Public Statement

Statement on the Proposal to Substantially Reduce 13F Reporting

Commissioner Allison Herren Lee

July 10, 2020

The Commission proposes today to increase the reporting threshold by 35 times for institutional investment managers that must report equity holdings on Form 13F, thus eliminating visibility into portfolios controlling $2.3 trillion in assets.[1] This proposal joins a long list of recent actions that decrease transparency and reduce both the Commission's and the public's access to information about our markets.[2]

I'm unable to assess the wisdom of today's proposal because it lacks a sufficient analysis of the costs and benefits. The costs of losing transparency are glossed over in brief narrative form and largely discounted. And to the extent the proposal purports to capture benefits in the form of cost savings, those cost savings rest largely on new Paperwork Reduction Act (PRA) estimates of the costs of compliance. The Commission's legal obligation to do a thorough economic analysis under the National Securities Markets Improvement Act, however, cannot be satisfied by simply substituting PRA estimates.[3] What's more, the asserted cost savings derived from the PRA estimates in the final draft of this proposal reflect a *quadrupling* of our current estimate using assumptions that depart substantially from those used by the Commission for over a decade.

I am concerned that the projected cost savings in today's proposal are greatly overstated and wholly inconsistent with the Commission's past analysis—and, importantly, that the actual cost savings do not justify the loss of visibility into portfolios controlling $2.3 trillion in assets. Additionally, the Commission's assertion of authority to raise the threshold conflicts with the plain text in the Exchange Act that requires us to collect the information. Specifically, section 13(f)(1) withholds authority from the Commission to raise the threshold, and the proposal fails to address that conflict.

Reducing Transparency

Today's proposal would eliminate access to information about discretionary accounts managed by more than 4,500 institutional investment managers representing approximately $2.3 trillion in assets.[4] Short shrift is given to the costs of the proposed change and the ways in which the Commission and the public use the information. In fact, just last year the National Investor Relations Institute wrote a detailed case for *greater* transparency and more timely access to 13F filings, explaining how critical the data is for issuers in promoting "greater corporate-investor engagement."[5] Moreover, it states that greater transparency "is of particular concern to *smaller issuers* that cannot afford to pay for stock surveillance firms that analyze trading patterns and try to determine which investors are buying or selling shares."[6] The proposal does not address this concern, discuss potentially reduced shareholder engagement, or balance the interests of issuers, and particularly small issuers, against the population

of institutional investment managers affected by this proposal, *i.e.*, those with discretion over between $100 million and $3.5 billion.

In addition, there is a recognition that new uses of the data have developed among academics, market researchers, and others, but no discussion or estimates of the costs to them or the public. There is also very little discussion of the costs to the Commission—an area where we should possess a depth of information—of losing a portion of the data.[7] We may obtain some of this information during the comment process, but we are obligated to do our own analysis at the proposal stage in order to explain our rationale for the policy choices made and permit commenters to weigh in as to the merits of our analysis.

The release states a belief that the proposal will likely "enhance competition by lowering the cost to participate in the market" and benefit investors if such savings are passed through to investors. I support identifying ways to help smaller managers compete effectively, and to target their resources in ways that benefit investors.[8] But, it is difficult to credit the possibility that the relatively small savings for this particular population of managers could advance either goal in any meaningful way.[9]

Projected Savings

Setting aside the fact that a PRA estimate is an insufficient substitute for economic analysis, the new PRA estimate contains numerous infirmities. As recently as 2018, the Commission provided an estimate of the total compliance costs associated with Form 13F in order to renew our authority to collect the relevant information.[10] That estimate—approximately $31.2 million—reflected the Commission's assessment of the total burden associated with Form 13F reporting for the entire industry, and was broadly consistent with the Commission's estimate of the 13F burden over a period of more than a decade.[11]

The proposal abruptly takes a new approach to the PRA estimate, increasing it to roughly $113.6 million. The nearly fourfold increase in estimated burden is driven in large part by new assumptions about the types of professionals involved in the preparation of Form 13F filings.[12] Specifically, the Commission now assumes that each filing requires *equal time* from a compliance attorney, a senior programmer, and a compliance clerk, resulting in a hefty increase in the hourly cost estimate.[13]

This new estimate, in addition to being impossible to reconcile with past Commission estimates, is difficult to square with the substantive requirements of Form 13F. The form generally requires a straight-forward list and amount of securities over which the manager exercises discretion, as well as whether the manager has voting authority over those securities.[14] To avoid confusion and to simplify reporting, the Commission even publishes a list on a quarterly basis of all reportable "Section 13(f) securities."[15] Doubtless there are questions that may arise that require one-off assistance from a compliance attorney or filing issues that warrant the occasional involvement of a programmer, but one would expect such issues to be an exception, not the norm.

Further, the revised burden estimate suggests that Form 13F presents a greater per-filing burden than Form N-PORT, a highly questionable conclusion.[16] Form N-PORT requires considerably more complex information about investment company holdings, and the Commission adopted those estimates after considering substantial input regarding costs from industry participants.[17]

I'm concerned that the approach to revising the burden estimate for Form 13F relies on assumptions that vastly overstate the complexity and resulting burden of the reporting requirement. The explanation of the basis for these new assumptions is a reference to "outreach to managers."[18] But more detail regarding this outreach is needed in order to ascertain whether the analysis is sufficiently rigorous and methodologically sound, especially in light of the heavy reliance on the analysis in justifying the proposal. Had the proposal stuck with the prior PRA estimate, the grand total cost savings to weigh against the reduced transparency would have amounted to roughly $4,000-$5,000 per institutional investment manager.[19]

Statutory Authority under Section 13(f)

Finally, the release also does not address substantial uncertainty as to whether the Commission has the authority to pursue today's proposed changes. The enabling statute, at section 13(f)(1), provides no support for increasing the reporting threshold. To the contrary, the relevant text provides:

Every institutional investment manager . . . which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) . . . having an aggregate fair market value on the last trading day in any of the preceding twelve months 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, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter. [20] (emphasis added)

The text is clear: Congress set a statutory reporting threshold at $100 million, and the Commission has the authority to lower it.[21] The proposing release does not wrestle with this language at all, and asserts uncritically that Section 13(f)(1) provides us with the relevant authority.[22] Congress appears to have said otherwise, setting specific limits on the Commission's authority in that respect.

The release also seems to suggest (without directly stating) that the Commission's exemptive authority in Section 13(f)(3) empowers us to increase the reporting threshold.[23] However, using exemptive authority in this way would vitiate the limit that Congress placed on our authority in the plain language of Section 13(f)(1).[24] We would, in effect, use our exemptive authority to rewrite the statute to reflect the opposite meaning from its plain language.[25] I am concerned by the brevity with which this issue is treated in the release.

I sincerely appreciate the efforts of the staff in the Division of Investment Management and the Division of Economic and Risk Analysis in implementing the Commission's policy agenda. I am not averse to an objective and rigorous consideration of whether the reporting threshold for Form 13F should be revised to better reflect current markets and balance competing concerns between transparency and cost. Unfortunately, however, because of the concerns identified above, I am unable to support this proposal.

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[1] *See* Reporting Threshold for Institutional Asset Managers, Exchange Act Release No. [Forthcoming] (July 10, 2020) ("13F Proposal"). Section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act") requires certain institutional investment managers to report to the Commission and the public information regarding the securities over which they exercise investment discretion. *See* 15 U.S.C. § 78m(f). The current threshold generally requires that any manager that exercises investment discretion with respect to securities with an aggregate fair market value of at least $100 million report certain information about those securities on Form 13F. *Id.* Congress codified that threshold in Section 13(f) of the Exchange Act as part of the Securities Acts Amendments of 1975. *See* Pub. L. No. 94-29, § 10 (1975) ("1975 Amendments").

[2] *See, e.g.*, Amendments to Financial Disclosures about Acquired and Disposed Businesses, Securities Act Release No. 10786 (May 21, 2020) (reducing the time period for which companies must provide financial statements for acquired and disposed businesses and increasing the circumstances in which companies may provide abbreviated financial information or omit financial statements); Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities, Securities Act Release No. 10762 (Mar. 2, 2020) (expanding the circumstances in which issuers of registered debt securities offerings that are guaranteed or collateralized by affiliates may skip the requirement to provide audited financial statements for those affiliates and reducing the amount of alternative disclosure that companies must provide in lieu of financial statements); Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Securities Act Release No. 10750 (Jan. 30, 2020) (proposing to eliminate disclosure items 301(Selected Financial Data), 302 (Supplementary Financial Information), 303(a)(4) (Off-balance sheet arrangements), and 303(a)(5) (Tabular disclosure of contractual obligations)); Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 87783 (Dec. 18, 2019) (proposing to dramatically reduce the disclosure required by resource extraction issuers, compared the requirements of the Commission's 2016 rule and

compared to international standards, by eliminating the requirement for contract-level disclosure, raising the de minimis threshold below which reporting is not required, and expanding other exemptions from compliance, including fully exempting smaller reporting companies and emerging growth companies from the rule); Investment Company Liquidity Disclosure, Investment Company Act Release No. 33142 (June 28, 2018) (rescinding before implementation the requirement in Form N-PORT that funds publicly disclose aggregate liquidity classification information about their portfolios).

[3] *See* National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106(b) (Oct. 11, 1996) (adding a requirement to the Exchange Act for the Commission to consider, when the Commission is engaged in rulemaking, whether an action will promote efficiency, competition, and capital formation). In this regard, I note that the proposal, at a total of 53 pages, does not even contain a separate section for economic analysis. Rather, it contains a number of (mostly narrative) assertions scattered throughout the descriptive portions of the release. This does not comprise a sufficient economic foundation for the proposed rulemaking or a sufficient basis for public comment regarding the Commission's view of the costs and benefits.

[4] *See* 13F Proposal, *supra* note 1, at 16-17.

[5] *See* National Investor Relations Institute, The Case for 13F Reform at 1 (Sept. 25, 2019), https://www.niri.org/NIRI/media/NIRI/Advocacy/NIRI-Case-for-13F-Reform-2019-final.pdf ("NIRI Letter"). *See also See* Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934 (Feb. 1, 2013), https://www.sec.gov/rules/petitions/2013/petn4-659.pdf (requesting that the Commission shorten the reporting delay for Form 13F to ensure that investors receive sufficiently timely access to holdings information to objectives underlying Section 13(f)).

[6] *Id.* at 2 (emphasis added). The only position from this letter mentioned in the release is NIRI's support for legislation that would increase the reporting threshold to $450 million to account for the effects of inflation. *See* 13 Proposal, *supra* note 1, at 13, fn. 31. Importantly, however, the legislation would also make other changes to increase both the timeliness and frequency of 13F reporting to facilitate greater transparency. *See* NIRI Letter, *supra* note 5, at 2-3. The context of the letter makes clear that NIRI's acquiescence to an increased reporting threshold is primarily because of the other changes that would simultaneously increase transparency for issuers and other market participants. Those changes to increase transparency, however, are absent from today's proposal, and the proposed increase to the reporting threshold far exceeds the level anticipated by NIRI's letter.

[7] 13F Proposal, *supra* note 1, at 21. As to the public use of 13F data, the release states simply that the effects "would depend on their particular use of this data." *Id*. at 24. I also note that there is insufficient discussion of countervailing considerations or solicitation of input from users of the data. The release suggests that other tools, such as N-PORT filings and the still non-existent consolidated audit trail ("CAT"), could mitigate the effects of the proposed changes, but provides no analysis as to the actual utility of those alternatives or the extent of overlap in the relevant data. And of course, information that might one day be available to the Commission from the CAT will not be available to the public.

[8] The Commission should consider, for example, reversing course on the guidance and proposed rulemaking regarding proxy advisors. *See* Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Investment Advisers Act Release No. 5325 (Aug. 21, 2019); Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 87457 (Nov. 5, 2019). While the Commission has failed to demonstrate the existence of any concrete problem that we are attempting to fix, we nonetheless propose to impose substantial new costs on advisers of all sizes both directly through our guidance and indirectly through increasing costs for proxy advisors.

[9] In light of the size of the managers subject to the requirement, the potential savings of today's proposal are relatively small regardless of whether one uses the existing PRA estimate or the proposed increase to it.

[10] *See* Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Form 13F, OMB Control No. 3235-0006 (Oct. 5, 2018), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201804-3235-001.

[11] *See* Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Form 13F, OMB Control No. 3235-0006 (June 9, 2015), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201412-3235-004 (estimating the burden at approximately $26.1 million); Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Form 13F, OMB Control No. 3235-0006 (Apr. 23, 2012), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201203-3235-007 (estimating the burden at approximately $28.4 million); Notice of OMB Action, Form 13F, Extension Without Change of a Currently Approved Collection, OMB Control No. 3235-0006 (Aug. 19, 2009), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200904-3235-003 (revising the 2006 estimate only with respect to total estimated burden hours—401,178 instead of 335,090—due to an increase in the number of filers); Supporting Statement: Form 13F, OMB Control No. 3235-0006 (Sept. 18, 2006), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200609-3235-002 (estimating the burden at approximately $17.97 million).

[12] *See* 13F Proposal, *supra* note 1, at 42-44 (stating that "[t]he current burden estimates for Form 13F assume that all of the functions are carried out by a compliance clerk, whereas we understand that additional professionals are typically involved," but providing no basis for the assumption that time is split equally between an attorney, senior programmer, and compliance clerk). While I recognize that the PRA analysis typically reflects an *estimate* of the compliance costs and that precision cannot be expected, the heavy reliance on this new estimate as a basis for the proposed changes warrants greater scrutiny.

[13] Previous estimates have attributed the work to a compliance clerk, which, according to our most recent estimate, entails an hourly burden of $71. By changing the assumption to assume equal time spent by a compliance attorney ($368/hour) and a senior programmer ($334/hour), the estimate has increased from $71 per hour to $257 per hour. *See id.*

[14] *See generally* Form 13F, https://www.sec.gov/pdf/form13f.pdf.

[15] *See* Official List of Section 13(f) Securities, https://www.sec.gov/divisions/investment/13flists.htm.

[16] The Commission estimated an average annual per-fund burden associated with Form N-PORT at $46,704. *See* Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 30b1-9 and Form N-PORT, OMB Control No. 3235-0730 (Jan. 24, 2017), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-3235-028. While that estimate exceeds the new *annual* burden associated with Form 13F, which, according to today's new estimate is approximately $22,333 per filer, it nonetheless results in a greater *per-filing* burden. Investment companies must submit Form N-PORT for each month of the year, while Form 13F is filed only quarterly. This results in a per-filing burden for Form N-PORT of $3,892, and a per-filing burden for Form 13F of $5,583. Given the heightened complexity of certain information required to be filed on Form N-PORT and the investment professionals involved in producing that information, this outcome seems unlikely.

[17] *See generally* Form N-PORT, https://www.sec.gov/files/formn-port.pdf. *See also* Investment Company Reporting Modernization, Investment Company Act Rel. No. 32314 at 433-441 (Oct. 13, 2016) (discussing comments received on the proposed PRA analysis relating to N-PORT and how relevant changes in the final requirements affect the estimate).

[18] *See* 13F Proposal, *supra* note 1, at 42.

[19] The release states that there are currently 5,089 managers required to report, with an existing total burden estimate of $31,186,425.60. *See* 13F Proposal, *supra* note 1, at 42-44. This results in an average per-manager burden of approximately $6,130. However, the release also acknowledges that the largest managers incur higher compliance costs on a per manager basis. *Id.* at 19. While the 550 managers captured by the proposed new threshold comprise only 10.8% of the existing managers required to report, they cover approximately 90.8% of the currently-reported assets. *Id.* at 16-17. If we assume that such managers account in the aggregate for 25-40% of the existing compliance costs—a reasonable assumption given the relative size of such managers—then the savings that will accrue to newly excluded managers will range from $4,122 to $5153. The following formulas reflect assumptions that the largest/remaining managers account for 40% and 25% of the existing burden

estimate, respectively: ($31,186,425.60 x .60 / (5089 existing filers – 550 remaining filers)) and ($31,186,425.60 x .75 / (5089 existing filers – 550 remaining filers)).

[20] *See* Section 13(f)(1). For readability purposes, I have omitted certain language from the statute that does not bear directly on today's proposal.

[21] This view is bolstered by the legislative history and an analysis of the rest of Section 13(f). S.249, the bill that was eventually adopted as the 1975 Amendments, proposed to implement Section 13(f) with language that would have allowed the Commission to adjust the $100 million threshold to "such other amount" by rule. *See* S.249 (1975). The companion bill in the House of Representatives—H.R. 4111—contained the more limiting phrase "such lesser amount" with respect to the Commission's authority to set the reporting threshold. After each chamber passed its own bill, the conference committee adopted the House's language, limiting the Commission to lowering the statutory threshold.

Likewise, other parts of Section 13(f) demonstrate that Congress knew how to provide broader authority when it intended to do so. Congress' use of "lesser amount" in Section 13(f)(1) is in contrast to its use of "other amount" in Section 13(f)(1)(E), which was adopted as part of the same legislation. In Section 13(f)(1)(E), Congress empowered the Commission to require disclosure by institutional investment managers regarding certain large transactions "having a market value of at least $500,000 **or such other amount** as the Commission, by rule, may determine . . . ." (emphasis added). *See* 15 U.S.C. 78m(f)(1)(E). Here, the import of the phrase "such other amount" is to provide Commission with broad authority to either increase or decrease the threshold set by Congress. The Commission's interpretation of Section 13(f)(1) appears to conclude that "lesser amount" means the same as "other amount"—a conclusion at odds with the plain meaning of the words. The presumption of consistent usage in statutory construction provides that "where [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *See* Antonin Scalia & Bryan A. Garner, Reading Law 170 (2012).

[22] The release presents only a portion of the relevant text, asserting: "Section 13(f)(1) authorizes the Commission to set the reporting threshold in an amount 'of at least $100,000,000 or such lesser amount' by rule." *See* 13F Proposal, *supra* note 1, at 7. This suggests that the Commission's rulemaking authority with respect to the threshold is subject to a *lower bound* of $100 million, *i.e.*, that Congress required a threshold of *at least* $100 million. In fact, however, the context makes clear that the reference to "at least $100 million" is a description of the statutory threshold: any manager exercising discretion over securities with an aggregate fair market value greater than or equal to $100 million must file reports with the Commission, unless the Commission designates by rule a lower threshold.

[23] Section 13(f)(3) provides: "The Commission, by rule, or order, 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." Given Section 13(f)(1)'s omission of any reference to authority for the Commission to increase the reporting threshold—and, in fact, substantial reason to believe that authority was withheld—it stands to reason that the Commission can only resort to this admittedly broad exemptive authority to support today's proposal. In short, the Commission appears to take the position that we have authority to exempt from the reporting requirement in Section 13(f)(1) the "class of institutional investment managers" that exercise discretion over securities with an aggregate value of less than $3.5 billion.

[24] This interpretation would result in Congress' choice of the words "lesser amount" having essentially no effect. *But see* Lowe v. SEC, 427 U.S. 181 at n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."). *See also* Scalia and Garner, *supra* note 21, at 174 ("If possible, every word and every provision is to be given effect . . . None should be ignored. None should be needlessly given an interpretation that causes it to duplicate another provision or to have no consequence.").

[25] The release also provides a passing citation to Section 36 of the Exchange Act as a source of authority for today's proposal. *See* 13F Proposal, *supra* note 1, at 48. Section 36 provides the Commission with overarching exemptive authority relating to the requirements in the Exchange Act. *See* 15 U.S.C. 78mm. Reliance on Section

36, however, would raise many of the same questions about the Commission's ability to use exemptive authority in a way that evades statutory restrictions on our rulemaking authority.