

Via Email

September 17, 2020

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

Re: File No. S7-08-20

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.¹

The purpose of this letter is to provide you with CII’s perspectives on the Securities and Exchange Commission (SEC or Commission) proposed rule “to update the reporting threshold for Form 13F reports by institutional investment managers” (Proposed Rule).² CII has concluded that we cannot support the Proposed Rule’s adoption of an amendment to rule 13f-1³ that would adjust the reporting threshold upwards to \$3.5 billion. Our concerns about that amendment are threefold: (1) we believe the amendment could reduce, rather than increase, the transparency of market information that may be useful to long-term investors; (2) we believe the Commission presently may not have the legal authority to raise the rule 13f-1 threshold;⁴ and (3) we believe raising the

¹ For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

² Reporting Threshold for Institutional Investment Managers, Exchange Act Release No. 89,290, 85 Fed. Reg. 46,016, 46,016 (proposed July 31, 2020), <https://www.federalregister.gov/documents/2020/07/31/2020-15322/reporting-threshold-for-institutional-investment-managers>.

³ See Rule 13f-1, 17 C.F.R. § 240.13f-1(a)(1) (June 1978), available at <https://www.law.cornell.edu/cfr/text/17/240.13f-1>.

⁴ *Id.* (“Every institutional investment manager which exercises investment discretion with respect to accounts holding section 13(f) securities, . . . having an aggregate fair market value on the last trading day of any month of any calendar year of at least \$100,000,000 shall file a report on Form 13F . . . with the Commission within 45 days after

rule 13f-1 threshold may negatively impact investor confidence in the integrity of the U.S. markets.

Reduction of Transparency

Commissioner Allison Herren Lee has stated that the Proposed Rule would reduce transparency by eliminating “access to information about discretionary accounts managed by more than 4,500 institutional investment managers representing approximately \$2.3 trillion in assets.”⁵

CII membership approved policies support disclosure by institutional investors of fund holdings.⁶ More generally, our policies support disclosure of material market information that improves, rather than reduces, transparency to long-term institutional investors.⁷ Those policies, also include criteria that could potentially lead us to support a proposal, like the Proposed Rule, that reduces transparency if, for example, the proposal otherwise provides a net benefit to long-term institutional investors.⁸

We note the SEC’s stated belief that the Proposed Rule would likely “enhance competition by lowering the costs to participate in the market” and benefit investors if such savings are passed through to investors.⁹ That potential benefit to investors from this and other aspects of the Proposed Rule, however, may potentially be offset or outweighed by the loss of transparency that could result from the Proposed Rule.

For example, Commissioner Lee has suggested that adoption of the Proposed Rule could have costs for investors because “there is a recognition that new uses of the data have developed among academics, market researchers, and others, . . . and the costs to the Commission . . . of losing a portion of the data.”¹⁰ And at least one provider of hedge fund stock ownership data has asserted that the Proposed Rule would reduce the ability of “pension funds and other institutional

the last day of such calendar year and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year.”).

⁵ Commissioner Allison Herren Lee.

⁶ See Council of Institutional Investors, Policies on Other Issues, Best Disclosure Practices for Institutional Investors (Adopted May 1, 2009), https://www.cii.org/policies_other_issues#disclosure_practices_inst_invest (“In order to foster an environment of transparency and accountability, institutional investors—including pension funds, hedge funds, private equity firms and sovereign wealth funds, among others—should make publicly available in a timely manner: . . . an annual report on holdings . . .”).

⁷ See Council of Institutional Investors, Policies on Other Issues, Statement on Company Disclosure (Adopted Mar. 10, 2020) (“In evaluating proposals . . . CII considers the following factors: Materiality to investment and voting decisions[;]. Depth, consistency and reliability of empirical evidence supporting the connection between the disclosure and long-term shareowner value[;] Anticipated benefit to investors, net of the cost of collection and reporting[;] and Prospect of substantially improving transparency, comparability, reliability and accuracy”).

⁸ *Id.*

⁹ 85 Fed. Reg. at 46,027.

¹⁰ Commissioner Allison Herren Lee; *see, e.g.*, Letter from Mary Barth, Graduate School of Business, Stanford University et al. to Vanessa Countryman, Secretary, Securities and Exchange Commission 1 (Sept. 16, 2020) (on file with CII) (“the Proposal does not contain any formal economic analysis, and does not attempt to quantify . . . the benefits that [Form 13F] . . . provides to investors . . .”).

investors” to exercise oversight over their investments in hedge funds.”¹¹ The Proposed Rule, unfortunately, provides little in the way of discussion or estimates of those potential costs.¹²

Lack of Authority

Commissioner Lee and other legal experts have indicated that the SEC may not have the legal authority to raise the rule 13f-1 threshold under the Proposed Rule.¹³ We find that view compelling and a sufficient reason, standing alone, not to support the Proposed Rule.

As Commissioner Lee has explained:

The enabling statute, at section 13(f)(1), provides no support for increasing the reporting threshold. To the contrary, the relevant text provides:

Every institutional investment manager . . . which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) . . . 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, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter. (emphasis added)

The text is clear: Congress set a statutory reporting threshold at \$100 million, and the Commission has the authority to lower it. The proposing release does not wrestle with this language at all, and asserts uncritically that Section 13(f)(1) provides us with the relevant authority. Congress appears to have said otherwise, setting specific limits on the Commission’s authority in that respect.¹⁴

Commissioner Lee’s conclusion is supported by an analysis by Alex Platt, an associate professor at the University of Kansas School of Law.¹⁵ Professor Platt directly refutes a key argument in the

¹¹ Novus Editorial, Andrea Gentilini & Nathan Innis, Don’t Mess with 13Fs, Novus (July 22, 2020), <https://www.novus.com/blog/dont-mess-with-13fs>.

¹² Commissioner Allison Herren Lee (“There is also very little discussion of the costs . . . of losing a portion of the data.”).

¹³ See Lara Crigger, Legal Questions Circle SEC’s 13F Plan, ETF.Com (Sept. 10, 2020), <https://www.etf.com/sections/features-and-news/legal-questions-circle-secs-13f-plan?nopaging=1> (“Does the SEC have the *legal* authority to raise the 13F reporting threshold? According to several legal experts—and at least one SEC commissioner—the answer is no.”).

¹⁴ Commissioner Allison Herren Lee (footnotes omitted).

¹⁵ See Notice & Comment, The SEC’s Proposal To Raise The § 13(f) Reporting Threshold Rests On A Misinterpretation of The Provision’s Legislative History, by Alexander I. Platt, Yale J. on Reg. (July 16, 2020), <https://www.yalejreg.com/nc/the-secs-proposal-to-raise-the-%C2%A7-13f-reporting-threshold-rests-on-a-misinterpretation-of-the-provisions-legislative-history-by-alexander-i-platt>.

Proposed Rule that a 1975 Senate Banking Committee report gives the Commission “authority to raise or lower”¹⁶ the threshold.¹⁷ As Professor Platt explains:

[The 1975 Senate Banking Committee report language] never became law. Shortly after the Senate passed this bill, the House passed a different version requiring the SEC set the reporting threshold at “at least \$100,000,000 or such *lesser* amount (but in no case less than \$10,000,000). . . .”

. . . .

. . . . After the House passed this version, a Conference Committee was convened and . . . [a]s enacted – and to this day – the operative statutory threshold is “\$100,000,000 or such *lesser* amount (but in no case less than \$10,000,000). . . .”

In sum, the Commission’s legal theory for why its proposal is authorized under § 13(f) seems to rely on a misinterpretation of the statute’s legislative history. . . . [T]he 1975 Congress rejected language . . . that would have authorized the SEC to raise the reporting threshold in favor of language (“such lesser amount”) that seems to preclude this.¹⁸

Impact on Investor Confidence

The Proposed Rule describes as one of the SEC’s original “primary goals [of section 13(f) disclosures was] to increase investor confidence in the integrity of the U.S. securities markets.”¹⁹

CII membership approved policies describe the crisis of investor confidence in the integrity of the U.S. markets following the global financial crisis.²⁰ Our policies reflect the view that transparency,²¹ including public reporting,²² and the vigilance and oversight of regulators, including the SEC,²³ are critical factors to creating and maintaining investor confidence in our markets.

As previously indicated, we believe the Proposed Rule could have at least two undesirable results that may be inconsistent with the primary goal of section 13(f) to increase investor confidence in

¹⁶ 85 Fed. Reg. at 46,018 (“The 1975 Amendments Senate Report stated that the Commission would ‘have authority to raise or lower’ the threshold.”).

¹⁷ See Notice & Comment.

¹⁸ *Id.*

¹⁹ 85 Fed. Reg. at 46,017.

²⁰ See Council of Institutional Investors, Policies on Other Issues, Financial Gatekeepers (Apr. 13, 2010), https://www.cii.org/policies_other_issues#effective_proxy_voting (“The crisis of confidence in the markets that followed spurred regulators and lawmakers to scrutinize and rein in gatekeepers.”).

²¹ *Id.* (“Continued reforms are needed to ensure that the pillars of transparency [and] . . . oversight and accountability are solidly in place.”).

²² See Council of Institutional Investors, Policies on Other Issues, Independence of Auditing and Auditing Standard Setters (updated, Mar. 1, 2017) (“A recognition that financial . . . reporting . . . is a public good, necessary to investor confidence in individual enterprises and the global capital markets as a whole . . .”).

²³ See Council of Institutional Investors, Policies on Other Issues, Financial Gatekeepers (“Regulators should remain vigilant and work to close gaps in oversight.”).

our markets. First, the Proposed Rule could reduce the transparency of disclosures about institutional investor holdings in a manner that may have a net cost for long-term institutional investors. And second, the dubious analysis and conclusion that the Commission has the legal authority to raise the 13f-1 filing threshold raises questions about the underlying basis of the Proposed Rule.

For all of the above reasons, CII cannot support the Proposed Rule. Thank you for considering our views on this matter. Please contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney". The signature is written in black ink and is positioned above the typed name.

Jeffrey P. Mahoney
General Counsel