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September 29, 2020

Vanessa A. Countryman
Secretary
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:

The National Association of Manufacturers appreciates the opportunity to provide comment to the Securities and Exchange Commission on File No. S7-08-20, the Commission's proposed rule to increase the Form 13F reporting threshold for institutional investment managers.[1]

The NAM is the largest manufacturing trade association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. These businesses often turn to the public market to finance the significant investments in equipment and research necessary for modern manufacturing. Thus, a vibrant public market that supports capital formation and long-term growth is critical to the sustained success of manufacturing in America. Manufacturers know that a central factor to their success as publicly traded companies is a consistent, transparent dialogue with their shareholders that enables smart business growth and strong investor returns.

The information provided by asset managers via Form 13F filings is the only reliable source of information that public companies have about their shareholders.[2] Data from Form 13F is the linchpin of manufacturers' investor relations programs, and without this critical information manufacturers' efforts to understand and communicate with shareholders would be substantially curtailed. As such, the NAM is extremely concerned that the SEC has proposed to severely limit the availability of Form 13F information. By increasing the reporting threshold from $100 million to $3.5 billion, the proposed rule would exempt 89% of current 13F filers from the disclosure requirement—drastically limiting publicly traded manufacturers' visibility into their shareholder base and undercutting vital shareholder outreach, communication, and education efforts. Moreover, the proposed rule would have a disproportionate impact on small businesses, which are more likely to be held by smaller institutions and thus to lose information about a higher percentage of their existing Form 13F filers.

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[1] *Reporting Threshold for Institutional Investment Managers*, 85 Fed. Reg. 46016 (31 July 2020). Release No. 34-89290, *available at* https://www.sec.gov/rules/proposed/2020/34-89290.pdf.

[2] The NAM strongly supports amendments to the SEC's NOBO-OBO rules so that Form 13F filings would no longer be the sole source of information about issuers' beneficial owners. We commend the SEC's ongoing efforts to reform the proxy process, and manufacturers believe that NOBO-OBO reform is a critical facet of the Commission's work to modernize the "proxy plumbing" underpinning the U.S. proxy system. However, the potential for NOBO-OBO reform in the future does not mitigate the impact that the proposed 13F rule would have in the present. The NAM encourages the SEC to preserve companies' existing ability to understand their shareholder base by reconsidering its 13F rule proposal and, later, to enhance shareholder transparency via commonsense NOBO-OBO reform.

At a fundamental level, companies should know who their shareholders are so that management can be responsive and responsible to the ultimate owners of the business. Form 13F filings enable this crucial relationship. The NAM respectfully encourages the SEC to reconsider, and ultimately to withdraw, its proposed rule to substantially reduce the utility of Form 13F information. The proposing release claims that the rule would modernize and update Form 13F in order to achieve minor cost savings for some asset managers. Unfortunately, the full impact would be a significant reduction in market transparency and a loss of vital information upon which businesses and shareholders depend to facilitate fair and efficient markets in the United States.

I. <u>Impact of the Proposed Rule on Corporate Uses of Form 13F Data</u>

The report on the Securities Acts Amendments of 1975 issued by the Senate Banking Committee[3] makes clear that Congress sought to grant companies more information about their shareholders when enacting Section 13(f) of the Exchange Act:

> *Related to the need for disclosure by institutional investment managers of their securities holdings and transactions is the need for the management of individual companies to be able to identify the holders of their stock. Institutional investment managers have customarily used nominees, officers and employees of the institutions to hold legal title in "street name" to stock certificates to allow the institution greatest flexibility in transferring the stock certificates. This practice may impede company management in its attempts to communicate directly with the beneficial owners of its securities.*[4]

Congress clearly considered the importance of transparency for issuers in a general sense ("the need for the management of individual companies to be able to identify the holders of their stock") and the specific uses to which a company might put Form 13F data ("to communicate directly with the beneficial owners of its securities"). The report describes a status quo where businesses were blind to the holders of their stock as an "extra layer of unnecessary secrecy" and underscores the Banking Committee's belief that the Section 13(f)(1) disclosure regime would be "a carefully drawn response to the problem."[5]

In proposing a 3500% increase in the Form 13F disclosure threshold, the SEC acknowledges that the proposed rule "would decrease holdings data available to…corporate issuers"[6] that might be "interested in determining the beneficial holders of their publicly traded stock."[7] This understates the importance of 13F information to publicly traded companies and fails to appropriately consider the impact of the proposed rule on issuers and their outreach to shareholders. Notably, the proposing release queries whether "any of these Form 13F data users find the data from smaller managers to be valuable"[8] given that, in the Commission's view, the information's importance "would depend on their particular use of this data."[9]

There are myriad uses to which public companies put Form 13F data, and for publicly traded manufacturers of all sizes these uses are more *universal* than *particular*. The wide range of

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[3] S. Report No. 94-75, to accompany S. 249: Securities Acts Amendments of 1975. Senate Committee on Banking, Housing and Urban Affairs, 94th Congress, 1st Session (14 April 1975).

[4] *Id.* at 80.

[5] *Id.* at 81.

[6] Proposing Release, *supra* note 1, at 23.

[7] *Id.* at 22.

[8] *Id.* at 23.

[9] *Id.* at 24.

contemporary use cases for Form 13F data combined with Congress's unambiguous legislative intent in enacting Section 13(f)(1) make clear that increased transparency into public company shareholders is a core feature of the 13F disclosure requirement. These are not "particular uses" that have built up around a disclosure regime intended for a separate purpose; rather, Form 13F data was intended to be and has fully become a critical tool for public companies to understand and communicate with their shareholders.

A. Communicating with Shareholders

At the most basic level, Form 13F filings provide issuers with a list of the identities of their shareholders. This list is the foundation of public companies' day-to-day investor relations efforts. Investor relations activity is centered on consistent communication with a business's shareholders, and it is impossible to communicate with shareholders if company management is blind to their identities. There is no way to conduct effective shareholder outreach without a base of knowledge about the shareholders themselves—and effective shareholder outreach is critical to a well-functioning public company.

Publicly traded manufacturers meet with a cross-section of their shareholders on a regular basis, both via scheduled outreach from the company and in response to meeting requests from shareholders. Knowing who their investors are and understanding more about them (as discussed in more detail below) enables businesses to schedule these meetings, staff them appropriately, and effectively manage limited time and resources.

The SEC has traditionally supported enhanced transparency and encouraged the vital investor-management dialogue that supports the public company model. Consistent communication between issuers and shareholders enhances long-term value creation, and Form 13F filings enable these critical relationships. However, the proposed rule would exempt 89% of current filers from the reporting requirement, limiting communication and undercutting important engagement opportunities.

B. Analyzing Shareholders' Holdings

Form 13F filings provide for a deeper level of analysis beyond a simple list of names. Knowing how large an investor's position is, when they first purchased shares, and whether their holdings have increased or decreased helps companies better understand their shareholders and the relative significance of their holdings—both to the company and to the investor.

Businesses are quick to reach out if they identify a new investor upon reviewing quarterly 13F data in order to welcome them to the company and to better appreciate their goals in holding stock. Significant increases or decreases in holdings from current shareholders necessitate similar outreach in order to address any concerns and clarify how the company fits into the shareholder's evolving portfolio.

Information about smaller asset managers (i.e., those likely to be excluded from the Form 13F filing requirement under the proposed rule) is crucial for these purposes. Businesses are unlikely to have as much information about smaller institutions, and these investors' holdings are more likely to fluctuate than those of larger index funds—but 13F provides vital data on who these investors are and how their holdings have changed. This information gives issuers an opportunity to conduct critical outreach to these important shareholders, who in turn disproportionately benefit from tailored company communications. These opportunities would all but vanish under the proposed rule given its focus on only the largest asset managers.

C. Understanding Shareholders' Portfolios

Form 13F allows for transparency into shareholders' portfolios beyond their investment in a given business, enabling companies to understand more about shareholders' investing strategies and ensure that communications with them are as tailored and effective as possible.

For example, Form 13F data might reveal valuable information about a shareholder's exposure to a certain industry, their investing goals and time horizons, or their priorities on key governance issues. Is the shareholder primarily pursuing growth, value, income, or other targets in their investments? Are their holdings centered on a specific industry, or is their portfolio more diverse? Does their position in the business represent a sizeable share of their portfolio, or is it less significant? Is there a specific focus on type, size, or location of company? Are their holdings consistent quarter-to-quarter and year-to-year or are there significant changes in the portfolio makeup?

These insights allow a business to understand how it fits into a given shareholder's portfolio and to tailor its outreach accordingly—resulting in more productive, meaningful conversations with investors. They also allow businesses to understand their shareholder base as a whole, providing a greater understanding of the market's view of the business's value and prospects, notable trends in the makeup of their shareholder base, and benchmark data compared to industry peers.

The proposed 13F reporting regime, focused as it is only on the largest institutions, would significantly limit these important uses of Form 13F data for all publicly traded companies—and particularly for smaller businesses (which are more likely to be held by asset managers that fall under the proposed $3.5 billion threshold).

D. Identifying Potential Investors

Information from Form 13F is valuable for companies to identify and track potential new investors. Knowledge about an investor's industry focus or growth goals can lead to proactive outreach and productive conversations about how a business might enhance their portfolio.

For companies of all sizes, including smaller businesses in need of growth capital, this information can be critical. Functions enabled and enhanced by Form 13F data include building out a series of meetings for a non-deal roadshow, planning management travel (or knowing who to reach out to in a given city if management is already on the road), and scheduling presentations at business development and partnering events. Similarly, Form 13F information is useful for businesses considering M&A activity or partnership opportunities, allowing them to understand the differences between their and a potential partner's shareholders and to identify any notable overlap.

Identifying new investors and understanding M&A/partnership opportunities are critical to capital formation for all public companies, and for small businesses in particular. The information made available by Form 13F is the best (and in many cases, only) way for small businesses to approach these opportunities in a targeted manner that is most likely to grow their business and their shareholder base.

E. Responding to Activists

Quarterly Form 13F reports grant businesses insights into activist investors that take a position in their stock and give them valuable time to consider how best to respond to potential activist activity. Though 13F filings are published well after the end of the quarter (up to 135 days after an activist first buys stock if they purchase on the first day of the quarter), they are still often the first signal a business receives that an activist has built a position in the company's stock.

In addition to the obvious (identifying the activist's identity), the information on Form 13F also allows issuers to do further research on other companies in which the activist has or has had a position and what, if any, asks they may have made of those businesses. With a more fulsome understanding of the activist's probable goals, an issuer can reach out directly to them and begin a conversation to hear their perspectives on the business and discuss how best to address any concerns they may have. Alternatively, the business can use 13F data to begin proactive outreach to the rest of its shareholder base—a valuable opportunity to share management's perspectives on the activist's goals and work with the full base of long-term investors to agree on the best path forward for the business.

The proposed rule would exempt many well-known activists from the Form 13F disclosure requirement, leaving companies unable to respond if targeted. The infrequent and delayed nature of 13F filings already limits issuers' ability to respond to activists, and eliminating their disclosure obligations entirely would leave companies flying blind in the event of activist activity.

F. Navigating Proxy Season

Robust communication with shareholders takes on increased importance during proxy season. The SEC recently instituted long-awaited reforms that will reduce the outsized influence of proxy advisory firms and political activists during proxy season, but making Form 13F data less robust could undercut these improvements to the proxy process by making it more difficult to communicate with long-term shareholders.

Communication with shareholders about routine proxy ballot questions is a standard feature of publicly traded companies' investor relations programs. Helping investors to understand management's perspectives on the proposals up for a shareholder vote enables informed decision-making by shareholders on a wide range of important issues. If conversations before proxy season (enabled by information found in 13F filings) helped a business understand a given investor's governance priorities, outreach during proxy season (also enabled by information found in 13F filings) can ensure that they are comfortable with how those priorities are addressed on the proxy ballot. Notably, this outreach is important for investors up and down the capitalization table, as in many cases a business is required to meet certain quorum requirements or achieve a certain percentage of outstanding shares (rather than votes cast) for a proposal to pass—so interaction beyond the top holders is critical.[10]

For contentious proxy ballot questions, these communications are even more essential. A deep understanding of the full shareholder base allows companies to reach out quickly if they receive an adverse recommendation from a proxy advisory firm. At present, there is no standardized way to share with investors management's response to an adverse proxy firm recommendation without outreach enabled by Form 13F. Once the new rule requiring proxy advisory firms to notify their clients when companies file a response to a recommendation goes into effect, investors will finally have an opportunity to compare the proxy firm's and the company's perspectives—but the robust communication strategies enabled by Form 13F information will still be critical to educating shareholders within the tight timeframes of proxy season.

The NAM strongly supported both recent proxy rules,[11] which were designed to prioritize the needs of long-term shareholders above those of unaccountable third parties like proxy advisory firms and

[10] The proposed rule, of course, would eliminate transparency into all but the largest shareholders—making these vote thresholds even harder to meet.

[11] *See, e.g.,* NAM Comments on File No. S7-22-19 (*available at* https://www.sec.gov/comments/s7-22-19/s72219-6735396-207626.pdf) *and* NAM Comments on File No. S7-23-19 (*available at* https://www.sec.gov/comments/s7-23-19/s72319-6735509-207647.pdf).

single-issue activists. It is therefore critical that businesses remain able to communicate directly with their shareholders—else we risk returning to a status quo dominated by intermediaries and plagued with inaccurate or politically motivated information that does not address long-term shareholders' priorities and to which businesses are unable to respond. Form 13F enables companies to understand their shareholders' goals and to communicate directly with them during proxy season, both critical checks on the power of proxy advisory firms and political activists.

The NAM appreciates the SEC's recent efforts to focus the proxy conversation on the financial wellbeing of long-term investors, and we encourage the Commission to maintain the availability of robust Form 13F data that enables the very conversations that form the basis of a healthy, productive proxy season.

II. <u>Impact of the Proposed Rule on Investor Uses of Form 13F Data</u>

As discussed, Form 13F enables vital shareholder-management dialogue that benefits investors and issuers alike. A deep understanding of the holders of a company's stock is critical to targeted outreach and tailored conversations—both of which allow shareholders to better understand the business and have their voices heard as owners. Beyond these important conversations with the companies in which they hold shares, investors also use Form 13F information to determine whether to make or adjust an investment in a company. Knowledge gleaned from 13F analysis is key to understanding how the market views a given issuer and how the company might fit into an investor's portfolio.

The 1975 Senate Report makes clear that Congress had investors in mind in enacting Section 13(f) of the Exchange Act. The Report states:

> *Perhaps the most important justification for the information collection program which this bill would authorize is the need to collect and disseminate to individual investors data about institutional investment managers. Many people believe that it is not possible to make informed investment decisions on a security without information related to the likely market activity and the degree of institutional concentration in the security.*[12]

The significant reduction in transparency associated with the proposed rule would deprive investors of the very information "related to the likely market activity and the degree of institutional concentration" that Congress intended when authorizing the SEC to collect Form 13F data. Without this information, investors would face barriers to identifying institutional concentration, assessing market liquidity, and comparing investment options.

The increase in the institutional ownership of American stocks over the past several decades underscores this point. Institutions own nearly 80% of equity market value in the United States,[13] so understanding their holdings is now more important than ever. As the legislative history makes clear, 13F information is intended to "stimulate a higher degree of confidence among all investors in the integrity of our securities markets"[14]—a commendable standard, and one which the proposed rule would fail to meet.

[12] 1975 Senate Report, *supra* note 3, at 82.

[13] McGrath, Charles. *80% of equity market cap held by institutions*. Pensions & Investments, 25 April 2017. *Available at* http://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions.

[14] 1975 Senate Report, *supra* note 3, at 82.

III. Significant Reductions in Transparency

As noted in the proposing release, 5,089 institutional investment managers currently file Form 13F reports. If the rule were to be finalized as proposed, only 550 managers would be required to file Form 13F—an 89% decrease.[15] This significant drop would have a direct impact on public companies' ability to identify their shareholders and communicate effectively with them. Conversations with NAM members about the impact of the proposed rule illuminate the challenges they would face if the proposed rule were finalized as proposed:

- A Fortune 250 company in the automotive industry reports that 43% of its current Form 13F filers manage less than $3.5 billion in assets, including 13% of its top 100 shareholders and 12% of its top 50 shareholders.
- A mid-cap company in the electronics industry reports that 67% of its current Form 13F filers would fall below the proposed threshold, leaving just 240 institutions into which it would have visibility.
- A Fortune 250 company in the chemical manufacturing industry would experience a 68% reduction in Form 13F filers under the proposed rule.
- A small-cap company in the automotive industry would lose information on 60% of its current Form 13F filers.
- A Fortune 250 company in the industrial manufacturing industry would lose visibility into nearly 700 of its current Form 13F filers, a 60% decrease.
- A small-cap company in the transportation industry would experience a nearly 40% decrease in shareholder visibility, including a loss of information about a quarter of its top 20 shareholders.
- A Fortune 250 company in the food industry would lose access to information on 10% of its top 200 investors and 60% of its Form 13F filers overall.
- A Fortune 500 company in the technology industry would experience a 60% decline in the number of reporting shareholders.

These anecdotal perspectives align with the 89% drop in Form 13F filers that the SEC expects, illustrating the breadth and depth of the rule's impact. Companies of all sizes would lose vital information, including in many cases data about a significant portion of their major shareholders. As discussed, this reduction in transparency would have far-reaching effects and would significantly hamper shareholder outreach efforts at businesses across the country. A 3500% increase in the Form 13F reporting threshold would limit the usability of 13F data and undercut Congress's goal of providing information about institutional investors to businesses and the public.

The Commission has identified the primary benefit of the rule as regulatory relief for smaller asset managers. The proposing release estimates that institutions no longer required to file a Form 13F might save $15,000 to $30,000 annually.[16] These relatively minor benefits pale in comparison to the significant costs of the proposal—namely, the harm to issuers and investors brought on by reduced transparency and diminished shareholder-management engagement. Technology has made compiling Form 13F data straightforward and relatively inexpensive for most asset managers, so the impact of the loss of Form 13F data far outweighs the cost and time savings that would accrue to asset managers under the proposed rule. The NAM is hopeful that the SEC's review of business and shareholder responses to the proposal will illuminate the considerable consequences of finalizing the rule and lead the Commission to reconsider the cost-benefit analysis underpinning the proposal. Limited cost savings do not justify a dramatic upheaval in the only reliable method by which businesses can access information about their shareholders.

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[15] Proposing Release, *supra* note 1, at 17.

[16] *Id.* at 18.

IV. The SEC's Authority to Increase the Form 13F Reporting Threshold

A. Implementing Authority

Section 13(f)(1) of the Exchange Act states that institutional investment managers with assets under management "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"[17] must file reports pursuant to the section. The proposing release asserts that Section 13(f)(1) grants the SEC the authority to raise or lower the $100 million threshold, but the plain language of the statute says otherwise. Section 13(f)(1) grants the SEC clear authority to *lower* the threshold (as long as it remains above $10 million) while specifically denying the authority to raise it.[18]

The statute creates a reporting regime wherein institutions with assets under management totaling $100 million must report pursuant to the section while allowing the Commission to set a lower threshold by rule. Section 13(f)(1) does not say that the reporting threshold must be "at least" $100 million (as the proposing release implies); it says that an asset manager's holdings must be "at least" equal to the threshold to trigger reporting—and that the threshold itself can only be $100 million or "such lesser amount" set by the SEC. Put more clearly, the SEC could set a threshold of $99 million, or $30 million, or $11 million—but not $101 million, or $200 million, or $3.5 billion.

The proposing release notes that the 1975 Senate Report says the Commission "would have authority to raise or lower the jurisdictional amount from $100 million"[19]—but, critically, the Senate bill on which the report was issued differed from the final version approved by Congress. Section 13(f)(1) as included in the Senate bill would have required institutions to file if their assets under management equaled "at least $100,000,000 or such ***other*** amount (but in no case less than $10,000,000) as the Commission, by rule, may determine."[20] The enacted bill, as discussed, requires disclosure at a level of "at least $100,000,000 or such ***lesser*** amount." Congress considered granting the SEC broad authority to raise or lower the reporting threshold, but ultimately chose to limit the Commission's authority and only allow it to lower the threshold.[21]

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[17] 15 U.S.C. 78m(f)(1).

[18] The first step in statutory interpretation begins with a "plain language analysis of the statutory text. That is, we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) (internal citation omitted). Here, "or such lesser amount" has a clear meaning, which is to grant the SEC authority to lower (and only to lower) the $100 million threshold.

[19] 1975 Senate Report, *supra* note 3, at 107.

[20] *Id.* at 187 (emphasis added).

[21] Courts have historically ascribed legislative intent when Congress amends legislative language. *See, e.g., Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Similar standards apply when Congress includes differentiated language in different sections of a statute. *See, e.g., Russello v. United States*, 464 U.S. 16 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Both principles are relevant when Congress amends a draft bill before enacting it.

Furthermore, when it is clear that Congress knew how to enact a provision and chose not to, that choice carries weight. *See, e.g., Animal Legal Def. Fund v. United States Dep't of Agric.*, 789 F.3d 1206 (2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling."); *Commissioner of Internal Revenue v. Beck's Estate*, 129 F.2d 243 (1942) ("The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here."). In interpreting Section 13(f)(1)'s "of at least $100,000,000 or such lesser amount" language, the SEC can easily look to the Senate-passed bill to determine that Congress knew how to include more expansive language ("or such *other* amount") and specifically chose not to.

Notably, the proposing release does not address the "or such lesser amount" language from Section 13(f)(1), appearing to rely on just a misinterpretation of the "of at least" language earlier in the clause. But "one of the most basic interpretive canons"[22] in administrative law, the "rule against superfluities,"[23] says that agencies cannot implement a statue in such a way that renders Congress's language meaningless. In other words, agencies are prevented from tossing aside a given word, phrase, or clause in a duly enacted law if there is a plausible reading that would give effect to the full language of the statute.[24] In this instance, "or such lesser amount" should be read to apply a clear upper bound on the SEC's authority to set the Form 13F reporting threshold rather than to apply to nothing at all. ("[O]f at least," meanwhile, simply applies to the accumulation of an asset manager's holdings that would trigger reporting.)

Given the clear language of Section 13(f)(1), the NAM believes that the proposed rule is inconsistent with the SEC's implementing authority under the Exchange Act.[25]

B. Exemptive Authority

The proposing release contends that, irrespective of the SEC's implementing authority under Section 13(f)(1), Section 13(f)(3) grants the Commission broad exemptive authority with respect to the Form 13F reporting requirement.[26]

Section 13(f)(3) of the Exchange Act states that the SEC "may exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from any or all of the provisions of this subsection or the rules thereunder."[27] Per the statute, other than one-off individual exemptions (for "any institutional investment manager"), the SEC's exemptive authority can only be exercised with respect to a cognizable "class" of asset managers. In proposing a blanket exemption for institutions with no shared characteristics other than having assets under management between $100 million and $3.5 billion, the rule would exceed the statutory limitations on the SEC's exemptive authority.

Furthermore, a key principle of statutory interpretation holds that agencies cannot implement a law, or authorize exemptions therefrom, in such a way as to negate or make obsolete the authorizing language.[28]

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[22] *Corley v. United States*, 556 U.S. 303 (2009).

[23] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

[24] *Ibid.* "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (Quoting 2A N. Singer, Statutes and Statutory Construction §46.06, pp. 181-186 (rev. 6th ed. 2000).)

[25] The proposing release solicits comment on whether the Commission should increase the Form 13F reporting threshold using a different methodology than focusing on stock market growth (which resulted in the proposed $3.5 billion threshold), suggesting consumer price inflation and stock market returns as potential alternative metrics. As discussed, the NAM does not believe the SEC has statutory authority to increase the Section 13(f)(1) threshold above $100 million. Additionally, an increase to $400 million (using the Personal Consumption Expenditures Price Index) or $500 million (using the Consumer Price Index) would still impose significant limits on businesses' ability to communicate with their shareholders, resulting in a decrease of 2,901 or 3,185 Form 13F filers, respectively. The NAM opposes on both legal and policy grounds any attempt to raise the statutory $100 million reporting threshold.

[26] Proposing Release, *supra* note 1, at 7.

[27] 15 U.S.C. 78m(f)(3).

[28] *See, e.g., Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951), which rejects a statutory interpretation in which "the exception swallows the proviso and destroys its practical effectiveness."

The language in Section 13(f) is clear—the 13F reporting requirement is designed to increase transparency into the holdings of institutions with assets under management above $100 million. Section 13(f)(3)'s exemptive authority grants the SEC the ability to exempt certain institutions that would otherwise be required to file—perhaps institutions in their first two years of operations, or those with fewer than 10 employees, or those that manage assets just for one family—by considering cross-cutting characteristics that might justify an exemption without negating the core requirement of the reporting regime.[29]

The SEC cannot, by contrast, issue a blanket exemption based on institutions' assets under management given that the $100 million reporting trigger is central to Congress's design of the regulation in question.[30] By issuing a rule to "exempt" asset managers north of the statutory $100 million threshold for no reason other than having assets under management below $3.5 billion (a universe of managers clearly contemplated by and included in the statutory reporting regime), the SEC proposes to nullify the central feature of the 13F reporting requirement as enacted by Congress. The proposed "exemption" is thus not a valid exercise of the SEC's exemptive authority under Section 13(f)(3).

In other contexts, the SEC has sought to limit the extent to which the exercise of its exemptive authority undermines congressional intent. For example, in adopting rules to implement the resource extraction reporting regime required by Section 13(q) of the Exchange Act,[31] the Commission declined to provide an exemption because it believed doing so "would be inconsistent with Section 13(q) and would undermine Congress' intent" and that it would not be "appropriate to adopt provisions that would frustrate, or otherwise be inconsistent with, such intent."[32,33] The NAM encourages the SEC to remain mindful of these limits on its exemptive authority and abandon its attempt to "undermine" and "frustrate" congressional intent as expressed in Section 13(f).

V. Reforms to Modernize Form 13F Reporting

The Commission has expressed a desire to update and modernize Form 13F. The NAM agrees that the Form 13F reporting regime is out-of-date. However, significantly reducing market transparency is hardly the way to bring the requirement into the 21st century. The NAM encourages the SEC to consider reforms to Form 13F and the NOBO-OBO rules that enhance transparency and provide businesses with more information about their owners.

First, the NAM would support amendments to the due dates for Form 13F reports. Quarterly filings due 45 days after the end of the quarter are a relic of a time when both trading and filing were much

[29] In addition to leaving the structure of the reporting regime intact, these classifications (or others similarly construed) would represent a cognizable class, as noted a key feature of the SEC's exemptive authority under Section 13(f)(3).

[30] As discussed above, Congress set the $100 million threshold in Section 13(f)(1) and specifically chose not to authorize the SEC to raise it.

[31] *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56365 (12 September 2012). Release No. 34–67717, *available at* https://www.sec.gov/rules/final/2012/34-67717.pdf.

[32] *Id.* at 202.

[33] The U.S. District Court for the District of Columbia vacated the 2012 resource extraction rule on Administrative Procedure Act grounds, holding that the SEC's process in deciding not to grant an exemption was arbitrary and capricious. *See API v. SEC*, 953 F.Supp.2d 5 (2013). But the District Court specifically noted that it might be "entirely reasonable for the Commission to conclude that requiring disclosure from a certain issuer or about a certain country goes to the heart of the provision's goal, and that the burden reduction [associated with an exemption] is not worth this loss" provided the appropriate APA standards were met for that conclusion. With regard to the proposed 13F rule, the NAM contends that the proposed exemption "goes to the heart of the provision's goal" and thus that the minor burden reduction for some asset managers is not worth the significant loss of transparency around Form 13F information.

less instantaneous. While public companies rely heavily on 13F data, as discussed above, it remains the case that the information is often stale by the time it reaches a business's investor relations team. As an example, an investor buying stock on October 1, 2020 would not need to report their new position until February 15, 2021. Significant changes in an investor's goals, a business's shareholder base, or the market more broadly can occur during this four-and-a-half-month lag time, to say nothing of the potential for activists to intentionally take positions early in a reporting period to avoid detection while they build their holdings. The NAM supports shortening the reporting window so that businesses and investors have access to Form 13F information sooner than 45 days after the end of the quarter.[34]

The NAM would also support broadening the Form 13F reporting requirement to include information about more than just investors' long positions. As discussed, long information is valuable to public companies, but it paints an incomplete picture of holders of in a company's stock. Broadening the 13F reporting requirement to include short positions would give both businesses and investors a more fulsome appreciation of the market's view of a business and shareholders' goals in investing in its stock.

With respect to NOBO-OBO reform, the NAM believes that businesses should be able to know who their shareholders are and to communicate with them directly so that issuers can be responsive and responsible to their owners. The current NOBO-OBO rules are a significant roadblock to transparency and much-needed investor-management dialogue. The NAM would support comprehensive review of the NOBO-OBO rules in the context of the Commission's work on proxy plumbing, with a specific emphasis on enhancing transparency between shareholders and the companies in which they invest.

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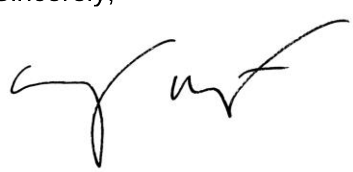
The importance of Form 13F data to businesses and their investors is clear—as is the impact that the proposed rule would have on shareholder-management communication that is critical to the public company model. The NAM respectfully requests that the Commission withdraw the proposed rule in order to preserve the utility of Form 13F information and continue to allow public companies to conduct vital shareholder outreach and education.

On behalf of the NAM and the millions of workers who make things in America, thank you for your attention to these concerns.

Sincerely,



Chris Netram
Vice President, Tax and Domestic Economic Policy

[34] We would also support congressional action to give the SEC authority to require Form 13F reporting more frequently than the current quarterly filing regime.