

COMMENT LETTER

May 21, 2002

Comment Letter to SEC on Corporate Financial Reporting, May 2002

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Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 5th Street, N.W.
Washington, DC 20549

Re: Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports (File No. S7-08-02)

Dear Mr. Katz:

The Investment Company Institute¹ appreciates the opportunity to comment on the Securities and Exchange Commission's [proposal](#) to accelerate the filing of quarterly reports and annual reports under the Securities Exchange Act of 1934.² This proposal is part of a package of proposals designed to improve the corporate disclosure and financial reporting system.³ Our members have a significant interest in these proposals; we estimate that investment companies held, as of year-end 2001, more than \$4 trillion in U.S. corporate equity and fixed-income securities, on behalf of millions of investors.

The Commission's proposal would reduce the time period for filing quarterly reports on Form 10-Q from 45 to 30 calendar days after the end of an issuer's quarter, and reduce the time for filing annual reports on Form 10-K from 90 to 60 days after the end of its fiscal year. The Institute believes that shortening these deadlines in this manner would be at least partially responsive to the "gap" that frequently exists between the release of earnings announcements and the filing of periodic reports under the 1934 Act. We believe, however, that there is a more effective way for the Commission to respond to this concern. Specifically, we urge the SEC to adopt rules requiring all earnings announcements by reporting companies to be filed with the Commission on Form 8-K, and requiring that these Form 8-K filings include a reconciliation to GAAP-basis earnings. We further believe that the SEC should adopt such rules irrespective of whether or not it shortens the filing deadlines for Forms 10-K and 10-Q.

The Proposing Release correctly notes that there exists an "information gap" between the time that companies issue their earnings announcements in press releases and the due dates for filing periodic reports, and that the Commission's proposals are intended to lessen

this gap.⁴

The Institute applauds the Commission's efforts in this regard. However, accelerating the deadlines for filing Forms 10-K and 10-Q will not, as the Proposing Release concedes, eliminate the gap. As a result, the proposal will not adequately address the potentially distorting effects that can result from the release of non-standardized earnings information that is unaccompanied by, or not reconciled to, GAAP-basis earnings.

Frequently, press releases issued by companies include "pro forma" or non-standardized earnings presentations. As the Commission itself only recently noted,⁵ since pro forma earnings are not calculated under any standardized set of principles, comparisons with the issuer's prior period results, as well as comparisons to other issuers in the same industry, can be difficult, if not impossible. Moreover, the presentation of pro forma earnings can obscure and diminish the importance of GAAP-basis earnings. Earnings announcements also may not fully disclose that the earnings reflect a one-time gain. Nevertheless, these earnings announcements can have a significant effect on security prices. We question whether this sort of "selective disclosure" is consistent with the underlying philosophy of the periodic reporting requirements under the 1934 Act, which are intended to ensure that there is sufficiently complete information in the marketplace to establish an accurate price for the security in question.⁶

Lessening the time lag between earnings announcements and the filing of Forms 10-K and 10-Q would respond to this concern, but only in part. In addition, shortening the deadlines for filing these forms could make it more difficult for issuers to ensure that the information they provide in these forms is accurate and complete. While it is true, as the Commission notes in the Proposing Release, that technological advances in recent years have made it easier to capture, process and disseminate information, the Commission, over the same period of time, has enhanced the disclosures required of issuers in these reports, particularly in the management's discussion and analysis.⁷ It is important that the SEC does not inadvertently diminish the depth of information that is included in the management's discussion and analysis. And, it is equally important that the filing deadlines are not so short that they would weaken or reduce the review and audit procedures performed by independent accountants.

The Institute is not in a position to ascertain definitively whether the proposed 30- and 60-day reporting deadlines would have these deleterious effects. Whether or not, however, the Commission determines to shorten the deadlines as proposed (or by some lesser period of time), we would urge the SEC to take steps that we believe would more directly respond to the discrepancies that exist between the timeliness and quality of information contained in earnings announcements included in press releases and that of information contained in reports filed with the Commission. As noted above, we would recommend in this regard that the SEC adopt rules that would require reporting companies that release earnings announcements to file such information with the SEC on Form 8-K.⁸ If the earnings announcement includes pro forma or non-standardized earnings information, the rules should require the Form 8-K to contain a reconciliation to GAAP-basis earnings. Such a reconciliation should consist of a side-by-side tabular presentation, along with a "plain English" narrative summary of the differences.⁹

We believe that requiring earnings announcements to be reconciled to GAAP in this manner would significantly enhance the flow of information to investors and to the market in general, consistent with the goals of the Commission's proposal. It also would avoid the potential concerns with the shortened deadlines noted above.

* * *

The Institute appreciates the opportunity to comment on the Commission's proposal. If you have any questions regarding our comments, or would like additional information, please contact the undersigned at (202) 326-5815.

Sincerely,

Craig S. Tyle
General Counsel

cc: Alan L. Beller, Director
Division of Corporation Finance

Paul F. Roye, Director
Division of Investment Management

ENDNOTES

[1](#) The Investment Company Institute is the national association of the American investment company industry. Its membership includes 9,064 open-end investment companies ("mutual funds"), 485 closed-end investment companies and six sponsors of unit investment trusts. Its mutual fund members have assets of about \$7.050 trillion, accounting for approximately 95 percent of total industry assets, and over 88.6 million individual shareholders.

[2](#) SEC Release Nos. 33-8089, 34-45741 (April 12, 2002); 67 Fed. Reg. 19895 (April 23, 2002) (the Proposing Release).

[3](#) See also SEC Release Nos. 33-8090; 34-45742 (April 12, 2002) (proposing to expand the list of significant events requiring current disclosure on Form 8-K); and SEC Release Nos. 33-8098; 34-45907 (May 10, 2002) (proposing to require MD&A disclosure about management's application of critical accounting policies).

[4](#) 67 Fed. Reg. at 19898-99.

[5](#) SEC Release Nos. 33-8039, 34-45124, FR-59 (December 4, 2001).

[6](#) "The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price . . . [T]he hiding and secreting of important information obstructs the operation of the markets as indices of real value." H.R. Rep. No. 73-1383 at 11 (1934), cited in SEC Release Nos. 33-7787, 34-42259, IC-24209 at note 8 (December 20, 1999).

[7](#) 67 Fed. Reg. at 19897. This trend is continuing. The SEC's most recent proposal to enhance corporate disclosure would require the MD&A to include disclosure regarding a company's critical accounting policies. See note 3 *supra*.

[8](#) Such information could be included in Item 9 of Form 8-K, which would avoid mandatory incorporation into filings under the Securities Act of 1933, as is permitted for Form 8-K filings intended to comply with Regulation FD.

[9](#) Furthermore, to ensure that investors have access to this information, we support the Commission's proposal to require companies to disclose in their annual reports on Form 10-K the location where investors can obtain access to Form 8-K and other company filings, including the requirement that companies disclose whether such reports are accessible on their Internet website.

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