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# Going Dark: SEC Proposes Amendments to Form 13F; Would Significantly Reduce Already Limited Transparency of Activist Ownership

The SEC has proposed an amendment to Form 13F that would exempt from filing all money managers holding less than $3.5 billion of "13(f) securities." The threshold would apply without regard to the fund's overall size or total assets under management. Increasing the threshold to $3.5 billion from the current cut-off of $100 million would slash the number of reporting filers by 90%, from 5,089 to 550, effectively abolishing Form 13F as a reporting system for most investors, including many activist and event-driven hedge funds, and preserve it only for the largest index funds and asset managers.

Form 13F generally requires investment managers holding more than $100 million of such 13(f) securities (typically Exchange-traded equity securities, certain options and warrants, shares of closed-end investment companies and certain convertible debt securities) to disclose their holdings within 45 days of the end of each quarter, and is often the primary means by which investors, companies and other market participants first learn or verify that an activist hedge fund is accumulating or has accumulated a significant (but less than 5%) position in a target company's stock. Because many activists do not own $3.5 billion of 13(f) securities, adoption of this revision would permit them to "go dark" and make it significantly more difficult to determine whether an activist, or a "wolf pack" of activists, owns a stake in a company. Indeed, as we have previously discussed, activist "tipping" could well result in only the wolf pack—and not the target company or other shareholders—being aware of the ownership stake until the moment that the activist strike occurs.

In proposing the revision, the SEC has suggested that the new threshold will further the primary goals of Form 13F, including gathering data about investment activities of institutional investment managers; facilitating consideration of the impact of these managers on the securities markets; and increasing investor confidence in the integrity of the securities markets. It is difficult to see how eliminating the limited transparency into ownership by activist and other hedge funds, and instead increasing the percentage of 13(f) information provided by "price-taking" index funds rather than smaller active funds that set prices, will further those goals. Contrary to both the original intent of Rule 13(f) and the current market use of 13(f) information, adoption of the SEC's current proposal would impede companies and their shareholders from promptly identifying the company's institutional investors, hinder shareholder/public company engagement, and increase the potential for market abuse by sophisticated investors who wish to accumulate shares on a stealth basis.

The SEC asserted that the benefits of the proposed change include potential annual savings of approximately $15,000-$30,000 per "smaller" manager, and reduction of indirect costs to "smaller" managers such as front running and copycatting. The "smaller" managers that would save these amounts and be relieved of this disclosure obligation would reportedly include some of the most well-known hedge fund names (such as David Tepper, David Einhorn, and John Paulson) and other activist investors, as well as funds whose overall assets under management are far in excess of the threshold. While Elliott Management, Pershing Square and Carl Icahn may currently be above the threshold, other well-known activist investors who have either

long been below the $3.5 billion 13(f) line or have, at times, fallen below it, include Corvex Management, JANA Partners, Legion Partners, Land & Buildings, Sachem Head and even Starboard Value, among many others. The SEC also noted that the academic literature supporting its views concerning indirect costs provide, at best, "partial" evidence, and generally did not demonstrate harm to the reporting entities related to the front running and copycatting issues that the SEC suggested might be problematic.

The SEC's proposal flies in the face of the transparency and engagement demanded by investors, asset managers and companies, including the very sensible 13(f) rulemaking petition filed in 2013 by NYSE Euronext, the Society of Corporate Secretaries and Governance Professionals and the National Investor Relations Institute, the 13(d) rulemaking petition that we filed in 2011, and many other calls for change in these reporting rules. The 13(f) petition sought a shortening of the 13(f) reporting deadline from 45 days to two business days after the relevant quarter, as well as monthly rather than quarterly reporting. As noted in the 13(f) petition, the 45-day reporting period—implemented over 35 years ago—was borne of practical considerations that are entirely antiquated in light of the increased sophistication of institutional investors and advances in information technology. Our 13(d) rulemaking petition would require prompt disclosure of meaningful stakes, with timing windows and disclosure levels consistent with other major financial markets.

Just as the SEC should not have allowed common-sense improvement of the 13(f) and 13(d) regimes to languish unaddressed for nearly a decade, it should not continue to do so now. Nor should it gut the reporting system by rendering it inapplicable to all but the largest reporting investors, reducing market transparency and burdening shareholder engagement, at the same time that other securities markets around the globe have improved market transparency and the timely and complete disclosure of ownership information.

We continue to believe that immediate SEC action is required to further the principles of market transparency and fairness that are the foundation of Section 13. U.S. public companies, and all stakeholders with an interest in securities market transparency and efficiency, should oppose adoption of the SEC's proposal, and support proposals that would increase transparency in shareholder ownership, including the long-pending 13(f) and 13(d) rulemaking petitions noted above.

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