September 29, 2020

Mrs. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Secretary Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned rule proposal ("Release" or "Proposal") noticed for public comment by the Securities and Exchange Commission ("SEC" or "Commission"). The Release[2] proposes to amend the reporting threshold for Form 13F reports used by institutional investment managers from the current $100 million to $3.5 billion. The Commission argues that since the threshold was set in 1975, the U.S. equities market has grown and that there are now more institutional investors that are subject to the $100 million trigger than in 1975. The Release also would increase the information provided by those institutional investment managers—those that have holdings above $3.5 billion—by eliminating the omission threshold for individual securities, and requiring the managers to provide additional identifying information. Finally, the Release would make certain technical amendments, including to modernize the structure of data reporting and amend the instructions on Form 13F for confidential treatment requests in light of a recent decision of the U.S. Supreme Court.[3]

We oppose the 35-fold increase of the threshold. Our opposition is informed by a simple and compelling fact: the Commission lacks the authority to raise the threshold. Our letter will focus on this by presenting the complete legislative and regulatory history leading up to the enactment of the provisions that required the disclosure of Form 13F information. The Release omits material facts regarding this history, which creates a misrepresentation and misimpression of the Commission's authority. Our letter aims to correct this misimpression by providing the omitted facts.

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[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] *See*, Release No. 34–89290; File No. S7–08–20, 85 Fed. Reg. 46016 (July 31, 2020) *available* at https://www.federalregister.gov/documents/2020/07/31/2020-15322/reporting-threshold-for-institutional-investment-managers.

[3] *See,* Release at 46016.

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We also oppose the 35-fold increase—which would permit nearly 90% of current institutional investment managers to go dark—because it is patently anti-transparency.[4] The information provided by institutional investment managers through the required disclosure of Form 13F (at the current $100 million threshold) is vital information necessary for investors to make informed investment decisions.[5] The essential nature of that information is demonstrated by the fact that—out of the hundreds of forms that SEC's EDGAR system hosts and makes available for download—Form 13F is the 6th most downloaded form.[6] This information is also used by journalists, academics, third-party data, and information processors—all of which augment investors' ability to make more informed decisions. The disclosure of that information also helps issuers to better engage their shareholders, which often could preempt and prevent costly and unnecessary friction between shareholders and the management of an issuer. The information contained in Form 13F also helps regulators study, examine, punish, and deter trading practices by institutional investment managers (and the broker-dealers that serve them) that degrade market quality and harm investors.

COMMENTS

Commission Lacks the Authority to Increase the Threshold 35-fold. The Notice Omits Several Material Facts Regarding the Legislative and Regulatory History that Mandated the Form 13F Disclosures. This Omission Creates a Misimpression of the Commission's Authority.

While the Commission is faithful in representing in the Release the enacted language of Section 13(f) of the Exchange Act as authorizing the Commission "to set reporting threshold in an amount of 'at least $100,000,000 or such lesser amount' by rule"[7] the Commission then proceeds to quote and rely upon a Senate Banking Committee Report (that accompanied the Senate-passed version of the bill) that states that the Commission would have "authority to raise or lower the threshold."[8] The Release also states that another provision of the enacted law affords the Commission broad authority to exempt any institutional investment manager from the requirements of Section 13(f) of the Exchange Act. The Commission cites these two sources: (1) the Senate Banking Committee Report language, and; (2) the provision that authorizes the Commission to exempt any institutional investment manager from the requirements of Section 13(f) as legal authority to increase the threshold 35-fold. But the Release omits several material facts in representing the legislative and regulatory context that gave birth to the provisions requiring the 13F disclosures, and the Commission conveniently mis-reads the exemptive authority

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[4] *See*, generally, Commissioner Allisson Herren Lee's dissent outlining serious shortcomings of the Proposal, including the Commission's questionable use of its exemptive authority (July 10, 2020), *available* at https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10.

[5] *See*, generally, Barbara Roper's Comment Letter in response to the Release, particularly pp.3-8, on the usefulness of the Form 13F data, (September 16, 2020), *available* at https://www.sec.gov/comments/s7-08-20/s70820-7777971-223451.pdf.

[6] *See* Comment Letter in response to the Release by Mary Barth, Graduate School of Business, Stanford University; Travis Dyer, SC Johnson College of Business, Cornell University; Wayne Landsman, Kenan-Flagler Business School, University of North Carolina; and Daniel J Taylor, The Wharton School, University of Pennsylvania, (September 16, 2020), *available* at https://www.sec.gov/comments/s7-08-20/s70820-7793920-223568.pdf.

[7] *See* Release at 46031.

[8] *See* Release at 46031, and also Report to Accompany S.249, Securities Act Amendments of 1975, Sen. Rep. No. 94-75, at p.107, 94th Congress, 1975, *available* at https://bit.ly/3c2Endd.

for self-serving reasons. Both these factors amount to a regulatory malpractice which alone should be grounds for the Commission to withdraw the Release.

Commission Lacks Authority to Increase the Threshold.

Section 13(f) is unambiguous in setting the threshold. The threshold applies to "every institutional investment manager…having an aggregate fair market value…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."[9] Nowhere else in the authorizing language does Congress suggest that the Commission may set the threshold higher than $100,000,000. Congress also set the direction that the Commission may go in changing the threshold, and that is **only downwards**, which would have increased the number of reporting entities. The following legislative and regulatory history only serves to reinforce this directive.

Section 13(f) came about after an extensive study of the institutional investment industry. Starting 1968, Congress, in a joint-resolution, directed the Commission "to make a study and investigation of the purchase, sale and holding of securities by institutional investors of all types in order to determine the effect of such purchases, sales and holdings upon the maintenance of fair and orderly securities markets, the stability of such markets, the interests of the issuers and upon the interests of the public."[10] This multi-year study culminated into a multi-volume report that detailed significant shortcomings in the regulation of the institutional investment industry. The same study also highlighted informational gaps that prevented the Commission from more robustly regulating the markets. Among these recommendations were the request the Commission made to Congress to authorize the Commission to require the disclosure of the portfolio holdings of institutional investors.

Three years following the transmittal of the "Institutional Investor Study Report of the Securities and Exchange Commission" to Congress, both the Senate and the House begun holding hearings on the matter. At a two-day hearing, the U.S. Senate Banking Committee's Subcommittee on Securities heard from several witnesses, including then SEC Chairman Ray Garrett.[11] On Tuesday, August 13, 1974, in the room 5302 of the Dirksen Senate Office Building, the Subcommittee on Securities, Chaired by Senator Harrison Williams, gaveled the start of the hearings. Chairman Williams called the witnesses to order to discuss S. 2234 and S. 2683. He introduced the bills:

> "Both of these bills are designed to assure public disclosure of the securities holdings and large equity transactions of institutional investors. Disclosure by institutional investors of their securities dealings is now generally recognized as being in the best interest of

9 *See* 15 U.S.C. 78m(f)(1), emphasis added.

10 *See* Institutional Investor Study Report of the Securities and Exchange Commission, Summary Volume (March 10, 1971), at v., *available* at https://bit.ly/348Wuuh.

11 Chairman Garrett was accompanied to the hearing by Harvey L. Pitt, Executive Assistant to the Chairman; Lee A. Pickard, Director, Division of Market Regulation; Allan S. Mostoff, Director, Division of Investment Management Regulation; Francis R. Snodgrass, Chief Counsel, Division of Market Regulation; and Martin E. Lybecker, Attorney in the Office of Chief Counsel, Division of Investment Management Regulation.

> the fair and orderly operation of the markets. This recognition is apparent in the bipartisan support for these two bills. S. 2234 was introduced in July of last year by Senators Brooke, McIntyre, Proxmire, Tower, and me. S. 2683 was drafted by the Securities and Exchange Commission and introduced by Senators Brooke, Tower, and me **at the SEC's request**."[12]

The two bills—again, one drafted by Chairman Williams and Senators Brooke, McIntyre, Proxmire, and Tower, and the other drafted by the SEC itself—pursued similar pro-transparency policies but, among other differences, had significantly different threshold levels. The bill drafted by the Senators (S.2234) **set the threshold at $10,000,000** (ten million dollars) for institutional investors, and $5,000,000 (five million dollars) for "any broker, dealer or exchange member with any trading or investment account" that would be subject to disclosure requirements.[13] Whereas the SEC-drafted bill (S.2683) excluded brokers and set the threshold to "at least $100 million, or such other amount not less than $10 million as the Commission may by rule determine having due regard for the public interest, the protection of investors or the maintenance of fair and orderly markets."[14] Note here that the "or such other amount" language is replaced with "or such **lesser amount**" in the final, enacted legislation passed by both chambers.

At the same hearing, Chairman Garrett discussed the different thresholds, explaining that while he, as the Chairman of the SEC, prefers the SEC-drafted version (setting the threshold at $100 million in contrast with the Senate-drafted version which set the threshold at $10 million), he nonetheless stated that that threshold is a starting point and "if we should later discover that we need to expand our database for our own purposes or for the information of the public, we would have the authority to do so."[15] Note that his use of "expand our database" meant requiring the disclosure of holdings by more institutional investors by lowering the triggering threshold from $100 million. In other words, Chairman Garrett testified that the Commission sympathizes with the Senators' policy goals of requiring the disclosure of 13F information by many more institutional investors (which would have been accomplished by setting the threshold at $10 million) but requested to have flexibility in gradually lowering the threshold from $100 million, as needed.

Chairman Garrett was not alone in foreseeing the possibility of requiring the disclosure of 13F information from more institutional investors (*i.e.* those that hold less than $100 million in securities). His colleague, Commissioner Philip Loomis and Commission's staff also anticipated that as the 13F information proves its usefulness, the Commission may require the disclosure from more institutional investors.

At a September 13, 1974, hearing before the House Subcommittee on Commerce and Finance, Commissioner Loomis—referring to the House companion bill (H.R.13986) to the SEC-drafted S.2683—discussed the $100 million threshold echoing the words of Chairman Garrett and

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12 *See* Institutional Investors Full Disclosure Act (S.2234 and S.2683), Hearings Before Subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs, United States Senate, 93rd Congress, 2nd Session (August 13-14, 1974), p.1, *available* at https://bit.ly/3kZxFI1 ("Senate Hearing").

13 *See* Senate Hearing, p.4.

14 *See* Senate Hearing, p.11.

15 *See* Chairman Garrett's testimony, Senate Hearing, pp.21-22.

said, "if we should later discover that we need to expand our database for our own purposes or for the information of the public, we would have the authority to do so, within specified limitations."[16] During the same hearing, the following exchange took place between the Subcommittee's staff Mr. Charles Curtis and Commissioner Loomis:

> Mr. Curtis: You indicate on [page 8 of your testimony] or at least create the impression that additional persons will be called upon for reports only if the Commission should later discover that it needs to expand this data base. It is a suggestion to me that the Commission does not intend to set that portfolio level at a lesser amount, although the statute would authorize you to take it down to a $10 million trigger. Is that a correct impression from your comments?
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> Mr. Loomis: I believe that is correct. I think we will start with the $100 million which will sweep in by no means the whole population but the majority or a substantial majority of the amounts of holdings involved. Then, if we discover as a result of experience **we need to go further, we will.** To start, we wouldn't want to expand the job before we begin it.[17]

Later, in another exchange between Mr. Curtis and Commissioner Loomis, Mr. Curtis re-affirms the Committee's understanding that were the Commission to change the thresholds that trigger reporting, the Commission would only go in the direction that **expands** the database and increases the number of reporters. In the exchange, Mr. Curtis asks to Commissioner Loomis, "You have already indicated that the Commission's current intention is to leave the program operative at the $100 million portfolio level **depending on a subsequent determination as to whether the database needs to be expanded**. Has the Commission made a similar determination in estimating whether it will require these reports at more frequent intervals than a quarterly basis, or has there been any determination as to what will be the frequency of reporting called for?" To which, Mr. Loomis responds, "I think we would start with a quarterly basis and see what we get and find out whether some of it should be provided more often, depending on the nature of it."[18] In this hearing

Finally, as further indication that the $100 million threshold could only change in the direction that increases the number of institutional investors that must disclose 13F information, Commissioner Loomis submitted for the House Subcommittee hearing a Memorandum prepared by the Commission's staff that, among other analysis, included the following statement: "The Commission would be given rule-making authority to reduce the $100 million test, but in no case to an amount less than $10 million, having given reasonable consideration to the public interest, the protection of investors, the maintenance of fair and orderly markets, and the fair and equitable

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[16] *See* Institutional Disclosure And Sales of Investment Company Advisers (H.R.10570 and H.R.13986), Hearing Before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, 93rd Congress, 2nd Session (September 13, 1974), p.27, *available* at https://bit.ly/3cFwef1 ("House Hearing").

[17] *See* House Hearing, p.44

[18] *See* House Hearing, pp.44-45.

treatment of affected persons."[19] Neither in this staff memo nor in the rest of the Senate or House hearings, there is any indication by Members of Congress (or their staff) or Commissioners (or Commission staff) that the Commission is authorized to raise the reporting threshold above $100 million.

To sum-up: Congressional managers of the 13F disclosure bills; their staff; SEC Chairman and at least one other Commissioner, and, finally; SEC staff, all understood that the $100 million is a starting point, and should that threshold undergo any changes, the only direction the Commission is authorized to go is the one that increases the number of reporters. Given this history, and the fact that the Senate wanted to set the threshold at $10 million (ten million) while the Commission requested $100 million (hundred million) it is no surprise that during the Conference that reconciled many differences among multiple other bills that comprised the Securities Act Amendments of 1975, the operative language for the Section 13(f) threshold changed from the (SEC-preferred) "at least $100 million, or such other amount not less than $10 million as the Commission may…" to "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…." This latter language became the law and has remained unchanged since 1975.

The Commission is Misreading and Misrepresenting the Exemptive Authority

As noted above, in addition to the Senate Report language,[20] the Commission in the Release also cites the general exemptive authority under Section 13(f)(3) that—in the view of the Commission—grants the Commission authority to exempt nearly 90% of current institutional investors from the 13F disclosures. Given the legislative and regulatory history laid out in the preceding pages of this letter, it is preposterous to suggest that Congress passed a law requiring disclosure of certain information from (then) over three hundred entities[21] but somehow also authorized the Commission to cut that number down to 30, should the Commission feel like it. The legislative history supports our contention and disagrees with the Commission's current reading of the 13(f)(3) exemptive authority.

At the August 13, 1974, Senate hearing noted above, Senator Wallace Bennett had the following exchange with SEC Chairman Garrett:

> "Senator Bennett: It has been suggested that accounts over which a bank has no investment discretion, such as the custodial accounts, should be exempt from reporting. Do you have any comment?
>
> Mr. Garrett: If it has no investment authority or responsibility and gives no investment advice, then I would say yes."[22]

[19] *See* House Hearing, p.29.
[20] *See* fn. 8, *supra.*
[21] *See*, for example, House Hearing, p.44, noting that the disclosure requirements would apply to 300 separate entities.
[22] *See* Senate Hearing, p.39.

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These and similar understanding of the exemptive authority—that limits the use of such authority to particular facts and circumstances—were also expressed by various industry representatives over the course of the two days of the Senate hearings.[23]

At the September 13, 1974, House hearing noted above, the Commission's staff—in their memorandum that analyzed the differences between the S.2683 (*i.e.,* SEC-drafted bill) and the H.R.13986—explained the need for the exemptive authority and the kinds of circumstances under which such authority may be used. The Commission memorandum reads:

> "H.R. 13986 provides exemptive authority to the Commission with respect to persons defined as investment managers as a class. S. 2683 would provide such exemptive authority over any investment manager, any security, any class of investment managers or any class of securities. The omission in H.R. 13986 of exemptive authority over any individual manager, any security or any class of securities may raise awkward problems. One of the potential problems which is not precisely foresee able is that, since the security holdings reporting provisions are drafted broadly in an effort to include all securities holdings, it is quite possible that certain securities holdings may be of little or no interest to the Commission and to the public, and the Commission may wish to delete such securities from the holdings reporting provisions. **For example, it may be desirable to exempt the securities of foreign issuers held by foreign institutions.** Therefore, it would be desirable to change that exemptive authority to include authority ever any investment manager, any security, or any class of securities."[24]

Nothing else in the legislation and regulatory history we have examined suggest that Congress or the Commission expected or understood that the Section 13f(3) exemptive authority would permit the Commission to reduce the number of entities that disclose 13F information by nearly 90%.

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Other than a half-a-sentence mentioning of the Commission's 1968-71 study, the Release omits the entire legislative and regulatory history recounted above. This omission of material facts and analyses creates a misimpression of the Commission's authority to change the threshold, which amounts to a regulatory malpractice.

<u>Conclusion</u>

The Commission must withdraw this patently anti-transparency and anti-investor Proposal. Given the legislative and regulatory backdrop recounted above, we reiterate that the Commission

[23] *See* Senate Hearing, p.68; p.70; p.75; p.78; p.202, etc.
[24] *See* Commission's memorandum reproduced in the House Hearing, p.30 (emphasis added).

lacks the authority to raise the threshold 35-fold and the Commission would be abusing the exemptive authority found under Section 13(f)(3) if it does so.

Sincerely,

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