MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

September 29, 2020

Via Electronic Filing

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File Number S7-08-20; Release 34-89290; Reporting Threshold for Institutional Investment Managers

Dear Ms. Countryman:

Managed Funds Association ("MFA")[1] welcomes the opportunity to comment on the Securities and Exchange Commission (the "SEC") proposal to update the reporting threshold for Form 13F reports filed by institutional investment managers and to make other changes to Form 13F. MFA's comments reflect our members' perspectives as institutional investors in public companies managing assets on behalf of their underlying investors, including public and private pension funds, endowments, and charitable organizations, among other sophisticated investors. MFA supports the SEC's willingness to review longstanding rules and update those rules when their costs and burdens outweigh their benefits. For the reasons discussed below, however, we believe that the SEC should conduct further analysis on the costs and benefits of the proposal before deciding whether to adopt a revised reporting threshold.

As noted in the SEC's release describing the proposal ("Proposing Release"), it has been 45 years since the agency adopted the reporting threshold for institutional investment managers set out in Section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act"). Much has changed in the U.S. equities market and in the investment management industry since that time, including the size of U.S. markets and the ways that investors use Form 13F information. As discussed below, we are concerned that the Proposing Release does not fully consider the important ways investors use Form 13F information. We believe that reconsideration of the costs and benefits of Form 13F information is necessary to determine whether the threshold should be amended and, if so, at what level. We also provide comments on proposed changes to the omission threshold, technical

[1] MFA represents the global alternative investment industry and its investors by advocating for public policies that foster efficient, transparent, fair capital markets, and competitive tax and regulatory structures. MFA supports member business strategy and growth via proprietary access to subject matter experts, peer-to-peer networking, and best practices. MFA's more than 140 member firms collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia, supporting a global policy environment that fosters growth in the alternative investment industry.

amendments, and proposed changes to the standard for seeking confidential treatment, which we believe the Commission should consider if it determines to move forward with final rulemaking.

Reporting Threshold

The SEC noted in the Proposing Release that, when it originally adopted Form 13F, it "attempted to structure the form in a manner that would provide useful data regarding holdings that would impact the markets, while minimizing the form's reporting burdens." In considering whether to revise the reporting threshold for institutional investment managers, we believe that the SEC did not fully account for the variety of ways that market participants use Form 13F information. As a result, the Proposing Release underestimated the costs associated with the loss of publicly available information that would result from the proposed $3.5 billion threshold.

The SEC noted that since Form 13F data became publicly available, market participants have developed a variety of uses for the data. While the SEC described a number of these uses in the Proposing Release, we believe that the SEC did not fully consider the range of the uses of Form 13F data, which is critical to determining the costs associated with the loss of that data. For example, many managers use aggregate Form 13F data for risk management purposes, such as assessing whether a particular trade is crowded. This analysis is a valuable risk management tool to assess the impact of aggregate ownership of securities by institutional investment managers on the securities markets. We understand that allocators use Form 13F data as part of their due diligence on managers with whom they invest. MFA also is aware that some public companies use Form 13F data to help identify and engage with their shareholders. We encourage the SEC to reconsider its cost-benefit analysis in accounting for these different uses of Form 13F data.

According to the Proposing Release, the proposed increase in the reporting threshold would result in a reduction in the dollar amount of assets reported on Forms 13F of approximately 10% from current levels, and a reduction of approximately 90% in the number of investment managers that file Form 13F reports. We believe the reduction in the number of investment managers filing Form 13F reports is material given the uses of Form 13F data described above, in particular with respect to assessing the impact of aggregate ownership of a security by institutional investment managers. We also believe that a 10% reduction in data, measured by dollars, is a material reduction in the data, thereby imposing costs on market participants that use Form 13F information. The additional indirect costs caused by a reduction of available information will be borne by a wide range of market participants, including small managers that use the data for risk management or other purposes. MFA requests that the SEC reconsider the materiality of the costs associated with the proposed reduction in information, both with respect to the decline in information by dollar value and by number of managers required to report.

In MFA's view, the Proposing Release also overestimates some of the cost savings involved with raising the reporting threshold and the materiality of those costs. Many managers have deployed technology to make their Form 13F reporting efficient, which we believe minimizes the costs of filing for all managers and limits the likelihood that larger managers will have significant cost burdens associated with filing Form 13F. Further, even managers that would have some direct cost savings if they were no longer required to file Form 13F would have increased indirect costs associated with the loss of publicly available information. We believe that the SEC should reconsider the net benefits to managers given the relatively small amount of direct cost savings and the increased costs associated with the loss of information.

Given the concerns discussed above, we believe it is important for the SEC to provide a further opportunity for public review and comment of a revised cost-benefit analysis through a re-proposal, if the Commission decides to move forward with a revised reporting threshold. This approach would provide market participants the opportunity to address whether a modified approach to the reporting threshold addresses their identified concerns. To the extent the SEC decides to move forward with rulemaking, we further encourage it to modify the proposed rules to address the issues discussed in more detail below.

Omission Threshold

Form 13F currently allows, but does not require, an investment manager to exclude holdings of fewer than 10,000 shares (or less than $200,000 principal amount of convertible debt securities) and less than $200,000 aggregate fair market value (the "de minimis exclusion") of securities required to be reported under Section 13(f). In the Proposing Release, the SEC explained that it had adopted the de minimis exclusion in seeking to further its goals of structuring Form 13F in a manner that would provide meaningful holdings data while minimizing the Form's reporting burdens. The SEC concluded that aggregate holdings in the amounts covered by the de minimis exclusion were unlikely to have a material effect on the market.

The SEC proposed eliminating the de minimis exclusion, saying that it believes that by substantially increasing the Form 13F reporting threshold, the exclusion would no longer be necessary or appropriate. The SEC also stated that investment managers meeting the proposed higher reporting threshold would find reporting all positions less burdensome than for other managers, and that the incremental cost would be "immaterial."

MFA disagrees with the proposal to eliminate the de minimis exclusion and respectfully asks the SEC to retain this provision in any final rule. The original reason cited by the SEC for the de minimis exclusion, that it excludes positions that are so small that they are unlikely to have a material effect on the market, remains true today. The proposal to increase the reporting threshold does not make these small positions any more significant than they would be otherwise. Moreover, while MFA agrees that larger investment managers likely have technological solutions to aid their reporting, eliminating the de minimis exclusion would require those managers to reprogram their systems to be able to include those positions, which would result in some increased cost for those managers.

Technical Changes

MFA generally supports the proposed technical amendments in Section II.E. of the Proposing Release and encourages the SEC to adopt those proposed changes if it moves forward with rulemaking.

Confidential Treatment Requests

Form 13F data generally becomes public upon filing. Section 13(f)(4) of the Exchange Act provides that the SEC may prevent or delay public disclosure of information reported on Form 13F in accordance with applicable provisions of the Freedom of Information Act ("FOIA"). An investment manager desiring that the SEC treat its Form 13F data confidentially must submit a request for confidential treatment in accordance with the procedures described on the Form.

Instruction 2.d to the Instructions for Form 13F Confidential Treatment Requests currently requires that an investment manager seeking confidential treatment "[d]emonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the [m]anager's competitive position; show what use competitors could make of the information and how harm to the [m]anager could ensue." The SEC proposed to amend this instruction to require managers to "demonstrate that the information is both customarily and actually kept private by the manager, and to show how the release of this information could cause harm to the manager."

The SEC explained in the Proposing Release that the amendment is necessitated by the U.S. Supreme Court's 2019 decision in the case of *Food Marketing Institute v. Argus Leader Media* ("*FMI*"), which the SEC described as having changed the standard for determining whether information is "confidential" under exemption 4 of the FOIA. MFA believes that the SEC's proposal is not necessary and that the existing standard is both appropriate and not inconsistent with the Supreme Court's decision.

The facts and circumstances surrounding the *FMI* case are distinguishable from those surrounding Form 13F reporting. In *FMI*, certain sensitive data was required to be reported to the U.S. Department of Agriculture, and applicable regulations provided assurances to the reporting companies that such data would not be disclosed publicly. The Department was challenged in court over its refusal to release the requested data, pursuant to an exemption under FOIA. The lower court found that the confidentiality provision included an unstated requirement that disclosure be likely to cause substantial harm to the reporting company, based on precedents established in prior cases. The Supreme Court disagreed, holding that the common understanding of the term "confidential" at the time the FOIA exemption was adopted reflected no such requirement.

Form 13F reports, in contrast to those described in *FMI*, are not filed with any assurance of confidentiality. As the SEC noted in the Proposing Release, the information reported on Form 13F becomes publicly available upon filing, unless the reporting institutional investment manager requests confidential treatment and the SEC agrees to grant such treatment. This difference from the reporting at issue in *FMI* is significant and distinguishes the Form 13F reporting requirement from the matter at issue in that case.

In addition, investment managers act as agents on behalf of clients who own the relevant securities, creating a fundamentally different fact pattern than in *FMI*, with respect to who may have access to the information for which confidentiality is being sought. Unlike the facts and circumstances in *FMI*, investment managers provide information on a regular basis to clients and investors that nonetheless could appropriately be considered private and confidential. It is unclear, however, whether providing investors and clients with information about their holdings could be deemed to preclude a manager from seeking confidential treatment, a result that would effectively nullify the statutory right to request confidential treatment. In light of the significant distinctions between *FMI* and Form 13F reporting, MFA asks the SEC to reconsider the necessity of making the proposed change, which would create significant uncertainty with respect to the circumstances in which the SEC grants confidential treatment.

Should the SEC determine to proceed with a change to the standards for requesting confidential treatment, the requirement that the information be "customarily and actually kept private" would need to be accompanied by practical guidance to investment managers how they can meet this standard. Given the need for practical guidance, we encourage the SEC not to make the

proposed change effective until the SEC has issued such guidance. To the extent the SEC proceeds with a proposed change in light of *FMI*, we also encourage the SEC to reconsider whether the requirement for a manager to show harm is consistent with the Supreme Court's decision.

MFA appreciates the opportunity to provide comments to the SEC in response to the Proposing Release. While we appreciate the SEC's willingness to review and consider updates to longstanding rules, we believe further consideration of the costs associated with the proposed change to the Form 13F filing threshold is needed before the SEC makes a decision on whether to enact a change to the threshold. If you have any questions regarding any of these comments, or if we can provide further information with respect to these or other issues, please do not hesitate to contact the undersigned at (202) 730-2600.

Respectfully submitted,

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