Via Electronic Submission

October 5, 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:

This letter is submitted on behalf of United Therapeutics Corporation, a biotechnology company co-headquartered in Sliver Spring, Maryland and Research Triangle Park, North Carolina (the "Company" or "we"), in response to the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in the proposing release referenced above (the "Proposing Release"). As set forth in the Proposing Release, the Commission has proposed amendments to Rule 13f-1 ("Rule 13f-1") under Section 13(f) ("Section 13(f)") the Exchange Act of 1934 (the "Exchange Act") and Form 13F to increase the reporting threshold from $100 million to $3.5 billion and to increase the information provided by institutional investment managers, respectively.

United Therapeutics thanks the Commission for this opportunity to comment on the proposed amendments to Rule 13f-1 and Form 13F and the Commission's efforts to improve reporting by institutional investment managers.

Summary of Our Comments

We concur with the Commission's view that the Rule 13f-1 reporting system is outdated and in need of modernization. We are supportive of the Commission's objectives to "reflect the changes in the structure of the market that have occurred over time."[1] However, we believe that the proposed revision to Rule 13f-1 is unlikely to accomplish Section 13(f)'s goal of "improv[ing] the body of factual data available regarding the holdings of institutional investment managers and thus facilitat[ing] consideration of the influence and impact of institutional investment managers on the securities markets"[2] or the Commission's objective of providing useful information to shareholders.

[1] Reporting Threshold for Institutional Investment Managers, Exchange Act Release No. 34-89290, 13, 20 (July 10, 2020).
[2] Id. at 9.

We believe that, as proposed, the change in threshold for reporting under Rule 13f-1 will instead *impair* the usefulness of the body of factual data available regarding the holdings of institutional investment managers. The consequence will be a significant loss of transparency into the shareholdings of our company and other publicly-traded companies in the market, thereby impeding companies' abilities to meaningfully engage with shareholders.

Discussion

A. Transparency

1. Shareholder Engagement

Over the past several decades, Rule 13f-1 has been one of the driving factors in a remarkable evolution in companies' engagement with their shareholders. Each year, companies like ours discuss key concerns and initiatives with shareholders, both when preparing annual proxy statements and when considering significant company actions. Form 13F filings are integral and unique sources of ownership information for companies showing who their significant shareholders are, which is a starting point for shareholder engagement. Under the Commission's proposal, 89% of current Form 13F filers would go dark[3], representing several steps backward from this previously-achieved increase in company-shareholder engagement.

While the Commission's rationale for increasing the threshold rests on creating parity with the portion of the market that was targeted at the time of the rule's initial adoption in 1975, this ignores the dramatic alteration in the relationships between companies and their shareholders since then. Shareholder engagement has become a market standard of good corporate governance, with the result that market participants have increasingly become productive *company* participants alongside management and boards of directors. Increasing the Rule 13f-1 threshold would allow the largest institutional investment managers to continue this participation, but could have the effect of excluding those shareholders with (relatively) smaller positions—even if they are more active in the company's stock than some larger, more passive investors. Management has limited time to devote to shareholder engagement and must choose which shareholders to prioritize. More information about all the company's significant investors, whether they be large or relatively small in scale, allows management to make better-informed decisions about how to allocate its time. For some companies, particularly smaller-cap companies, it may be information on the smaller, more active investors that is more valuable—both from the standpoint of engaging with interested shareholders and detecting activist hedge funds.

Finally, proxy advisory firms such as Institutional Shareholder Services and Glass-Lewis have come to expect detailed disclosure regarding the extent of an issuer's shareholder outreach efforts, which often includes precise percentages of an issuer's shares that were included in such

[3] IHS Markit, SEC's 13F Proposal – Issuer and Investor Analysis, Corporate Secretary (August 7, 2020), https://ihsmarkit.com/research-analysis/secs-13f-proposal--issuer-and-investor-analysis.html.

efforts. These disclosures would become impossible without the information available from Form 13F filings.

2. Detecting Activism

According to the IHS Markit, 86% of activist managers would go dark under the Commission's proposed new threshold, which will be a loss in transparency not for the biggest companies in the market, but for the smaller companies that are more frequently targeted by activists.[4] Particularly in this time of market volatility due to COVID-19, more insight into how a company's stock is trading and held is needed, not less. With a $3.5 billion threshold, companies will have a diminished ability to monitor activist movements that might take advantage of this market volatility. In addition, experts are warning that, just as activist investing "rose significantly after the 2008 financial crisis," it may spike as the economy rebounds from COVID-19.[5] Indeed, "[a]ctivist investors may focus their attention on companies that … already have significant activist representation in their stocks and those facing new vulnerabilities"[6]—that is, those companies that most need the information provided by Form 13F about who is trading in and out of their stock. These same experts encourage companies to prepare for such activism by engaging with investors and *monitoring changes in the company's shareholder base*.[7] With a 35x increase in the Rule 13f-1 reporting threshold, a company will not know if an activist investment manager is planning a proxy contest until that activist is compelled to disclose its position on Form 13D—the deadline for which is *10 days* after that threshold is crossed. Although this is a shorter time frame than the current Form 13F filing deadline, a moderate Form 13F filing threshold still increases the chance that an activist will have to report an accumulation of a company's stock before it reaches the Form 13D threshold.

It is also important to note that, since the adoption of Section 13(f) in 1975, the marketplace and media landscape have evolved in a way that has allowed small, vocal market participants to greatly increase their significance to public companies, including through use of derivative securities, which are not even subject to reporting under Rule 13f-1. Any consideration of changes to the reporting threshold must take this present reality into account.

3. Inadequate Alternatives

We recognize that there may be other ways for a company to determine its stock ownership, such as the use of private stock surveillance firms and Forms N-PORT and 13D/13G. However, none of these options are as useful and/or reliable as Form 13F. Not only do private

[4] Jeremy Cohen and Jeff Zilka, SEC Proposed Rule Change Is A Step Backwards for Shareholder Democracy – Edelman, Yahoo! Finance (July 29, 2020), https://finance.yahoo.com/news/sec-proposed-rule-change-step-193708183.html

[5] Lisa Silverman, INSIGHT: Preparing for Post-Pandemic Corporate Activism, Bloomberg Law (May 4, 2020), https://news.bloomberglaw.com/corporate-governance/insight-preparing-for-post-pandemic-corporate-activism

[6] Frank Aquila and Melissa Sawyer, How boards can prepare for post-pandemic activism, Corporate Secretary (April 6, 2020), https://www.corporatesecretary.com/articles/boardroom/32040/how-boards-can-prepare-post-pandemic-activism

[7] Id.

stock surveillance firms also use Forms 13F as part of their information base, they can cost a company anywhere from $25,000 to $50,000 annually and, even then, their information is just a "best guess." Form N-PORT only applies to registered "investment companies" (not unregistered hedge funds), and the information in it is made public only after a 60-day delay.[8] Forms 13D and 13G only require disclosure after an investor crosses the 5% threshold of ownership in a particular company, which is often a higher threshold than what an institutional investment manager would report on a Form 13F. Even then, Forms 13D and 13G are not reliable when activists form "wolf packs" whereby, acting in concert, each activist will accumulate less than 5% of a company's securities and then not report themselves as a 13D group.

Under SEC rules, companies communicate with their beneficial owners primarily through broker or bank intermediaries. However, the "OBO/NOBO" rules allow a beneficial owner to prohibit direct contact by a company in which it holds stock if it objects to disclosure of its identity. Moreover, beneficial owners can also prohibit disclosure of the amount of their holdings in a company. Thus, reliance on these other rules to give companies insight into their shareholder base would be misplaced. Any large shareholder that would fall under the proposed $3.5 billion threshold for institutional investment managers could also elect to prohibit disclosure of its identity and/or holdings to a company through the OBO/NOBO rules.

The rationale in the Proposing Release relies all too heavily on the purported high estimated compliance costs. While we acknowledge that institutional investment managers are required to incur additional compliance costs when they are subject to Rule 13f-1, that cost, even for smaller investment managers, is not unduly burdensome. Developments in technology, which have given institutional investors instant access to detailed information regarding their holdings and have allowed them to submit Form 13F electronically, have made compliance with this rule significantly easier and less costly than it was several decades ago. Given the lack of alternative sources for the information Rule 13f-1 provides to the marketplace, the value of this information to issuers and investors alike is significant. Not only is Rule 13f-1 straightforward and simple to comply with, but a single manager's Form 13F typically provides valuable information to multiple companies and other investors. Thus, the benefits of the Rule 13f-1 reporting system far exceed the modest cost it imposes.

B. Impact on Capital Formation

While large shareholders are likely to have already adopted a positive position with respect to investing in that particular company, many companies use Forms 13F to identify smaller shareholders who have not yet invested a significant amount in the company but may be willing to. As another facet of shareholder engagement, management may reach out to these shareholders, not just for opinions on company actions, but also to discuss the possibility of making additional investments to provide the company with growth capital. Such a significant increase in the Rule 13f-1 reporting threshold cuts off companies' visibility and accessibility

[8] Even after the 60-day delay following the end of the investment company's fiscal quarter, only the information from the last month of the fiscal quarter is made available. *See* General Instruction F to Form N-PORT.

regarding these smaller shareholders, thereby limiting companies' potential capital raising opportunities. For earlier-stage companies in the biotech industry, capital raising is an essential tool to speed the development of potential live-saving therapies.

C. Effect on Our Company

We strive to maintain strong relationships with our shareholders as part of our commitment to corporate governance. In 2019, members of our Board of Directors invited discussions with shareholders in the spring and in the fall who collectively hold about 70% of our outstanding shares. These conversations with shareholders give us deeper insight into our shareholders' perspectives and help inform our Board of Directors' decisions on strategy, governance, compensation, and sustainability. Some of the actions we have taken in response to shareholder feedback over the past several years include the adoption of majority voting, the adoption of proxy access, the de-classification of our Board of Directors, and the initiation of our environmental, social, and governance disclosure program. Notably, the design of our four-year equity grant for 2019-2022 was in direct response to feedback received during our ongoing shareholder engagements.

If the threshold for Rule 13f-1 is raised to $3.5 billion, we would expect to lose information on approximately 75% of our current Form 13F filers. Many of the remaining filers are passive holders that do not significantly change from quarter to quarter. As with many companies, especially small- and mid-cap companies, the information we gain on smaller investors from Form 13F filings is just as, if not more, important to our company than is the information on larger, passive investors. Over the past 12 months, we have engaged with over 40 investors who would not be required to file under the new threshold.

D. Proposed Reforms

We agree with the Commission that a reform of Rule 13f-1 is necessary and timely, including a possible increase to the threshold for filing. However, we urge the Commission to consider a more nuanced approach to the new filing threshold instead of a simple increase based on proportionate market share. We agree with the National Investor Relations Institute's proposal to increase the threshold to $450 million, which is based on a Consumer Price Index adjustment.[9] Such an increase would be a less shocking to the market and, in tandem with the following additional reforms (particularly the first), would accomplish a more holistic approach to bringing Rule 13f-1 into the 21st century while also enhancing its usefulness.

- First, we recommend adjusting the filing threshold every five years based on the Consumer Price Index. This would provide ongoing review and consideration of the filing threshold as it relates to current market conditions. It would also set

[9] National Investor Relations Institute, The Case for 13F Reform (September 25, 2019), https://www.niri.org/NIRI/media/NIRI/Advocacy/NIRI-Case-for-13F-Reform-2019-final.pdf. Also, this assumes that the Commission has the authority to increase the threshold above $100 million, which is not free from doubt as discussed in Section E. below.

companies' and investors' expectations for the threshold, precluding undue reliance on a particular number.

- Second, we recommend shortening the reporting deadline from 45 days to 10 days after the end of the quarter. The significant delay between quarter-end and the filing deadline causes information to often be outdated when it is released to the market. This can allow an investor that purports to be a large shareholder to influence the company when, in fact, that investor's position has changed since the last Form 13F filing.[10] This can also allow activists to accumulate large portions of the company's stock early in a calendar quarter and leave the company in the dark as to its significant shareholders until several months later. In addition, the 45-day reporting period was established 30 years ago and was the result of practical considerations that are no longer applicable in light of the increased sophistication of institutional investors and advances in information technology, which often allow institutional managers to ascertain their exact holdings as of month end within a matter of minutes. Thirty years ago, computers, the Internet, and EDGAR were all in their infancy; today we have technology that allows for real-time reporting.

- Third, we recommend that all filers be required to disclose long, short, derivative, and outright positions in a company's stock, and that all positions be aggregated together (not netted) to determine if the threshold is met. This would provide a more accurate picture of where an investor stands in relation to a particular company.

- Finally, we recommend that the Commission reconsider its current procedure for handling confidential treatment requests related to Form 13F filings. Institutional managers can request confidential treatment of specific positions, and the current system effectively grants confidential treatment during the period between application and final determination on a request, which can be several months long.[11] Like the long deadline discussed in the first bullet above, this causes information to quickly become stale, thereby defeating the rule's purpose and function of providing the markets with transparency on holdings.

E. Authority

While we commend the Commission on its effort to reform Rule 13f-1, we are nevertheless concerned about its authority to do so under Section 13(f) in the proposed manner. Section 13(f) states, in relevant part, "[e]very 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

[10] National Investor Relations Institute, NIRI Advocacy Issues Survey – 2018 (August 2018) (46% of respondents reported that investors had misrepresented their positions to gain a meeting with the company's management).
[11] Christian Bonser, If You Only Knew the Power of the Dark Side: An Analysis of the One-Sided Long Position Hedge Fund Public Disclosure Regime and a Call for Short Position Inclusion, 22 Fordham J. Corp. & Fin. L. 327, 365 (2017).

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…" (emphasis added). A plain reading of the text shows that Congress set the upper limit at $100 million, and the Commission has the authority to *lower*, but not increase, the threshold. For the amount to be raised, Congress needs to amend Section 13(f) to either raise the threshold or give the Commission the specific authority to do so.

Conclusion

We appreciate the Commission's efforts, and willingness, to modernize Rule 13f-1; however, increasing the filing threshold to $3.5 billion will only serve to significantly reduce market transparency and impair many companies' ability to engage with their shareholders and detect activist activity in their stock by allowing a significant portion of current Form 13F filers to essentially go dark. We are of the opinion that the Commission does not thoroughly consider and address this loss of transparency in the Proposing Release—indeed, as Commissioner Lee notes in her dissent, "[t]he costs of losing transparency are glossed over in brief narrative form and largely discounted."[12] Because the alternative sources of information are incomplete and, in some cases, prohibitively expensive, we urge the Commission to take a more measured approach to the Rule 13f-1 filing threshold, and propose revisions to it in tandem with other reforms that would enhance the usefulness of information from the Rule 13f-1 disclosure system.

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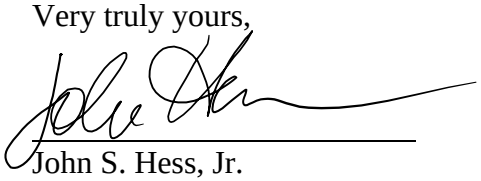
We appreciate the opportunity to comment on the Proposing Release and respectfully request that the Commission consider our recommendations and suggestions. We are available to meet and discuss these matters with the Commission and its staff, and to respond to any questions.

Very truly yours,



John S. Hess, Jr.
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[12] SEC Commissioner Allison Herren Lee, Statement on the Proposal to Substantially Reduce 13F Reporting (July 10, 2020), https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10.