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September 29, 2020

Via E-Mail: rule-comments@sec.gov
Ms. Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE Washington, DC 20549-1090

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

Dear Ms. Countryman:

Prospect Capital Corporation ("Prospect Capital") is a publicly-traded investment company regulated as a business development company ("BDC") under the Investment Company Act of 1940, as amended (the "1940 Act"). As a publicly-traded BDC, Prospect Capital is writing to express its opposition to the Securities and Exchange Commission's proposed amendments to the Form 13F reporting rules for institutional investment managers (the "Proposed Amendments"), as proposed in Release No. 34-89290 (the "Proposing Release").

Currently, Rule 13f-1, which implements Section 13(f) of the Securities Exchange Act of 1934, requires that managers file quarterly reports on Form 13F if they exercise investment discretion over accounts that hold, in aggregate, $100 million or more in Section 13(f) securities on the last trading day of any month of any calendar year. The Commission's proposal to raise this $100 million reporting threshold to $3.5 billion (a 35-fold increase that far outpaces price inflation since the initial threshold was adopted in 1978[1]) would effectively eliminate Form 13F reporting obligations for 4,539 of the 5,089 managers (89.2%) currently required to file quarterly 13F reports.[2]

In adopting Rule 13f-1, the Commission sought to implement a congressional directive to create within the Commission a central repository of historical and current data about the investment activities of institutional investment managers, and thereby to 1) improve the body of factual data available 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 and 2) permit establishment of uniform reporting standards and a uniform centralized

[1] According to the Proposing Release, utilizing the Personal Consumption Expenditures Price Index inflation standard through 2018, the threshold would be $358 million; while using the Consumer Price Index inflation standard through 2018, the threshold would be $453 million. The Proposing Release also notes that using stock market growth as the basis for adjustment instead of price inflation would result in a threshold of $3.57 billion. Proposing Release at 15-16.

[2] Proposing Release at 11; Proposing Release at n.45.

data base maintained by the Commission.[3] The Commission recognized in adopting subsequent amendments to Rule 13f-1 that "[s]ince the information on Form 13F is useful to both investors and issuers and the amendments will increase the amount of such information available on a timely basis to issuers and the investing public, the amendments are appropriate in the public interest and for the protection of investors," and further that "rapid dissemination of the institutional disclosure information to the public is a fundamental purpose of the bill" enacting Section 13(f).[4]

The Proposed Amendments frustrate this fundamental purpose of Section 13(f). Publicly-traded registered closed-end funds and BDCs (together, "CEFs") in particular would be severely and adversely impacted in ways that may not have been fully considered by the Commission if they lose access to the great majority of the useful information publicly disseminated in Form 13F as a result of the Proposed Amendments.

1. Shareholder Engagement and Good Corporate Governance

While the current 13F process is viewed by some as imperfect,[5] it does provide CEFs a quarterly snapshot of their shareholder base, which allows the fund to engage with its shareholders throughout the year, hear their concerns and participate in best governance practices. As revised, the Proposal curtails a CEF's ability to so identify and engage with its shareholders.

When adopting rules requiring the filing of Form 13F via EDGAR, the Commission noted that "investors would find the information contained in Form 13F filings useful in tracking institutional investor holdings in their investments and . . . issuers . . . would find detail as to institutional investor holdings useful because much of their shareholder list may reflect holdings in 'street name' rather than beneficial ownership."[6] The Proposing Release does not explain how the loss of this useful information is outweighed by the purported cost savings for 13F filers.[7] As other commenters have noted, 13F filings are the only accurate means of tracking institutional holdings.[8] Although larger issuers may have the resources to hire "stock surveillance firms,"

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[3] Filing and Reporting Requirements Relating to Institutional Investment Managers, Exchange Act Release No. 14852 (June 15, 1978).

[4] S. Rep. No. 75, 94th Cong., 1st Sess. 87 (1975); Exchange Act Release No. 40934 (Jan. 12, 1999).

[5] NYSE Euronext, along with the Society of Corporate Secretaries and Governance Professionals and the National Investor Relations Institute, previously requested that SEC pursue other reforms that would have been helpful to issuers, including a shorter reporting deadline. NYSE Group, NIRI, and Society for Corporate Governance, Request for Rulemaking Concerning Amendment of Beneficial Ownership Reporting Rules Under Section 13(f) of the Securities Exchange Act of 1934 in Order to Shorten the Reporting Deadline under Paragraph (a)(1) of Rule 13f-1, Petition No. 4-659, February 4, 2013, https://www.sec.gov/rules/petitions/2013/petn4-659.pdf; NYSE Group and NIRI, Petition for Rulemaking Pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934, Petition No. 4-689, October 7, 2015, https://www.sec.gov/rules/petitions/2015/petn4-689.pdf.

[6] Exchange Act Release No. 40934 (Jan. 12, 1999), 64 FR 2843, at p. 2844-45.

[7] It is unclear to what extent the elimination of 13F filing obligations would actually result in material costs savings for 13F filers in the "digital age."

[8] Letter from David C. Adams, Chairman and Chief Executive Officer, Curtiss-Wright Corporation (Sep. 3, 2020); Letter from Stephen P. Weisz, President & CEO, Marriott Vacations Worldwide Corporation (Aug. 21, 2020).

such firms also rely on Form 13F as a starting point for their research efforts. Moreover, not all issuers who will be impacted by the Proposed Amendments will be able to afford to hire such firms.

2. Solicitation for Meetings under the 1940 Act

CEFs are subject to more stringent meeting and quorum requirements under the 1940 Act.[9] Listed closed-end funds, like other listed issuers, are required by their exchanges to hold a shareholder meeting annually for the election of directors. In addition, however, the 1940 Act generally requires a shareholder vote for other matters, including the approval of an advisory contract, the election of directors, and the selection of an accountant to certify financial statements. Further, funds seeking to engage in corporate reorganizations must hold meetings to obtain shareholder approval of such plans under state law.

CEFs regulated under the 1940 Act face challenges in soliciting proxy votes for such matters that operating companies generally do not face. Unlike most operating companies where the majority of the outstanding shares are held by institutional investors, a significant portion of CEF stockholders are retail investors who generally hold smaller numbers of shares than institutional investors. Funds often find it difficult and expensive to satisfy quorum requirements on "non-routine" matters (*i.e.*, those matters where brokers do not have discretion to vote on behalf of beneficial holders), merely because retail shareholders are less likely to vote at all, regardless of whether they may favor a proposal.

Over the past several years, the percentage of retail ownership in CEFs has been increasing.[10] The general low retail shareholder participation rate makes the proxy process both difficult and expensive. It also leads to a number of risks, including that a proposal may not be approved or that quorum requirements may not be satisfied, causing the Company to adjourn its meeting and pay additional solicitation expenses in an effort to locate more shareholders and motivate them to vote. If such efforts are unsuccessful, a fund might be faced with even more difficult problems and potential violations of the 1940 Act (*e.g.*, a lapsed investment advisory agreement in violation of Section 15(a) of the 1940 Act) or might need to abandon a proposed transaction that shareholders might have viewed as beneficial.

In addition, although state law, as well as a fund's organizational documents, governs quorum and meeting requirements, the 1940 Act requires certain actions to be approved by a special standard known as the "1940 Act Majority," which is enumerated in the 1940 Act to require either (1) that more than half of the fund's shares vote in favor of a proposal or (ii) that more than half of a fund's shares be represented at the shareholder meeting, and 67% of those shares vote in favor of a proposal.

In light of the high percentage of retail shareholders and these high voting thresholds, funds need to convince a large number of shareholders to vote at all in order to meet the quorum

[9] Generally, see Jennifer R. Gonzalez and Shane C. Shannon, "Regulatory Monitor: SEC Update," The Investment Lawyer, Volume 26, No. 8 (Aug. 2019).

[10] *Id*.

requirement that is statutorily imposed. Funds typically have attempted to do so by mailing additional solicitation materials or calling shareholders directly.

One of the few means by which a 1940 Act fund can improve its chances at obtaining a quorum is by using the information contained in Form 13F to identify, locate, and solicit existing shareholders. Without this information, it is likely that many CEFs would encounter greater difficulty in meeting quorum requirements.

3. Defense Against Opportunistic Activists

It is well known that CEFs, which often trade at a discount to their net asset value, are particularly susceptible to activist attacks and pressure. As the Investment Company Institute recently noted in a report provided to the Commission:[11]

> In recent years, activist investors have intensified their efforts to seize a controlling interest in closed-end funds to pursue a self-interested agenda to extract short-term profits. These arbitrage tactics cause serious harm to funds and work against the interests of their long-term investors, including forcing fundamental changes to the products that are contrary to what stockholders sought when making their investment. Activists also can demand actions that can cause funds to shrink in size or be liquidated altogether, thereby reducing the availability of closed-end funds to investors and increasing costs. Decreasing the number of closed-end funds harms a large demographic of closed-end fund shareholders—including retirees many of whom rely on the dividends from closed-end funds.

CEFs depend upon Form 13F filings to monitor for and ultimately defend against attacks by opportunistic activist investors.

The Commission's mathematical estimate that managers controlling 90.8% of currently-reported assets would continue to file under the revised thresholder fails to consider the nature of the assets and managers in question. Although the securities markets have undoubtedly increased in *size and trading volume* since the currently effective 100 million threshold was established, the *structure* of the markets themselves has transformed. It would be anathema to the principles underlying Section 13(f) to increase the reporting thresholder for 13F filers to such a great extent without consideration of who, exactly, files the 13F reports in modern times, who relies on the reports, and in what way.

For example, many of the largest holders of 13(f) securities are passive and indexed, meaning that they are not likely to launch activist attacks. A number of well-known hedge fund executives and billionaire investors would fall under the proposed $3.5 billion threshold because they do not hold a significant volume of 13(f) securities on a long-term basis.[12] Issuers whose shares may publicly trade at a discount to net asset value, like many CEFs, are much more

[11] Investment Company Institute, *Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses* (March 2020).

[12] Letter from National Investor Relations Institute (Aug. 28, 2020); Bloomberg News (Quint), "Tepper, Einhorn, Soros Stock Holdings Would Go Dark in SEC Plan," July 15, 2020.

concerned with the holdings of these active investment managers and hedge funds that would fall below the proposed $3.5 billion threshold. Increasing the reporting thresholder to exclude approximately nine in ten asset managers will obfuscate a CEF's visibility into the trading activities of the very activists that it needs to be monitoring.

The Staff of the Division of Investment Management, in recently withdrawing a former interpretive position limiting the ability of closed-end funds to utilize certain statutory antitakeover mechanisms, has recognized feedback from the closed-end fund industry highlighting the vulnerability of closed-end funds to activist attacks, and acknowledged that "the number of listed closed-end funds has declined considerably" in recent years.[13] This is in part due to the vulnerability of CEFs to the activists who seek to force the funds to consolidate or "open-end" in an effort to turn a quick profit, regardless of whether the fund's board determines that such actions would otherwise be in the fund shareholder's long-term best interests.

The aftermath of the financial crisis of 2008-2009 saw a significant increase in shareholder activism, as activists were able to cheaply acquire significant ownership stakes in issuers at recession-induced prices. There is no reason to believe that activists will shy away from exploiting the same opportunities in the aftermath of the COVID-19 pandemic.

For many years, Form 13F filings have been the sole means by which CEFs can effectively monitor smaller positions taken in fund securities by known activist investors, and therefore take the appropriate steps to protect the fund in the best interests of fund shareholders, including engagement with existing shareholders, engagement with the activist, and taking steps to proactively address concerns voiced by shareholders or the activist. Under the Proposed Rules, CEFs would be unaware of activist activity until the activist "surfaces" by filing a Schedule 13D revealing a 5% or greater ownership stake in the CEF, leaving CEFs vulnerable to activist "sneak attacks."

Conclusion

We are grateful for the opportunity to comment on the Proposed Amendments. For the foregoing reasons, we request that the Commission withdraw the Proposed Amendments and instead consider the reforms detailed in the rulemaking petitions submitted by National Investor Relations Institute, the NYSE Group, the Society for Corporate Governance, and Nasdaq.

CEFs, which fulfill crucial role in meeting the needs of "Main Street" investors, including retirees, rely on transparent and fulsome ownership information not only in promoting good corporate governance and shareholder engagement, but in efficiently satisfying the quorum and meeting requirements directly imposed upon them by statute, and, in more dire circumstances, in fighting for their survival against self-interested activists.

[13] *Staff Statement: Control Share Acquisition Statutes,* Division of Investment Management (May 27, 2020).