

# To Our Clients and Friends

# Memorandum

July 24, 2020

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## *SEC Issues Rulemaking Proposal to Increase the Rule 13f-1 Reporting Threshold to \$3.5 Billion and Revise SEC Form 13F*

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### Introduction

The Securities and Exchange Commission (“SEC”) published on Friday, July 10, 2020, a rulemaking proposal to revise upward, from \$100 million to \$3.5 billion, the reporting threshold for institutional investment managers who are required quarterly to report securities holdings on SEC Form 13F.<sup>1</sup> The proposed changes, if adopted, would result in the first adjustment to the current reporting threshold under Section 13(f) of the Securities Exchange Act of 1934, as amended (“Exchange Act”), since Exchange Act Rule 13f-1 set the threshold at \$100 million in 1978, and would eliminate the filing obligation for approximately 90 percent of current Form 13F filers.<sup>2</sup> In addition to proposing an increase in the reporting threshold, the proposal, if adopted, would eliminate a current exception allowing filers who otherwise meet the filing threshold to exclude from their published reports certain *de minimis* positions.<sup>3</sup> The proposal also would result in certain technical adjustments to Form 13F,<sup>4</sup> and amend the SEC’s instructions for obtaining confidential treatment requests to revise the requirements in a manner believed necessary in light of a 2019 Supreme Court decision.<sup>5</sup>

### Exchange Act Section 13(f) and Form 13F

Under current Exchange Act Section 13(f)(1), institutional investment managers that use the United States mail (or other means or instrumentality of interstate commerce) in the course of their business and that exercise investment discretion over \$100 million or more in Section 13(f) securities are required to file

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<sup>1</sup> Proposed Rulemaking, *Reporting Threshold for Institutional Investment Managers*, Exchange Act Rel. No. 89290 (July 10, 2020) (“Proposed Rule”), available at <https://www.sec.gov/rules/proposed/2020/34-89290.pdf>.

<sup>2</sup> *Id.* at 18 (noting that the proposal would result in filing relief for “approximately 4,500 Form 13F filers, or approximately 89.2 percent of all current filers”). See also, Press Release, *SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect Today’s Equities Markets* (July 10, 2020), available at <https://www.sec.gov/news/press-release/2020-152>. Because institutional investment managers who meet the filing threshold must file quarterly, the proposal would reduce the number of Form 13F reports filed yearly by approximately 18,000 filings.

<sup>3</sup> Proposed Rule at 31 – 34.

<sup>4</sup> *Id.* at 34 – 38.

<sup>5</sup> *Id.* at 37 – 38.

quarterly reports outlining their investment discretion over such securities on SEC Form 13F.<sup>6</sup> Section 13(f) securities are defined as equity securities of a class described in Section 13(d)(1) of the Exchange Act; the SEC publishes quarterly a public list of securities meeting the definition that is known as the “Official List of Section 13(f) Securities.”<sup>7</sup>

For purposes of Section 13(f), the term “institutional investment manager” is defined as “any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.”<sup>8</sup> Institutional investment managers are deemed to exercise investment discretion if “(i) the manager has the power to determine which securities are bought or sold for the account(s) under management; or (ii) the manager makes decisions about which securities are bought or sold for the account(s), even though someone else is responsible for the investment decisions.”<sup>9</sup>

Once an institutional investment manager meets the \$100 million threshold at the end of any calendar month in any given year (even if such manager subsequently drops below the filing threshold), that manager triggers an obligation to file four quarterly Form 13F reports, each reporting the Section 13(f) securities over which it has investment discretion at the end of each respective reporting period.<sup>10</sup> The first such report is required to be filed based on the Section 13(f) securities over which the manager has investment discretion at the end of December during the calendar year in which the manager first reached the month-end \$100 million filing threshold. The second, third and fourth Form 13F reports are required to be filed based on the Section 13(f) securities over which the manager has investment discretion at the end of March, June and September in the year following the calendar year in which the filing threshold was initially met. Each required filing is due within 45 days of the end of the calendar quarters ending in

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<sup>6</sup> See Securities Exchange Act Section 13(f)(1).

<sup>7</sup> See *id.* The Official List of Section 13(f) Securities is updated quarterly and can be found on the SEC’s website in its repository of frequently asked questions regarding Form 13F. See SEC Frequently Asked Questions About Form 13F (“Form 13F FAQs”), available at <https://www.sec.gov/divisions/investment/13ffaq.htm>. The Official List of Section 13(f) Securities “primarily includes U.S. exchange-traded stocks (e.g., NYSE, AMEX, NASDAQ), shares of closed-end investment companies, and shares of exchange-traded funds (ETFs). Certain convertible debt securities, equity options, and warrants are on the Official List and may be reported.” See Form 13F FAQs, Question #7.

<sup>8</sup> See Exchange Act Section 13(f)(6)(A). The term “person” is further defined in Exchange Act Section 3(a)(9) to include “a natural person, company, government, or political subdivision, agency, or instrumentality of a government.” While a natural person exercising investment discretion over its own account is not within the definition, the staff of the SEC’s Division of Investment Management has interpreted the definition to also cover a “natural person or an entity that exercises investment discretion over the account of any other natural person or entity. For example, an investment adviser that manages private accounts, mutual fund assets, or pension plan assets is an institutional investment manager. So is the trust department of a bank.” See Form 13F FAQs, Question #3.

<sup>9</sup> See 13F FAQs, Question 6, *citing* Securities Exchange Act Section 3(a)(35), and Exchange Act Rule 13f-1(b). Under Rule 13f-1(b), institutional investment managers are also deemed to exercise investment discretion over “all accounts over which any person under its control exercises investment discretion,” which the staff of the SEC’s Division of Investment Management has interpreted to mean that parent corporations have shared investment discretion with their subsidiaries. See Exchange Act Rule 13f-1(b) and Form 13F FAQs, Question #6.

<sup>10</sup> See Exchange Act Rule 13f-1(a)(1); see also Form 13F FAQs, Questions #25, #28 and #29.

December, March, June and September. The Form 13F filing obligation is therefore triggered based on activity in one year, and met through filings made in the successive year.

### The SEC's Rulemaking Proposal

While the rulemaking proposal contains a number of technical and logistical proposals, the proposal's most substantive changes concern (1) the increase in the reporting threshold from \$100 million to \$3.5 billion, (2) the elimination of the *de minimis* exception, and (3) a change in the instructions applicable to requests for confidential treatment.

#### *Proposal to Increase the Current Reporting Threshold from \$100 million to \$3.5 billion*

The most significant revision put forth in the SEC's proposed rulemaking concerns the revision to the Form 13F reporting threshold contained within Rule 13f-1. In its proposal, the SEC outlined a number of possible methodologies for arriving at a new threshold, and stated that it is proposing to raise the threshold from \$100 million to \$3.5 billion because that amount is "designed to reflect proportionally the same market value of U.S. equities that \$100 million represented in 1975" (the year in which Exchange Act Section 13(f) was passed), while also retaining disclosure of approximately 90 percent of the current Form 13F holdings currently reported, on a dollar value basis.<sup>11</sup> In proposing an increase based on the growth in the U.S. equities market, the SEC rejected alternative methodologies considered, including an adjustment based on the growth, between 1975 and 2018, of the Consumer Price Index (which would have resulted in a proposed \$500 million threshold), the Personal Consumption Expenditures Price Index inflation standard (which would have resulted in a proposed \$400 million threshold) and the total return of the stock market (which would have resulted in a proposed \$9.5 billion threshold).<sup>12</sup>

This is not the first time that the SEC has considered raising the Section 13(f) reporting threshold. In 2010, the SEC's Office of Inspector General issued a report in connection with its review of the Section 13(f) reporting requirements, noting that, during 2006, the SEC's Office of Economic Analysis (now the Division of Economic and Risk Analysis) had conducted an analysis of the impact of increasing the Section 13(f) reporting threshold from \$100 million to \$300 million, an amount reflecting inflation using the then-current Consumer Price Index.<sup>13</sup> The OIG Report went on to recommend that this analysis be updated, and a determination be made as to whether an increase should be pursued.<sup>14</sup>

In rejecting the lower and higher inflation-based metrics considered in its proposal, the SEC emphasized a continued need by regulators and the public for access to "information regarding the equities holdings of larger managers that have the potential to significantly affect the securities markets," while acknowledging a "less compelling" need for public disclosure by "smaller managers."<sup>15</sup> Adjusting the threshold based on

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<sup>11</sup> See SEC Proposal at 12, 17 – 18.

<sup>12</sup> *Id.* at 15 – 16, 20 – 21.

<sup>13</sup> See Report of the SEC's Office of Inspector General, Office of Audits, *Review of the SEC's Section 13(f) Reporting Requirements*, Recommendation 10 (Sept. 27, 2010) ("OIG Report"), available at <https://www.sec.gov/about/offices/oig/reports/audits/2010/480.pdf>.

<sup>14</sup> See *id.* The OIG also recommended that a determination should be made as to whether Form 13F should be expanded to include additional securities, a breakdown between proprietary and customer accounts, average reporting positions, and aggregate purchase and sale data. See OIG Report Recommendations 10 and 12.

<sup>15</sup> SEC Proposal at 25.

the rise in the value of U.S. equities markets is intended to “recalibrate” the reporting threshold to reflect the statute’s objectives which, the SEC notes, include “providing the Commission, other regulators and the public with holdings information of larger managers that may impact the markets without requiring smaller managers to incur the costs associated with filing reports on Form 13F and subjecting them to the risks of potentially harmful investment behaviors resulting from those filing obligations.”<sup>16</sup> The potential harmful investment behaviors that the SEC is considering, and on which it has requested comment, are potential front-running and copycatting, which the SEC has suggested may result in increased costs, particularly for smaller managers who “may be more likely to reflect a limited number of separately managed portfolios that follow the same style or reflect the investment behavior of a single portfolio manager,” and have fewer resources to file confidential treatment requests for position information that may be subjected to such harmful behaviors.<sup>17</sup>

In proposing to adjust the threshold, the SEC acknowledged that the U.S. equities market is likely to continue to change in size, and that it may be necessary to make future adjustments to the reporting threshold. Although the SEC considered proposing a series of automatic adjustments to the reporting threshold on an ongoing basis, it instead has determined to propose that its staff conduct periodic re-reviews of the current Form 13F reporting threshold, on a five-year basis, to determine whether additional adjustments are necessary.

#### *Proposal to Eliminate the De Minimis Reporting Exception*

The current instructions to Form 13F allow a reporting institutional investment manager to omit from its Form 13F otherwise reportable holdings of Section 13(f) securities if, on the period end date, it holds “fewer than 10,000 shares (or less than \$200,000 principal amount in the case of convertible debt securities) and less than \$200,000 aggregate fair market value (and option holdings to purchase only such amounts).”<sup>18</sup> The SEC did not offer an explanation as to why it proposes to eliminate this *de minimis* exception, stating only that requiring the disclosure of these smaller positions now would have a “negligible” effect on “efficiency, competition, and capital formations” since the information would likely be immaterial and of insignificant value, and present minimal costs for filers with investment discretion over \$3.5 billion of 13(f) securities, particularly given their resources to seek confidential treatment of such positions where applicable.<sup>19</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 14. While the SEC has asked for comment on whether Form 13F presents these problems, it also acknowledged in its proposal that other market participants have petitioned for the disclosure of greater information in Form 13F reports, including proposals for the shortening of the 45-day delay in Form 13F reporting and to require the reporting of short sale trading data on Form 13F. In its current proposal, the SEC has noted that it believes it is more important to first address whether the scope of managers requiring to report should be revised before tackling any other substantive proposals to change Form 13F. See *id.* at fn. 28.

<sup>18</sup> See Form 13F Instructions, Special Instruction 10, available at <https://www.sec.gov/about/forms/form13f.pdf>. Exchange Act Section 13(f)(1) gives the Commission authority to exempt “securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection.” Exchange Act Section 13(f)(1). The current *de minimis* exception is a reporting exemption, and is applied on a security-by-security basis, but has no impact on the determination of whether a manager has met the filing threshold.

<sup>19</sup> SEC Proposal at 40. The SEC appears to be taking the position that, given the resources of institutional investment managers who have investment discretion over \$3.5 billion of 13(f) securities, reporting *de minimis*

*Proposal to Revise the Instructions Related to Confidential Treatment Requests*

The instructions to Form 13F currently provide a mechanism, subject to supplemental guidance published by the SEC, for institutional investment managers to seek confidential treatment with respect to their holdings of certain 13(f) securities.<sup>20</sup> Initially, the categories of information for which the SEC would grant confidential treatment was limited to “(1) information that would identify securities held by the account of a natural person or certain estates or trusts; and (2) information that would reveal an investment manager’s program of acquisition or disposition that is ongoing both at the end of a reporting period and at the time that the investment manager’s Form 13F is filed.”<sup>21</sup> The Division of Investment Management later indicated that two additional categories were also eligible to receive confidential treatment: “(1) open risk arbitrage positions; and (2) investment strategies that utilize block positioning.”<sup>22</sup>

Under existing SEC guidance, confidential treatment requests for 13(f) securities positions must “[d]emonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the Manager’s competitive position; show what use competitors could make of the information and how harm to the Manager could ensue.” In its rulemaking proposal, the SEC is proposing that the language in this instruction be changed such that managers be required only to “[d]emonstrate that the information is both customarily and actually kept private by the Manager, and how release of this information could cause harm to the Manager.”<sup>23</sup> Additional qualifications would continue to be listed in the Form 13F instructions concerning confidential requests.

The SEC believes that this proposed change is necessary in order to address a 2019 Supreme Court case, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), which held that “where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4” of the Freedom of Information Act.<sup>24</sup> Although the *Food Marketing Institute* decision may have made it easier for parties to prevail in substantiating confidentiality claims under FOIA generally,<sup>25</sup> it is unclear whether the decision, and the proposed change to the Form 13F instructions, will

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positions is not overly burdensome and, where reporting such positions has the potential to result in competitive harm, such filers should have significant economic resources to file for confidential treatment of such positions.

<sup>20</sup> See Form 13F Instructions, Special Instruction 10; Letter from Douglas Scheidt, Associate Director and Chief Counsel, Division of Investment Management, *Section 13(f) Confidential Treatment Requests* (June 17, 1998) (“1998 Letter”), available at [https://www.sec.gov/divisions/investment/guidance/13fpt2.htm#FOOTBODY\\_1](https://www.sec.gov/divisions/investment/guidance/13fpt2.htm#FOOTBODY_1); IM Guidance Update No. 2013-08, *Form 13F Confidential Treatment Requests Based on a Claim of Ongoing Acquisition/Disposition Program*, (Oct. 2013) (“2013 IM Guidance”), available at <https://www.sec.gov/divisions/investment/guidance/im-guidance-2013-08.pdf>.

<sup>21</sup> See 1998 Letter.

<sup>22</sup> *Id.*

<sup>23</sup> SEC Proposal at 37, 50.

<sup>24</sup> *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). Exemption 4 applies to maintain the confidentiality of certain trade secrets or other confidential business information.

<sup>25</sup> See e.g., Mark Fenster, *Opinion analysis: Court gives broad meaning to “confidential” in FOIA exemption for commercial and financial information*, SCOTUSBLOG (June 24, 2019, 7:48 PM), available at <https://www.scotusblog.com/2019/06/opinion-analysis-court-gives-broad-meaning-to-confidential-in-foia-exemption-for-commercial-and-financial-information/>.

have any impact on filers' abilities to claim confidential treatment over their Section 13(f) positions, since filers must still meet the SEC's other tests in order to receive the assurance of privacy from the agency required under that decision.<sup>26</sup>

### What's Next?

The SEC's proposed rulemaking will be published in the Federal Register, sixty days from which all comments must be received. If adopted, the SEC has stated that it intends to apply the revised reporting threshold, for purposes of determining who is a required filer, for every month end during the year in which the proposal is adopted.<sup>27</sup> This means that, should the SEC adopt the proposal during 2020, only those institutional investment managers who are above the new reporting threshold at the end of any month during 2020 will be required to file the four required Form 13F reports due during 2021.

Already several hundred commenters have objected to the SEC's proposal to raise the reporting threshold,<sup>28</sup> and the size of the threshold likely will generate significant debate, particularly as the proposal is likely to result in a number of significant managers being excluded from the rule's scope. On the same day that the proposal was released, Commissioner Allison Herren Lee released a separate statement criticizing the proposal, noting that she is "concerned that the projected cost savings...are greatly overstated and wholly inconsistent with the Commission's past analysis—and, importantly, that the actual cost savings do not justify the loss of visibility into portfolios controlling \$2.3 trillion in assets."<sup>29</sup>

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<sup>26</sup> In the 1998 Letter, the Division of Investment Management stated that they were "concerned that many Form 13F filers have concluded that confidential treatment of information contained on Form 13F will be granted automatically upon a superficial showing of need," and noted that "[s]uch a conclusion is erroneous," with confidential treatment requests granted instead "only in those instances in which an investment manager demonstrates in its [Confidential Treatment] Application that confidential treatment is in the public interest." See 1998 Letter. Filers who seek confidential treatment must signify that their filings omit securities based on a confidential treatment request and are required to "file an amendment to [their] public Form 13F whenever [a] request for confidential treatment is denied by the Commission or when confidential treatment that was previously granted by the Commission expires." See Form 13F FAQs, Questions 52 – 58. Filers who file based on a confidential treatment request do not always find out immediately if their request has been granted and, as the OIG Report observed, in some instances, final decisions on Confidential Treatment Requests are not rendered on a timely basis, thus giving requesters *de facto* confidential treatment, even where such requests are ultimately deemed not to meet the substantive criteria for such treatment. See OIG Report, Finding 8.

<sup>27</sup> SEC Proposal at fn. 26.

<sup>28</sup> See Comments on Reporting Threshold for Institutional Managers, available at <https://www.sec.gov/comments/s7-08-20/s70820.htm>. As of the date of this memorandum, nearly 900 comments have been submitted, the overwhelming majority of which are opposed to the proposed rulemaking.

<sup>29</sup> See Commissioner Allison Herren Lee, Statement on the Proposal to Substantially Reduce 13F Reporting, ("Statement of Commissioner Lee"), available at <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>. Many of the initial comments have echoed this concern. In a July 23, 2020 interview on CNBC, SEC Chairman Jay Clayton publicly defended the SEC Proposal, stating that, under the newly proposed threshold, the public would still receive information concerning "the lion's share of institutional money in the marketplace," and observing that the current threshold of "\$100 million is clearly not the right number." Chairman Clayton also pushed back on the notion that Form 13F reports are intended to assist investors in improving their trading strategies, stating that the purpose of Form 13F reports is instead to allow the SEC "to monitor the large positions in the marketplace for integrity." Kellie Mejdrich, *SEC Chairman Defends Investment Manager Proposal*, Politico (July 24, 2020). Chairman Clayton's remarks came a day after Jim Cramer criticized the rule as an "outrageous rule change that would make the market a lot less transparent." Tyler Clifford, *Jim Cramer blasts SEC's 'outrageous' proposed rule change for institutional investor disclosures*, CNBC (July 22, 2020),

Commissioner Lee has also raised questions regarding the extent to which the SEC has the statutory authority under Section 13(f) to raise the filing threshold. As Commissioner Lee points out, Section 13(f) requires institutional investment managers to make Form 13F filings whenever they have investment discretion over Section 13(f) securities “having an aggregate fair market value on the last trading day in any of the preceding twelve months of at least \$100,000,000 **or such lesser amount** (but in no case less than \$10,000,000) as the Commission, by rule, may determine...”<sup>30</sup> The rulemaking proposal therefore raises a question of statutory interpretation as to whether the SEC has the authority, by rule, to not only lower the threshold, but to raise it.<sup>31</sup>

While it remains to be seen whether the proposed rulemaking will pass as proposed, or with changes, filers would be wise to remain focused on the rulemaking and whether it is challenged in the courts, particularly as there are many motivated parties who have become accustomed to being able to rely on Form 13F disclosures.<sup>32</sup>

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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available at <https://www.cnbc.com/2020/07/22/jim-cramer-rips-secs-proposed-rule-change-for-institutional-investors.html>.

<sup>30</sup> Statement of Commissioner Lee; Exchange Act Section 13(f) (emphasis added).

<sup>31</sup> The rulemaking proposal cites for support of its authority the Senate Report on the 1975 Amendments to the Exchange Act, which includes language stating that the Commission “would ‘have authority to raise or lower’ the threshold.” SEC Proposal at 7. However, as Commissioner Lee points out, this language was not included in the final bill, which reflects the conference committee’s adoption of the House language. See Statement of Commissioner Lee at fn. 21. As Commissioner Lee points out, the proposal “also seems to suggest (without directly stating) that the Commission’s exemptive authority in Section 13(f)(3) empowers [the Commission] to increase the reporting threshold.” While Section 13(f)(3) gives the SEC authority (by rule or by order) to “exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from” Section 13(f) or the rules thereunder, it is unclear whether this authority extends to a decision to raise the filing threshold for *all* securities. See Exchange Act Section 13(f)(3). As Commissioner Lee noted, it is an open question as to whether “using exemptive authority in this way would vitiate the limit that Congress placed on [the Commission’s] authority in the plain language of Section 13(f)(1).”

<sup>32</sup> As the SEC notes in the rulemaking proposal, “while Form 13F was originally designed to assist regulators and the public in understanding the effects of institutional equity ownership on the markets, the pool of users of the data has expanded to include academics, market researchers, the media, attorneys pursuing private securities class-action matters, and market participants (including institutional investors themselves) who use the data to enhance their ability to compete. The data can also assist individuals in making investment decisions, investment managers in managing assets, and corporate issuers of 13(f) securities interested in determining the beneficial holders of their publicly traded stock.” SEC Proposal at 22. The plaintiff’s attorney bar has also made use of Form 13F filings in the past, relying on data in these forms to bolster everything from damages assessments to claims for the recovery of short swing profits under Exchange Act Section 16(b).

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