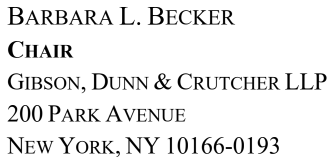
COMMITTEE ON
MERGERS, ACQUISITIONS AND
CORPORATE CONTROL CONTESTS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August 31, 2020

Via Email to rule-comments@sec.gov

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-08-20
Request for Comments on Amendment to Reporting Threshold for Institutional Investment Managers

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Mergers, Acquisitions and Corporate Control Contests of the New York City Bar Association (the "Committee"). Our Committee is composed of experienced attorneys whose practices focus on merger and acquisition transactions and related corporate law, corporate governance and securities regulation matters. Our Committee includes lawyers with diverse perspectives on corporate and securities law issues, including partners at law firms and in-house counsel to issuers, investors and financial advisors.

We are responding to the request of the Securities and Exchange Commission (the "Commission") for comment on the proposed update to the reporting threshold for Form 13F reports by institutional investment managers, as described in Release No. 34-89290; File No. S7-08-20 (the "Release").

We believe that increasing the threshold for filing from $100 million to $3.5 billion would directly contravene Congress's stated purpose of adopting Section 13(f) of the Securities and Exchange Act of 1934—specifically, to narrow the "gaps in information about the purchase, sale and

holdings of securities by major classes of institutional investors."[1] As the Release notes, the Section 13(f) disclosure program had three primary policy goals quoted below in support of Congress's stated purpose.[2] We do not believe these goals would be served by the proposal.

- *"First, to create a central repository of historical and current data about the investment activities of institutional investment managers."*
    - As described in the Release, the updated threshold would eliminate filings from nearly 90% of institutional investment managers currently filing Forms 13F. The Commission noted in the Release that investors have other sources of information to understand the activities of institutional investment managers, such as Form N-PORT, which requires investment companies to prepare monthly holdings reports and to submit them to the Commission on a quarterly basis, and which the Commission makes available to the public on a 60-day delay. However, many smaller investment managers may not be registered with the Commission and so would no longer be subject to any reporting requirements. We share the concern raised by Commissioner Lee that the proposal "would eliminate access to information about discretionary accounts managed by more than 4,500 institutional investment managers representing approximately $2.3 trillion in assets"[3] on which lawmakers and regulators depend to advance the policy goals of Section 13(f).
- *"Second, to improve the body of factual data available regarding the holdings of institutional investment managers and thus facilitate consideration of the influence and impact of institutional investment managers on the securities markets and the public policy implications of that influence."*
    - Entire segments of the investment management market would likely be removed from the Section 13(f) reporting requirements by the proposal set forth in the Release, which may disable policymakers from understanding the influence of institutional investment managers on the securities markets. Preliminary analyses of the Release note that small investment managers tend to invest in companies with smaller market capitalizations.[4] Much of the information flow regarding these smaller companies, and hence the ability of

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[1] *See* Release at 7 n.10, 8 n.19 (citing 15 U.S.C. 78m(f)(1)); *see also* Filing and Reporting Requirements Relating to Institutional Investment Managers, Exchange Act Release No. 14852, 43 Fed. Reg. 26700, 26701 (June 22, 1978) (the "Adopting Release").

[2] See Release at 9 n.20 (citing Adopting Release, 43 Fed. Reg. at 26701, 26701 n.4).

[3] *See* Commissioner Allison Herren Lee, *Statement on the Proposal to Substantially Reduce 13F Reporting*, U.S. SEC. & EXCH. COMM'N (July 10, 2020), https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10 (all websites last visited on August 20, 2020).

[4] Ben Ashwell, *Issuers and Investors Express Concerns About SEC's Proposed 13F Rule Change*, IR MAGAZINE (July 17, 2020), https://www.irmagazine.com/regulation/issuers-and-investors-express-concerns-about-secs-proposed-13f-rule-change.

the companies, their shareholders and securities regulators to evaluate trading behavior across the broad market segment comprised by such companies, would be lost as a result of implementing the higher reporting threshold. One survey of 70 consumer services companies reviewed the top 100 shareholders of such companies to assess how many shareholders had assets under management of less than $3.5 billion.[5] The proportion for companies with a market capitalization over $40 billion was only 3%, but for companies with a market capitalization of less than $1 billion, the proportion rose to 23%. The proposed dramatic shift in disclosure requirements means that regulators may lose a window into understanding how those smaller asset managers behave and what impact they have on smaller issuers. In addition, smaller issuers will lose access to information about their respective shareholder bases that can be important to boards and management in shareholder engagement efforts.

- The Committee is also concerned that the proposed threshold seeks to establish an inapt equivalency in market impact relying largely on total equity values at the time of adoption and at present day. The landscape of both passive and active investing has changed significantly since Section 13(f) was adopted, as has the concentration of capital among larger investment managers and public companies. We are concerned that the Commission's reliance on this simplified metric of the change in market size, without considering participant behavior, may have unintended consequences for policymaking in other arenas.

- "*Third, to increase investor confidence in the integrity of the U.S. securities markets.*"
    - It is difficult to reconcile this policy goal with the proposal set forth in the Release. By increasing the threshold for filing to $3.5 billion, all but the approximately 550 largest investment managers would be able to accumulate significant stakes in public companies without a public reporting obligation.[6] As such, many of the most prolific investors whose trading activities have significant impacts on individual public companies as well as the market as a whole would be free from quarterly disclosure obligations. The only remaining entities still consistently reporting on Form 13F would predominantly be large index funds and other passive investors not ordinarily involved in price discovery. As a result, investors would be left with an incomplete view of the asset management market by virtue of the implementation of the proposal set forth in the Release.
    - In addition, the Commission's suggestion in the Release that raising the reporting threshold

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[5] Alexander Yokum, *SEC Proposes Boosting the 13F Reporting Threshold—Potential Impact,* LINKEDIN (July 13, 2020), https://www.linkedin.com/pulse/sec-proposes-boosting-13f-reporting-threshold-potential-yokum.

[6] For example, the Release describes that the value of the public equity markets has increased from $1.1 trillion to $35.6 trillion between the time Rule 13f-1 was adopted to 2019, *see* Release at 11 Fig. 2; however, this increase is driven solely by the *value* of publicly traded companies in the U.S. having significantly increased as the *number* of public companies is fewer than it was in 1979. As such, the 5% threshold that would trigger the filing of a Schedule 13D or 13G tends to represent a much more significant investment than most investors will make in a public company.

on Form 13F may be useful in reducing "front-running" and "copycatting" among investment managers appears unlikely given the time lag between when an investment position is assembled and when it is disclosed on Form 13F and the absence of evidence offered for that assertion in the Release.

In our view, the modest expense incurred by managers in complying with Rule 13f-1 is significantly outweighed by the benefit to market participants and policymakers of ensuring that the trading activities of these investors remain transparent. We believe that the markets would be better served if the Commission instead refocused on previously advanced proposals to shorten the time lag between when an investment position is assembled and when it is disclosed on Form 13F.[7] These proposals would increase the transparency of the positions taken by asset managers and so would make the 13F reporting system more useful to companies, investors and policymakers alike.

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We appreciate the opportunity to participate in this process, and would be pleased to discuss our comments or any questions the Commission or its staff may have. Please do not hesitate to contact Barbara Becker, Chair of the Committee on Mergers, Acquisitions and Corporate Control Contests, at [redacted].

Respectfully submitted,

Barbara L. Becker

Chair, Committee on Mergers, Acquisitions
and Corporate Control Contests

[7] *See*, *e.g.,* Janet McGinness, Executive Vice President & Corporate Secretary, NYSE Euronext; Kenneth A. Bertsch, President & CEO, Society of Corporate Secretaries and Governance Professionals; and Jeffrey D. Morgan, President & CEO, National Investor Relations Institute, Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934 (Feb. 1, 2013), https://www.sec.gov/rules/petitions/2013/petn4-659.pdf.