SEC 13F Threshold Proposal May Be Down But Not Yet Dead

18 November 2020

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On 10 July 2020, the SEC released for comment a proposed rule that would change the reporting threshold for Form 13F from $100 million to $3.5 billion for institutional investment managers. The SEC thought it was a good time to increase the threshold which was established 45 years ago to reflect the change in size and structure of the U.S. equities market and to increase the information provided by institutional investment managers by eliminating the omission threshold for individual securities, and requiring managers to provide additional identifying information.

What was a surprise to many, was the overwhelming pushback from market participants. There were 2,238 comment letters opposing the change, and only 24 in support of it according to an analysis from Goldman Sachs. Comments and concerns over the proposed rule change ranged from the whether or not the SEC has the right to lawfully change the rule which was enacted by Congress to, the impact on information lost and how shareholder activism might be enabled as a result.

The largest public pension fund in the U.S., CalPERS presented that specific concern against the proposed rule; "The SEC notes how much institutional investment managers may save by not having to report, but it does not address how much it will cost stakeholders to replicate the information lost or the cost to companies when fighting off attacks by activists that may be more common when such activists no longer have to report."

Many public companies also raised concern about activism being able to work in the shadows and how that could dramatically affect decisions in public company boardrooms. Over 900 publicly traded firms signed their names to letters from the National Investor Relations Institute (NIRI), the NYSE, and the Nasdaq. And while it is commonplace for companies to sign their names to trade association or exchange letters, it is more uncommon for individual executives to do so but that is just what happened. Some 33 executives across many verticals penned their own letters against the proposed rule change. These include the heads of Marriott International, Dell Technologies, and Ford Motor Company to name a few. In Dell's letter opposing the regulation, they cited the SEC Commissioner's opposition which claims "approximately 90% of current 13F filers going dark" and they further pointed out that "… we expect that this proposal would cause us to lose visibility into as many as 55% of our shareholders, and 15% of our top 100 shareholders that currently file form 13F's."

Contrary to this position is associate professor, Alexander Platt from the University of Kansas School of Law who said; “I think that these going-dark critics are exaggerating how much hedge funds would benefit from this ability to not file 13Fs,” in an interview with Institutional Investor. Platt went further to say, “Reducing transparency regarding institutional investor holdings might make things more difficult for hedge fund activists in some ways. Those activists benefit from that transparency just like issuers do.” Platt weighs the pros and cons, and the legality of the SEC proposal in his paper, *Beyond ‘Going Dark’: The SEC’s 13F Proposal and Hedge Fund Activism*.

Several individuals suggested a political motive in the change, noting that the change benefits the wealthy investor. On 22 October 2020, the Democratic Senate members (Brown, Baldwin, Reed and Van Hollen) got involved calling on the SEC to withdraw the rule and pursue reforms to increase transparency. To this point, back in 2019, NIRI had asked for lawmakers to support the Capital Markets Engagement and Transparency Act, which would reduce the reporting deadline from 45 days to 15 days.

While many in the market think this proposal will not be carried forward, the indication from the SEC is less clear. In a response sent to Bloomberg, the SEC offered: "It remains clear that the current threshold is outdated. The comments received illustrate that the form is being used in ways that were not originally anticipated when the form was adopted. We are focused on examining these important issues before we move forward with determining the appropriate threshold."

Based on that statement, it seems that we might see proposed regulation that will address increasing the threshold and improve transparency.

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