american securities association
America's Voice for Main Street's Investors

September 29, 2020

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

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

Dear Ms. Countryman:

The American Securities Association ("ASA")[1] writes to express our strong opposition to the Securities and Exchange Commission's ("SEC" or "Commission") proposed rule to limit Form 13F reporting obligations for money managers ("Proposal"). ASA is concerned the Proposal will reduce transparency in the U.S. equity markets, undermine investor confidence, negatively impact the long-term performance of public companies, and harm American workers. Our Constitutional and policy concerns are outlined in greater detail below.

I. SEC Does Not Have the Constitutional Authority to Change a Statute.

We are unaware of any regulatory or constitutional authority that would allow the SEC to amend the $100 million reporting threshold set forth in Section 13(f) of the Securities Exchange Act. No matter how much an administrative agency may disagree with the plain language of a statue,[2] only publicly elected members of Congress can alter the plain language of a statute and send it to the President to be signed into law.[3] Furthermore, the SECs assertion of broad statutory authority to amend a rule that implements a specific reporting threshold set by Congress and lacks a public interest justification looks like a legal gymnastic stretch that could end in a bad injury. Additionally, there is no indication that Congress has ever intended that the SEC suddenly

[1] The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

[2] 17 CFR § 240.13f-1(a)(1).

[3] Article 1 Sec. 8 of the Constitution vested Congress with the power to make all laws. Justice Clarence Thomas clearly noted the courts position on this power saying, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there", Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

increase the reporting threshold by a factor of thirty-five (35).[4] Consequently, this Proposal is legally flawed and appears to be indefensible on its face.

If we disregard the constitutional process and comment on this Proposal as if it could actually pass legal muster in an Article III court, then we oppose it because it would dramatically reduce transparency in the U.S. equity markets, undermine investor confidence in the integrity of our markets, negatively impact the long-term performance of public companies, and harm American workers as corporate raiders would be incented to dismantle company after company across this country.

Section 13(f) disclosures are an important source of information to public company management, investors, and American workers, both union and non-union. Eliminating them, would tilt the scales in favor of activist and takeover "wolf pack" hedge funds exercising short-term agendas at the expense of workers, long-term investors, and our capital markets. The policy of this proposal seems to suggest that this country should fully embrace the Gordon Gekko "smash-and-grab" model of capitalism personified by today's Wall Street vulture funds.[5] Because of its unquestionable legal flaws and severe negative impact on companies, shareholders, American workers, and the integrity of our markets, we suggest the Commission reverse course on this Proposal immediately.

The Commission should not be seen to be ignoring well-established principles of constitutional law in order to cater to Wall Street billionaires and corporate raiders over workers and investors, which would seem to be contrary to its core mission.

II. **General Policy Observations**.

Section 13(f) of the Securities Exchange Act requires money managers controlling at least $100 million to disclose their holdings of equity and certain other securities within 45 days after the end of each quarter. These disclosures ***help*** public companies understand who owns their shares and they communicate a money manager's position to the broader market. Form 13F requirements have been in place since 1975, are well understood by market participants, and impose minimal compliance burdens on money managers.

These disclosures are the most significant – and in many cases the only – source of information about public companies' shareholder base. Having insight into ownership is an important way for companies to assess and weigh the different perspectives of their shareholders when it comes to corporate decision-making. This knowledge also helps management allocate its time and attention across different investor relations efforts, especially as it relates to shareholder proposals and the composition of the board. Form 13F disclosures therefore promote – and

[4] "Congress anticipated that government agencies, including the SEC, would be expected to make extensive use of the institutional disclosure data in fulfilling their responsibilities to protect the public interest within a consistent and coordinated regulatory framework" https://www.sec.gov/files/480.pdf "Review of SEC's Section 13(f) Reporting Requirements".
[5] *Wall Street*. Directed by Oliver Stone, 1987.

indeed are critical to – good corporate governance, as they facilitate dialog and alignment between those who own a company and those who control it.

The Proposal would inexplicably raise the reporting threshold from $100 million to $3.5 billion. By the SEC's own estimates, this would slash the number of 13F filers by 90%, depriving companies of critical information about who their most significant and engaged shareholders are.[6] In addition, raising the threshold in this manner would allow almost every activist hedge fund to "go dark" and shield their ownership of public companies from the management, the shareholders, and the workers of those companies.[7] How the SEC arrived at this number is an interesting exercise of math? The absurdity of picking an outrageously inflated number out of thin air and proposing it as the right number cannot be overstated. Given that reality, we believe there is no legal, market, or evidence based justification for this Proposal to proceed.

III. <u>No Justification Exists to Amend Form 13F Requirements</u>.

The Proposal fails to provide any justification for why an increase in the 13F reporting threshold aside from speculation that minimal cost savings for hedge funds, will somehow be good for the market or investors as a whole. It is unclear how the benefit of a multi-billion hedge fund saving $15,000-$30,000 per year in compliance costs outweighs the lack of transparency and aggressive activism that will undoubtedly increase as a result of the rule.

In fact, in recent years the SEC has received numerous requests to do just the *opposite* of what is outlined in the Proposal. The SEC has received rulemaking petitions and several comment letters calling on the Commission to increase reporting requirements. For example, a 2013 rulemaking petition from the National Investor Relations Institute, New York Stock Exchange, and the Society of Corporate Secretaries and Governance Professionals called on the SEC to shorten the 45-day reporting delay at the end of each quarter.[8] The SEC has also received a rulemaking petition and been called on by Congress to shorten timeframes for other money manager reporting requirements, including those under Section 13(d) of the Exchange Act.[9]

IV. <u>The Commission Expands What Constitutes a "Small" Money Manager</u>.

The Proposal asserts that a threshold increase "would provide meaningful regulatory relief for smaller managers that manage less than $3.5 billion in 13(f) assets." The ASA simply disagrees

[6] Ironically, the entities that would remain subject to Form 13F reporting under the Proposal would be large index funds and asset managers that invest passively, and that therefore have little interest and rarely engage with the management of the companies they invest in.
[7] Proposal at 17.
[8] https://www.sec.gov/rules/petitions/2013/petn4-659.pdf
[9] https://www.sec.gov/rules/petitions/2011/petn4-624.pdf; Importantly, Memorandum dated September 24, 2010 from Deputy Chief of Staff to the Inspector General set forth in Appendix V to "Review of SEC's Section 13(f) Reporting Requirements" said "[w]e emphasize that consideration of significant changes to Form13F should be part of a coordinated review of the overall SEC system for disclosing ownership and transactions in the securities of public companies, *rather than in isolation*." https://www.sec.gov/files/480.pdf

that a hedge fund managing $3.5 billion in assets (and in some cases more) could under any circumstances be considered "small." As evidenced in a recent law firm memo, the Proposal would likely exempt some of the most well-known hedge fund managers on Wall Street from transparency requirements.[10]

To put this into perspective, the median market capitalization of the Russell 3000 index is roughly $1.6 billion. Small and mid-capitalization companies – who depend on current 13F reports to determine who their shareholders are – would be the most negatively impacted by this rule and many would likely become targets of activist hedge funds and corporate raiders.

V. The Proposal Lacks Any Rational Economic Analysis.

The Commission's emphasis on reducing compliance costs to justify the rule seems to be borne out of an unsupported concern about protecting the intellectual property and anonymity of hedge funds. In reality, the mechanics of a 13F filing are straightforward and, in many cases, automated. The SEC should not be prioritizing the reduction of minimal compliance burdens for sophisticated hedge funds at the expense of revealing important information to the public.

The other Commission argument the public is supposed to believe is that the filing of Form 13F requires managers to disclose allegedly proprietary investment strategies. This is also fundamentally flawed because as the SEC itself acknowledges in the Proposal, fund managers can apply for confidential treatment if a particular disclosure would harm the fund or its investors. We therefore believe the current rules already more than placate any supposed concerns the SEC and these hedge fund managers may have over the disclosure of potentially sensitive information.

VI. Conclusion

Rather than improve transparency in the U.S. securities markets, increase the integrity of our markets, and protect worker rights, this Proposal asks the public to side with billionaire hedge fund managers who destroy companies and fire workers because the current regulatory regime costs them too much.

Given all the concerns outlined above, the ASA strongly opposes this Proposal. We urge the Commission to refrain from enacting policies that will give hedge funds a green light to ruin public companies, destroy the lives of American workers and further exacerbate income inequality. Instead, the SEC should make a better use of use taxpayer money and its own time by acting on the pending rulemaking petitions calling for *enhanced disclosures* from hedge funds and other money managers.

[10] https://corpgov.law.harvard.edu/2020/07/19/going-dark-sec-proposes-amendments-to-form-13f/

We stand ready to assist on Constitutional and policy issues related to this Proposal and as a resource in any other way we can.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association