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## SEC Proposes to Raise 13F Reporting Threshold



On July 10, the Securities and Exchange Commission (SEC) proposed to amend Form 13F<sup>1</sup> to raise the reporting threshold to \$3.5 billion from the current threshold of \$100 million. In addition, the Proposal would likely provide broader access to confidential treatment of filers' Form 13F information. Form 13F is a public report, filed on a quarterly basis by "institutional investment managers" that exercise investment discretion over \$100 million of "13(f) securities," which are primarily listed U.S. equities.<sup>2</sup> Managers in scope include U.S. and non-U.S. organizations, regardless of whether registered with the SEC or exempt.

The Proposal cites the legislative history behind Form 13F, and specifically its aim to provide the SEC with transparency into the investment activities and holdings of "the largest institutional investment managers." The reporting threshold, however, has not changed since Form 13F's adoption in 1978. "Since then, the overall value of U.S. public corporate equities has grown over 30 times (from \$1.1 trillion to \$35.6 trillion)," as the SEC noted in its statement,<sup>3</sup> while "the relative significance of managing \$100 million has declined considerably." The Proposal would also require a review of the reporting threshold every five years.

In proposing relief for smaller managers from the public disclosure of their portfolio securities, the SEC cites the costs of "front-running and copycatting, which may" hinder their performance. Among other data points, the Proposal cites an academic study of hedge funds,<sup>4</sup> which suggests that such "funds experience decreased performance after Form 13F disclosure." The study suggested that the decreased performance observed was concentrated among certain strategies, including "funds that hold more illiquid stocks, have lower turnover rates, have greater portfolio concentration, [or] are in more competitive investment styles...."

While managers currently may request confidential treatment from the SEC to shield their Form 13F information from public disclosure, historically, such requests have been met with limited success. The Proposal would ease the standard<sup>5</sup> applied to certain of such requests for confidential treatment from one of “substantial harm”<sup>6</sup> to simple “harm”<sup>7</sup>, and, if passed as proposed, managers likely would be more successful in pursuing confidential treatment.

Comments are due within 60 days of the Proposal’s publication in the Federal Register.

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<sup>1</sup> *Reporting Threshold for Institutional Investment Managers* (<https://www.sec.gov/rules/proposed/2020/34-89290.pdf>), Release No. 34-89290 (July 10, 2020) (the Proposal).

<sup>2</sup> *Frequently Asked Questions About Form 13F* (<https://www.sec.gov/divisions/investment/13ffaq.htm>): “A list of these securities - called the Official List of Section 13(f) Securities - is available shortly after the end of each calendar quarter on the SEC’s website.... The Official List of Section 13(f) Securities primarily includes U.S. exchange-traded stocks (e.g., NYSE, AMEX, NASDAQ), shares of closed-end investment companies, and shares of exchange-traded funds (ETFs).”

<sup>3</sup> *SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect*

*Today’s Equities Markets* (<https://www.sec.gov/news/press-release/2020-152>), SEC Press Release (July 10, 2020).

<sup>4</sup> Proposal, at 19, citing Shi, Zhen, *The Impact of Portfolio Disclosure on Hedge Fund Performance* (2017), the Journal of Financial Economics, Vol. 126, at 38.

<sup>5</sup> The standard would be changed for consistency with a 2019 Supreme Court case (*Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019)), which addressed requests for confidential treatment from U.S. government agencies.

<sup>6</sup> Instruction 2.d. of Form 13F currently requires a manager to “demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the Manager’s competitive position; show what use competitors could make of the information and how harm to the Manager could ensue.” See also Form 13F Confidential Treatment Requests Based on a Claim of Ongoing Acquisition/Disposition Program (<https://www.sec.gov/divisions/investment/guidance/im-guidance-2013-08.pdf>), IM Guidance Update (October 2013).

<sup>7</sup> Proposed instruction 2.d of Form 13F would require a manager to: “demonstrate that the information is both customarily and actually kept private by the Manager, and how release of this information could cause harm to the Manager.”

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