Client Alert

July 2020

SEC Proposes Increase in Form 13F Reporting Threshold and Other Changes to Reflect Today's Equity Markets

On July 10, 2020, the Securities and Exchange Commission ("SEC") announced that it has proposed amendments to the Form 13F filing requirements to raise the reporting threshold from $100 million to $3.5 billion and to make other changes.

Adopted pursuant to a 1975 statutory directive to the SEC, Section 13(f) of the Securities Exchange Act of 1934 requires institutional investment managers ("managers") to file Forms 13F with the SEC if they exercise investment discretion with respect to specified publicly traded equity securities ("13(f) securities") having an aggregate market value of at least $100 million as of the last trading day of any month of any calendar year. Managers who trigger this $100 million threshold must file Forms 13F with the SEC disclosing their 13(f) securities positions as of the last day of the year in which they triggered the threshold and as of the last day of the first three calendar quarters of the subsequent year.

The proposal seeks to update for the first time in over 40 years the $100 million threshold, which at the time of initial adoption represented a certain proportionate market value of U.S. equity securities. Recognizing that since 1975 the overall value of U.S. public equities "has grown over 30 times (from $1.1 trillion to $35.6 trillion), and the relative significance of managing $100 million has declined considerably," the SEC is proposing to raise the threshold to $3.5 billion to reflect proportionally the same market value of U.S. public equities today that $100 million represented in 1975.

The SEC projects that under the new threshold, approximately 90% of the market value of 13(f) securities currently disclosed would be retained while approximately 90% of current filers who are smaller managers (or over 4,500 of the approximately 5,000 reporting managers, based on 2018 data) would no longer be required to report. This result would be consistent with legislative history indicating that the reporting threshold was designed to cover a large proportion of managed equities, while minimizing the number of reporting managers.

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Other proposed changes include the following:

- Eliminating the ability of managers to omit from their Forms 13F disclosure of de minimis positions (i.e., holdings of fewer than 10,000 shares (or less than $200,000 principal amount of convertible debt securities) and less than $200,000 aggregate market value);

- Requiring managers to include their CRD and SEC filing numbers in their Forms 13F;

- Imposing certain non-substantive technical amendments to Form 13F, including changes involving character limits and the rounding of dollar values and simplifying the Form 13F instructions; and

- Specifically amending the Form 13F instructions on confidential treatment requests in light of a 2019 U.S. Supreme Court decision that changed the standard for determining whether information is "confidential" under the Freedom of Information Act.

Interestingly, the proposal discusses how under the current threshold smaller managers are harmed by other market participants who use these managers' Form 13F data to "front run" and "copycat" their portfolios. This is particularly relevant to shareholder activists who sometimes must initially disclose in their Forms 13F their positions in targets before they can complete their stock acquisition programs, which often results in a run up in the stock price due to such front running and copycatting activities. Shareholder activists who would no longer be required to file Forms 13F under the proposed rules would benefit as the increase in the cost of investing caused currently by this harmful market activity would be eliminated or minimized.

In the proposal, the SEC also states that the Staff of the SEC will conduct reviews of the Form 13F reporting threshold every five years and recommend to the SEC additional adjustments to the threshold as appropriate.

There will be a 60-day comment period following publication of the proposal in the Federal Register.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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