



September 29, 2020

*VIA INTERNET UPLOAD*

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

RE: File No: S7-08-20  
Reporting Threshold for Institutional Investment Managers

Dear Ms. Countryman,

We commend the U.S. Securities and Exchange Commission (the “Commission”) for its efforts to revise the Form 13F reporting threshold to a level that supports the intended statutory goal of enabling the Commission to monitor the holdings of major investment managers.<sup>1</sup> The proposed amendments to Form 13F ( the “Proposal”) reflect the reality and scope of today’s equity markets, while reducing compliance and reporting burdens for smaller investment managers. We appreciate the opportunity to join in this important conversation.

For perspective, MarketCounsel Consulting, LLC (“MarketCounsel”) is a regulatory compliance consulting firm to some of the country’s preeminent independent investment advisers. In addition, our affiliated law firm, the Hamburger Law Firm, renders legal counsel to investment advisers, broker-dealers, hedge funds, family offices, and registered securities personnel. From its roots in 2000, MarketCounsel has been steadfast in its mission to deliver elegant solutions to the most substantial challenges faced by entrepreneurs in this fast-growing and highly-regulated industry.

We write today to support raising the Form 13F reporting threshold from \$100 million to \$3.5 billion. Raising the threshold acknowledges the changes in the size and structure of the U.S. equities market since 1975 and will relieve over 4,500 investment managers, many of them small businesses, from unnecessarily burdensome Form 13F reporting requirements. While we support the Proposal, we feel that the Commission could clarify, and in some cases improve, its analysis in order to garner more support for the Proposal.

## **BACKGROUND**

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In 1975, Congress amended the Securities and Exchange of 1934 (the “Exchange Act”) to facilitate the collection and public dissemination of information concerning the holdings of and transactions in securities

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<sup>1</sup> Reporting Threshold for Institutional Investment Managers, SEC Rel. No. 34-89290; 85 Fed. Reg. 46016 (July 31, 2020) <https://www.govinfo.gov/content/pkg/FR-2020-07-31/pdf/2020-15322.pdf>.

by institutional investment managers.<sup>2</sup> This amendment originated from the recommendations of a 1968 study on the effects that institutional trading had upon the maintenance of fair and orderly securities markets, the stability of those markets, and the interests of securities issuers and the public.<sup>3</sup>

Form 13F's adopting release notes that section 13(f) of the Exchange Act gives the Commission broad rulemaking authority to determine the size of the institutions required to file a Form 13F as well the format and frequency of those Form 13F reports.<sup>4</sup> Form 13F requires every institutional investment manager who exercises investment discretion with respect to accounts holding "section 13(f) securities" which have an aggregate fair market value of at least \$100,000,000 on the last trading day of any month to file Form 13F.<sup>5</sup>

The Form 13F adopting release declined to choose a threshold amount lower than what was mandated by Congress in the interest of easing the reporting burden on the industry.<sup>6</sup> While in 1999 the Commission updated the rules under section 13(f) to change to an electronic reporting method, it has never updated the \$100 million threshold.<sup>7</sup>

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## NEEDED RELIEF

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The Proposal would raise the reporting threshold to \$3.5 billion because that number tracks the growth in the value of U.S. public equities from 1975 until 2018.<sup>8</sup> We agree that moving to a \$3.5 billion reporting threshold realigns the requirement with the original intent of the rule. Other approaches such as using a consumer price inflation index, are less tied to the growth of the securities markets and, therefore, are less relevant in setting the appropriate reporting threshold. We agree that the threshold should be based on the relative size of the U.S. equity markets.

In 1975, \$100 million in discretionary assets was considered a large amount for an investment manager to manage. The 1975 U.S. Senate Report concerning Section 13F found that the \$100 million threshold would cover 300 institutions.<sup>9</sup> In 2018, 5,089 managers filed a form 13F, which demonstrates that \$100 million in discretionary assets is much more common now than it was in 1975.<sup>10</sup>

In 1975, the intention of Congress and the Commission was to cover as large a group of investment managers as possible with the lowest possible compliance burden.<sup>11</sup> Raising the Form 13F threshold to \$3.5 billion would still cover 90% of the reported assets while alleviating the filing burden of more than 4,500 managers.<sup>12</sup>

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<sup>2</sup> United States, Congress, Senate, Securities Act Amendments. Congress.gov <https://www.congress.gov/bill/94th-congress/senate-bill/249>.

<sup>3</sup> U.S. Securities and Exchange Commission. Filing and Reporting Requirements Relating to Institutional Investment Managers. Adopting Release. Sec.gov. <https://www.sec.gov/rules/final/34-14852.pdf>.

<sup>4</sup> *Ibid.*

<sup>5</sup> 17 C.F.R. 240.13f-1 (Exchange Act Rule 13f-1 and Form 13F under the Exchange Act).

<sup>6</sup> U.S. Securities and Exchange Commission. SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect Today's Equities Markets. Press Release. Sec.gov. <https://www.sec.gov/news/press-release/2020-152>.

<sup>7</sup> U.S. Securities and Exchange Commission. Rulemaking for EDGAR System. Sec.gov. <https://www.sec.gov/rules/final/34-40934.htm>.

<sup>8</sup> The Proposal at 46021.

<sup>9</sup> The Proposal at 46018.

<sup>10</sup> U.S. Securities and Exchange Commission. SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect Today's Equities Markets. Press Release. Sec.gov. <https://www.sec.gov/news/press-release/2020-152>.

<sup>11</sup> U.S. Securities and Exchange Commission. Filing and Reporting Requirements Relating to Institutional Investment Managers. Adopting Release. Sec.gov. <https://www.sec.gov/rules/final/34-14852.pdf>.

<sup>12</sup> U.S. Securities and Exchange Commission. Statement on the Proposal to Substantially Reduce 13F Reporting. Sec.gov. <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>.

The Proposal puts the estimated compliance cost savings between \$68.1 million and \$136 million a year.<sup>13</sup> Reducing compliance burdens, including the cost and time strain, by such an amount would be helpful for smaller investment advisers who already face significant regulatory compliance burdens. The change would reduce the compliance burden for almost 90% of the investment managers who currently report on Form 13F, while retaining over 90% of the information currently gathered in the filings. The Commission retains almost all of the information it has today while smaller investment advisers are freed from this burdensome reporting.

## RESPONDING TO CRITICISM

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While the Proposal seems to be an overall good idea, some have raised objections, primarily related to the Proposal's cost-benefit analysis and the Commission's authority to make changes to the threshold amount. These points are worth addressing because they stem from valid concerns. Addressing these objections will only serve to strengthen the Proposal.

First, there is a concern that raising the threshold means that the Commission would lose visibility on \$2.3 trillion of reportable securities<sup>14</sup>. While that may be true, that amount is less than 10% of the value of the securities that the Commission is currently receiving. The Proposal acknowledges, in percentages, the information that will no longer be reported. Using big numbers like "trillions" may add to shock value, but the information that will be retained still accomplishes the Form 13F's original intent. That intent was not to track all investment managers, it was to facilitate the consideration of the influence and impact of institutional investment managers on the securities markets and the public policy implications of that influence. The Proposal still allows for that.

The loss of less than 10% of the current data set is further alleviated after considering additional reports to Form 13F that investment managers must already file, such as Form 13D, Form 13G, Form 13H, Form PF, and Section 16, as well as Form ADV. These additional reports provide information about large concentrations of ownership, large trading activities, the holdings of alternative investment managers and assets under management.

More importantly, this objection fails to articulate a value of the lost information. In order to understand the Proposal's cost-benefit comparison, we must place a value on the lost information. We recommend that the Commission further study this area to determine if it is possible to quantify the value of the lost information.

Second, there is a concern that Commission overestimated the costs of the Form 13F compliance savings. The Proposal estimates that the savings range from \$15,000 to \$30,000 annually per manager, for a total of \$68.1 million to \$136 million.<sup>15</sup> Previously, the Commission estimated the Form 13F reporting costs at \$31.2 million.<sup>16</sup> We recommend that Commission review its estimate through engaging with various types of managers who may have different cost structures. However, even using the lower estimates, the Proposal is incrementally beneficial for smaller investment advisers who submit data that is relatively unimportant to support the Commission's objectives.

Finally, there is a concern that the Commission does not have the statutory authority to raise the Form 13F threshold. Section 13(f) of the Exchange Act gives the Commission broad rulemaking authority to determine the size of the institutions required to file reports.<sup>17</sup> Section 13(f)(1) authorizes the Commission

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<sup>13</sup> The Proposal at 46022.

<sup>14</sup> Lee, Allison Herren. Statement on the Proposal to Substantially Reduce Section 13F Reporting. Sec.gov. July 10, 2020 <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>.

<sup>15</sup> The Proposal at 46022.

<sup>16</sup> Office of Information and Regulatory Affairs. Form 13F, Report of Institutional Investment Managers (pursuant to section 13(f) of the Securities Exchange of 1934). Reginfo.gov [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201804-3235-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201804-3235-001).

<sup>17</sup> The Proposal at 40617.

to set the reporting threshold in an amount “of at least \$100,000,000 or such lesser amount” by rule. Section 13(f)(3) authorizes the Commission to exempt any manager or class of managers from the reporting requirements.<sup>18</sup> In our view the Proposal is exempting small and mid-sized investment managers, a class of managers. We believe that Congress would not have intended these investment managers to be required to file 13(f) reports. Therefore, the Proposal does not require that section 13(f)(3) override section 13(f)(1) because the Commission is not exempting all managers from this requirement, rather it is exempting a class of managers who do not meet the current definition of a large institutional manager.

By raising the threshold, the Commission is exempting managers who were not intended to be covered by the rule, but through the passage of time and the growth of the equity market find themselves over the rule’s threshold. Readjusting the threshold returns the requirement to the original legislative intent behind section 13(f). As the Commission stated in its press release, “[I]n legislative history indicates that the reporting threshold of section 13(f) was designed so that reporting would cover a large proportion of managed assets, while minimizing the number of reporting persons.”<sup>19</sup>

## CONCLUSION

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MarketCounsel strongly supports raising the section 13(f) reporting threshold to \$3.5 billion, because it will relieve an unnecessary compliance burden for approximately 90% of investment managers, while retaining over 90% of the currently reported data. Raising the reporting threshold brings Form 13F back to the original intent of Congress: to evaluate the risks posed by the holdings of large asset managers. Raising the threshold provides relief for many smaller investment advisers who already have significant regulatory compliance and reporting obligations.

We suggest that the Commission provide more detailed information involving the costs and benefits of the Proposal in the hopes that it would convince opponents that the Proposal is stripping a relatively insignificant amount of data and a proper level of information will still be available. To this end, the Commission can engage a variety of managers based on size and investment strategy to better understand the compliance costs and burdens of Form 13F.

We hope that our comments made on behalf of us, and our independent investment adviser clients, who serve investors across the country, are beneficial to this process. Should you have any questions or require any additional information regarding any of the foregoing, we remain available at your convenience using any of the methods below.

Best regards,  
MARKETCOUNSEL CONSULTING, LLC

By:   
Brian Hamburger, JD, CRCP  
President and CEO

  
Daniel Bernstein  
Chief Regulatory Counsel

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<sup>18</sup> The Proposal at 40618.

<sup>19</sup> U.S. Securities and Exchange Commission. SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect Today’s Equities Markets. Press Release. Sec.gov. <https://www.sec.gov/news/press-release/2020-152>.