



September 28, 2020

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

**RE: Reporting Threshold for Institutional Investment Managers, Release No. 34-89290; File No. S7-08-20**

Dear Ms. Countryman,

We are law professors who teach and study securities regulation. We write to draw the Commission's attention to a critical legal error in its recent proposal to raise the 13F reporting threshold.<sup>1</sup>

The plain text of Exchange Act § 13(f)(1) seems to establish \$100 million as a hard ceiling on the reporting threshold. That provision requires the Commission to set a reporting threshold "of at least \$100,000,000 *or such lesser amount* (but in no case less than \$10,000,000)..."<sup>2</sup> This language seems to mean that the Commission can lower the threshold below \$100 million but may not raise it.

The Commission's proposal suggests that § 13(f)(3) grants the SEC authority to exempt any "class" of managers from these reporting requirements.<sup>3</sup> Using this authority, the Commission seems to be arguing that it can "exempt" the "class" of managers with assets between \$100 million and \$3.5 billion from compliance with the reporting requirement without actually raising the reporting threshold.

Some have expressed skepticism that general exemptive authority can really be used to get around an express and specific statutory command. Commissioner Allison Herren Lee

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<sup>1</sup> One of the undersigned authors has previously presented the substance of the legal analysis contained in this letter. See Alexander I. Platt, *The SEC's Proposal To Raise The § 13(f) Reporting Threshold Rests On A Misinterpretation Of The Provision's Legislative History*, YALE J. ON REG. NOTICE & COMMENT BLOG (Jul. 16, 2020) available at <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/>.

<sup>2</sup> 15 U.S.C. § 78m(f)(1) (emphasis added).

<sup>3</sup> U.S. Securities and Exchange Commission, *Reporting Threshold for Institutional Investment Managers*, 85 Fed. Reg. 46,016, 46,018 (Jul. 31, 2018) ("Proposed Rule") ("section 13(f)(3) authorizes the Commission to exempt any manager or class of managers from the reporting requirements of section 13(f).").

objected that “using exemptive authority in this way would vitiate the limit that Congress placed on our authority in the plain language of Section 13(f)(1)” and would “in effect . . . rewrite the statute to reflect the opposite meaning from its plain language.”<sup>4</sup>

Perhaps anticipating these objections, the Commission’s proposal offers one additional and critical piece of evidence in support of its interpretation: a key quotation from a 1975 Senate Banking Committee report stating that the provision gives the Commission “authority to raise or lower” the threshold.<sup>5</sup>

The very big problem with this evidence is that the 1975 Senate Banking Committee was analyzing an earlier, materially different version of the provision than the one that Congress subsequently enacted. That earlier version required that the SEC set a threshold of “at least \$100,000,000 or such *other* amount (but in no case less than \$10,000,000). . . .”<sup>6</sup> The Senate Banking Committee’s understanding that this provision would have allowed the SEC to raise or lower the threshold is unremarkable; indeed, it is hard to construe the operative language (“such other amount”) otherwise. Under this version of the provision, Congress would have merely suggested a \$100M threshold while granting the Commission a license to move the threshold up or down as it saw fit.

But this language never became law. Shortly after the Senate passed this bill,<sup>7</sup> 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). . . .”<sup>8</sup>

The House’s substitution of “lesser” for “other” is the whole ballgame.<sup>9</sup> It converts the \$100 million from a mere suggestion into a hard ceiling above which the Commission is not authorized to go. After the House passed this version, a Conference Committee was convened and stuck to the House version of this provision.<sup>10</sup> As 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). . . .”<sup>11</sup>

In sum, we believe the legal theory articulated in the Commission’s proposal relies on a misinterpretation of the statute’s legislative history. Not only does the cited Senate Banking Committee report fail to support the SEC’s proposal, it actually indicates that the 1975 Congress rejected language (“such other amount”) that would have authorized the SEC to raise the reporting threshold in favor of language (“such lesser amount”) that seems to preclude this.

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<sup>4</sup> U.S. SEC Commissioner Allison Herren Lee, *Statement on the Proposal to Substantially Reduce 13F Reporting* (Jul. 10, 2020) <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>.

<sup>5</sup> Proposed Rule, *supra* note 3, at 46,018 (quoting S. Rep. No. 94-75, at 107 (Apr. 14, 1975)).

<sup>6</sup> S. Rep. No. 94-75, at 187 (emphasis added). This same language was included when the bill was introduced in the Senate in January 1975. *See* S. 249, 94th Cong. § 9 (as introduced in the Senate Jan. 17, 1975).

<sup>7</sup> S. 249, 94th Cong., § 9 (as passed by Senate, Apr. 18, 1975).

<sup>8</sup> 121 Cong. Rec. 11,768, 11,784, 11,786 (Apr. 24, 1975) (emphasis added).

<sup>9</sup> Lara Crigger, *Legal Questions Circle SEC’s 13F Plan*, ETF.com (Sept. 10, 2020), *available at* <https://www.etf.com/sections/features-and-news/legal-questions-circle-secs-13f-plan>.

<sup>10</sup> H.R. Rep. No. 94-229 at 26 (May 19, 1975) (Conf. Rep.).

<sup>11</sup> Securities Acts Amendments of 1975, Pub. L. 94-29, § 10, 89 Stat. 97, 119 (1975) codified at 15 U.S.C. § 78m(f)(1).

Respectfully,

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