SEC PROPOSES AMENDMENTS TO FORM 13F, PROPOSES INCREASING 13F REPORTING THRESHOLD

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U.S. Asset Management and Investment Funds Alert

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On 10 July 2020, the Securities and Exchange Commission (SEC) proposed amending Form 13F and Rule 13f-1 to raise the reporting threshold at which institutional investment managers are required to complete and file Form 13F from US$100 million to US$3.5 billion in applicable securities (13(f) Securities).[1] This is the first increase in the reporting threshold since Section 13(f) of the Exchange Act of 1934 (Section 13(f)) was passed in 1975, and it will provide some welcome relief to smaller and mid-sized managers.[2] According to the SEC, the proposed amendments will update the Form 13F reporting threshold "to a level that furthers the statutory goal of enabling the SEC to monitor holdings of larger investment managers while reducing unnecessary burdens on smaller managers."[3] As noted in the SEC press release, the proposed threshold is currently expected to continue to capture approximately 90 percent of the dollar value of transactions in 13(f) Securities (including exchange-traded funds (ETFs) and closed-end funds), while relieving approximately 90 percent of current filers of the obligation to file Form 13F.

SECTION 13(F) AND RULE 13(F)-1

Section 13(f) requires institutional investment managers to file a report with the SEC if the accounts over which the investment manager exercises investment discretion hold 13(f) Securities that have an aggregate fair market value on the last trading day of any month of at least $100 million. The SEC's Official List of Section 13(f) Securities is published and maintained on the SEC's website.[4] The SEC implemented the reporting requirement of Section 13(f) by adopting Rule 13f-1 and Form 13F in 1978. The information reported on Form 13F is filed quarterly and becomes publicly-available upon filing, unless the SEC's Division of Investment Management has granted an investment manager's request for confidential treatment and allowed the filing of Form 13F CTR.[5]

INCREASING THE FORM 13F THRESHOLD

Section 13(f) was passed by Congress in 1975 to capture investment activity and holdings data from larger investment managers in order to better maintain fair and orderly securities markets.[6] When Form 13F was subsequently adopted in 1978, the threshold for triggering the filing was set at US$100 million; however, the overall value of U.S. public corporate equities has since grown from US$1.1 trillion to US$35.6 trillion, and the relative significance of the original US$100 million threshold has declined considerably. In the proposing release for the amendments to Form 13F, the SEC stated that raising the reporting threshold to US$3.5 billion is intended to establish a reporting threshold that proportionally reflects the same market value of U.S. equities that US$100 million represented in 1975 when Congress enacted Section 13(f). The new threshold will therefore provide meaningful regulatory relief to smaller investment managers who are currently subject to Form 13F reporting, while continuing to require disclosure of over 90 percent of the dollar value of the securities currently reported.[7]

ADDITIONAL PROPOSED CHANGES

In addition to raising the reporting threshold, the proposed amendments would eliminate the omission threshold for Form 13F that currently allows an investment manager to omit holdings of fewer than 10,000 shares in a specific 13(f) Security or less than US$200,000 in principal amount of convertible debt securities and less than US$200,000 in aggregate fair market value. As a result, an investment manager that is required to file Form 13F will be required to report all of the holdings of 13(f) Securities in accounts over which the investment manager exercises investment discretion.

The proposal also seeks to make an important amendment to the instructions on Form 13F regarding confidential treatment requests. Specifically, the proposed amendments would require investment managers seeking confidential treatment for information contained in Form 13F to show (i) that the information is both customarily and actually kept private by the investment manager, and (ii) how the release of such information could cause harm to the investment manager. This important change is designed to implement the new standard recently established by the U.S. Supreme Court for confidential treatment of information.[8]

IMPACT OF CHANGES TO INVESTMENT MANAGERS

The proposed amendments will have little impact on larger investment managers, as they will continue to file an amended version of Form 13F and will likely have procedures and systems inplace to capture de minimis holdings for reporting; however, smaller and mid-sized investment managers, both foreign and domestic, that will no longer be required to file Form 13F will be relieved of a significant regulatory and operational burden. In addition, large non-U.S. investment managers that primarily trade in non-U.S. markets and have relatively limited activity in 13(f) Securities will also enjoy the reduced compliance and operational burden. However, many sponsors and managers of ETFs and closed-end funds that rely on Form 13F to identify their shareholders will have more limited information available, even if, as noted in the SEC's press release, the proposed threshold is currently expected to continue to capture the vast majority of the dollar value of transactions in 13(f) Securities.

PUBLICATION AND COMMENT PERIOD

The proposed amendments have been published on the SEC's website and will also be published in the Federal Register. Once published in the Federal Register, there will be a 60-day comment period during which we expect various investment advisers, industry groups, issuers, and others to submit public comments.

FOOTNOTES

[1] SEC Release No. 34-89290 (July 10, 2020).

[2] *See* Section 13(f) of the Securities Exchange Act of 1934.

[3] *See* Press Release, SEC, SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect Today's Equities Markets (July 10, 2020).

[4] *See* SEC, Official List of Section 13(f) Securities, 13(f) Securities primarily include U.S. exchange-traded stocks

(e.g., NYSE, AMEX, NASDAQ), shares of closed-end investment companies, and shares of ETFs. Certain convertible debt securities, equity options, and warrants are also on the Official List of Section 13(f) Securities and may be reported; see also SEC, Frequently Asked Questions About Form 13F (Feb. 24, 2020).

[5] Requests for confidential treatment of information in a Form 13F filing are rarely granted.

[6] *See supra* note 2.

[7] *See supra* note 2.

[8] *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019). The Supreme Court held in Food Marketing Institute that where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is considered "confidential" within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

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