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

September 28, 2020

Subject: Reporting Threshold for Institutional Investment Managers; Release No. 34-89290 (File No. S7-08-20)

Dear Secretary Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), I write to comment on the Securities and Exchange Commission's (SEC or Commission) proposed rule entitled Reporting Threshold for Institutional Investment Managers (Proposed Rule or Release).[1] The Proposed Rule would raise the reporting threshold for Form 13F from $100 million to $3.5 billion. After such a substantial increase to the threshold, large index fund managers will continue reporting under 13F while many other managers, such as those advising hedge funds and activist funds, will fall below the proposed threshold. We have several concerns about the proposed changes to the reporting threshold and the resulting implications.

Specifically, we believe the proposed change conflicts with the applicable statute. Indeed, the resulting, limited scope of reporting managers would effectively neuter the 13F requirement created by law. It appears that the Proposed Rule is beyond the scope of the SEC's authority with respect to 13F. Moreover, the Proposed Rule focuses heavily on the reporting managers and does not adequately consider the effects on or needs of other market participants. Lastly, we are not convinced that the data and rationale presented in the Proposed Rule justify such a substantial increase. For example, the SEC cites a 2003 letter co-signed by the Consumer Federation of America (CFA) as support for a substantially increased threshold; however, the CFA has written in strong opposition to the Proposed Rule.[2] The CFA raises many significant issues that should be considered prior to finalizing the Proposed Rule. For these reasons, as discussed in detail below, we also oppose the Proposed Rule.

[1] Securities and Exchange Commission, File No. S7-08-20, Reporting Threshold for Institutional Investment Managers (Jul. 10, 2020).
[2] Comment Letter to File No. 67-08-20, Reporting Threshold for Institutional Investment Managers of Consumer Federation of America, September 16, 2020.

As the largest public defined benefit pension fund in the United States (U.S.), we manage approximately $400 billion in global assets on behalf of more than 2 million public employees, retirees, and beneficiaries. Our duty to pay benefits decades into the future requires that we take a long-term view, so we support transparency in markets. We believe that policy makers and standard setters should "promote full disclosure so that financial markets provide incentives that price risk and opportunity."[3]

The Commission does not appear to have the authority to raise the statutory threshold.

In 1975, Congress adopted Section 13(f) of the Exchange Act, which requires institutions that exercise discretion over $100 million or more of covered securities ("13(f) securities") to provide detailed holdings information to investors and the public.[4] Congress authorized the SEC to expand the pool of reporting investment managers to include managers with as little as $10 million under management. This demonstrates a clear intent to allow the SEC to expand the scope of reporting managers. Importantly, Congress did not give the SEC similar discretionary authority for raising the threshold or otherwise limit the scope of reporting managers.

15 U.S.C. 78m(f)(1) reads as follows:

> (1) Every institutional investment manager which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager and which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule, *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. Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission by rule, may prescribe) with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security. (emphasis added)

The unambiguous language of the statute does not give the SEC the discretion to increase the threshold. While we recognize that the SEC may be relying on language from a Senate report, such legislative intent is only relevant and meaningful to the extent it helps to clarify statutory language which may be ambiguous or unclear. In this case, the statutory authorization is clear. Moreover, we understand the Senate report language to indicate that the SEC would "have the authority to raise or lower" the threshold within a range of $10 million and $100 million. On the

[3] CalPERS' Governance & Sustainability Principles, September 2019 at 34.
[4] 15 U.S.C. § 78m(f).

other hand, if the language of the Senate report contemplates a threshold above $100 million, then it would directly conflict with the unambiguous statutory language. With the Proposed Rule, the Commission would exceed statutory authority and contravene Congressional intent, which we expect would subject the Proposed Rule to unnecessary and costly legal challenges.

The Proposed Rule does not consider market participants other than the reporting institutional investment managers.

Section 13(f) also requires the SEC to consult with certain specified federal and state regulatory authorities, national securities exchanges, and national securities organizations in carrying out its regulatory responsibilities. However, it does not appear that the SEC consulted with any of the above when it decided that it would rewrite the law.

Additionally, the SEC has stated the importance of the information collected on Form 13F. Here are excerpts from the SEC's Office of Inspector General 2010 report, "Review of the SEC's Section 13(f) reporting requirements" (OIG Report):

> The information collected on Forms 13F has been and continues to be used by U.S. regulators, academics, the media and financial information distributors, and investors, and other U.S. equity markets participants, as intended by Congress. The Commission's staff use Form 13F information for a variety of research, oversight, and enforcement purposes. The Commission's staff also use Form 13F-based academic research, for example, to analyze the Commission's rulemaking initiatives under the federal securities laws.[5]
>
> The data that is provided by institutional investors on Form 13F is extraordinarily valuable to investors and other financial market participants.[6]
>
> Staff of our Division, notably our economists, make extensive use of Section 13(f) data.[7]

The excerpts above show that the SEC has articulated that the Form 13F information has value for the SEC. Congress foresaw a wide array of stakeholders would benefit from the data collected pursuant to Section 13(f) and the Commission's past reviews have affirmed Congress' intent. Congress predicted that individual companies would benefit from being able to identify the holders of their stock in order to communicate with significant beneficial owners. Companies have voiced their opinions in comments to the SEC in opposition to the Proposed Rule. Accordingly, we have concerns about the future utility of this information under the Proposed Rule when the primary reporters will be limited to index managers. We do not believe that the Proposed Rule seriously considers the impact of the changes, particularly with respect to the loss of substantial information, on market participants, especially companies.

[5] OIG Report at 7 referencing, In re Full Value Advisors, LLC, Release No. 34-61327 (Jan. 11, 2010), at 4.
[6] OIG Report at 37 and Memo from Kayla J. Gilan, deputy Chief of Staff Office of the Chairman to H. David Kotz, Inspector General.
[7] OIG Report at 43 and Memo from Henry Hu, division of Risk, Strategy and Financial Innovation to H. David Kotz, Inspector General.

We also find it troubling that the SEC does not analyze its own responsibilities with Section 13(f) and how it has executed the law. Nor does it use its own information to support its determination in the Proposed Rule. At a minimum, the Proposed Rule should address how market participants will be affected. The SEC notes how much institutional investment managers may save by not having to report, but it does not address how much it will cost stakeholders to replicate the information lost or the cost to companies when fighting off attacks by activists that may be more common when such activists no longer have to report.

The data and rationale are insufficient to justify the substantial increase in the threshold.

As briefly noted above, Section 13(f) requires the SEC to collect certain data. However, we note that the SEC did not use the data it was supposed to collect in order to justify revising Section 13(f). We find this more concerning in light of the findings in the OIG Report:

> **Finding 1: Despite the Intent of Congress in Prescribing the Section 13(f) Reporting System that the SEC Would Make Extensive Use of the Section 13(f) Information for Regulatory and Oversight Purposes, the SEC Conducts No Continuous or Systematic Review or Analysis of the Form 13F Reports**
>
> **Finding 2: The Lack of Monitoring of the Form 13F information by the SEC Renders this Data Less Useful and Reliable than Congress Had Intended**

The other findings of the OIG report are similarly critical of how the Commission has approached Section 13(f). By the indications of the Proposed Rule, little may have changed since 2010. Taken together, we cannot be sure that the SEC has corrected the deficiencies noted in the OIG Report. While it may be so that regulators disagree with Congressional actions, regulators cannot be allowed to rewrite a law that it does not like.

The SEC has a three-part mission: Protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.[8] "The section 13(f) disclosure program had three primary goals. First, to create a central repository of historical and current data about the investment activities of institutional investment managers. 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. Third, to increase investor confidence in the integrity of the U.S. securities markets."[9]

As previously stated, Congress fully intended to allow the number of reporting institutional investment managers to increase because the law provides "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."[10] However, the SEC is not given the authorization to increase the threshold and thereby decrease the number of reporting managers. The SEC should not use its exemptive authority to relieve institutional investment managers from providing market transparency. Furthermore, given the current size of the markets, the remaining reporters will be a small pool

[8] SEC Website
[9] Proposed Rule at 9.
[10] 15 U.S.C. § 78m(f).

of the largest index institutional investment managers. Little market information is garnered in their Form 13F Reports. Other funds such as hedge funds or activist funds might either fall below the threshold or restructure in order to avoid reporting. In sum, the Proposed Rule substantially diminishes the utility of Form 13F reporting.

To justify the change, the SEC simply asserts that the market increased in size and that a one-to-one increase in the reporting threshold is needed in order to keep the number of reporting managers to a minimum. The SEC seems to rely on the premise that Congress intended for Section 13(f) to capture a *finite* pool of institutional investors. Accordingly, the Proposed Rule essentially holds the number of managers constant. However, a plain reading of the statutory language indicates that Section 13(f) was intended to capture *all* institutional investment managers of a certain size. Certainly, Congress would have expected that this pool of investors would grow as the market grows, and if it intended something different, it would have included language clearly stating as much.

Basing the change solely on market growth does not explain how investor protections are improved, market efficiency is increased, and access to capital is increased. Indeed, it seems that the proposed change would decrease the utility of a central data repository, negatively affect the body of factual data available for consideration, and thereby decrease investor confidence in the integrity of U.S. markets. This proposal does not seem to align with the mission of the SEC nor support the primary goals of the Section 13(f) disclosure program.

Conclusion

As the Commission acknowledges, Congress adopted Section 13(f) in order to close "gaps in information about the purchase, sale and holdings of securities by major classes of institutional investors."[11] Unfortunately, the Proposed Rule works to increase the information gaps, leaving market participants to find other mechanisms to replace the information lost or suffer the consequences. To be clear, investors lose with the Proposed Rule. In no way does it protect investors. Companies are harmed as well.

Finally, we strongly disagree with the underlying premise that only the very largest institutional investment managers should disclose their ownership interests in public companies. We welcome the opportunity to discuss our comments to the Release in more detail. Please contact Anne Simpson, Investment Director, at (916) 795-9672, if you have any questions or wish to discuss in more detail.

Sincerely,

Marcie Frost
Chief Executive Officer

[11] Securities and Exchange Commission, File No. S7-08-20, Reporting Threshold for Institutional Investment Managers (Jul. 10, 2020), at 8, https://www.sec.gov/rules/proposed/2020/34-89290.pdf.