannual reporting model, and the **SEC has announced that it is prioritizing this proposal**. While the future of the proposal is uncertain, one collateral consequence of its adoption that has received little attention so far is the potential effect on SEC Form 8-K disclosure.

Subject to certain exceptions, General Instruction B.3. to Form 8-K provides that, if a registrant has "previously reported" substantially the same information as required by a Form 8-K item, the registrant is not required to disclose the information again on a subsequently filed Form 8-K. For this purpose, "previously reported" means, among other things, that the information was previously reported in a report under Section 13 or 15(d) of the Securities Exchange Act of 1934, including but not limited to a report on Form 10-Q or Form 10-K.

The "previously reported" exception gives issuers the ability to not file a separate, stand-alone Form 8-K by instead disclosing the information in a Form 10-Q, provided the deadline for Form 8-K disclosure (typically four business days following the disclosable event) has not yet expired by the time of the Form 10-Q filing.

Assuming no further or different relief from the 8-K disclosure requirements is provided in connection with any changes to the 10-Q reporting regime, registrants may have more limited ability to rely on the "previously reported" exception to Form 8-K disclosure.

Of course, much work remains to be done to implement any changes, and many more collateral consequences loom, specifically in the executive compensation arena. For example, adoption of the revised cadence would affect the operation of open trading windows and the nature of Regulation S-K 402(x) disclosure (relating to the timing of option grants in relation to the release of material nonpublic information), which could, as a result, impact the timing of equity awards and potentially the timing of settlement of vested equity awards and related income tax withholding methodology. Critical thought and attention will be needed in connection with all such collateral matters.

In the meantime, the proposed 10-Q reporting regime changes serve as a reminder that the "previously reported" exception is currently available, and that the exception can, in appropriate circumstances, relieve companies of otherwise burdensome disclosure obligations. Companies should keep in mind that the "previously reported" exception is not limited to prior disclosure on Forms 10-Q and 10-K and can also apply in certain other circumstances – for example, to prior reporting in a proxy statement or a securities registration statement.

Companies contemplating actions that otherwise require Form 8-K disclosure should keep the "previously reported" exception in mind and consult with counsel about its availability.

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