INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

April 30, 2013

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: *NYSE Euronext Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934 (File No. 4-659)*

Dear Ms. Murphy:

NYSE Euronext, along with the Society of Corporate Secretaries and Governance Professionals and the National Investor Relations Institute, has submitted a rulemaking petition asking the Securities and Exchange Commission ("Commission" or "SEC") to amend the reporting rules under Section 13(f) of the Securities Exchange Act of 1934 to shorten the current reporting deadline.[1] The Petition requests that the current requirement to file reports on Form 13F with the Commission within 45 days after the last day of each calendar quarter be reduced to two days. The Petition also encourages the Commission to take action to increase the frequency of Form 13F reporting from quarterly to monthly. The Petition states that the recommended changes to the current reporting requirements will facilitate issuers' ability to identify and engage with shareholders in a timely manner.

The Investment Company Institute[2] strongly opposes the Petition. As discussed further below, we are deeply concerned that either shortening the reporting deadline or increasing the frequency of reporting (or both) would result in significant harm to registered investment company ("fund")

[1] Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934, submitted by Janet McGinness, Executive Vice President & Corporate Secretary, NYSE Euronext, Kenneth A. Bertsch, President & CEO, Society of Corporate Secretaries and Governance Professionals, and Jeffrey D. Morgan, President & CEO, National Investor Relations Institute ("Petition"), available on the SEC's website at http://www.sec.gov/rules/petitions/2013/petn4-659.pdf.

[2] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $14.7 trillion and serve over 90 million shareholders.

shareholders. In addition, while ICI supports encouraging issuers to engage with their shareholders on corporate governance and other matters, we do not believe it is reasonable or appropriate to achieve this engagement by requiring institutional investment managers to publicly reveal their investment portfolios as the Petition recommends.

Background

Section 13(f)(1) of the Securities Exchange Act of 1934 generally requires institutional investment managers, including investment advisers to funds, to file reports with the Commission if they manage, in the aggregate, more than $100 million in certain equity securities. Rule 13f-1 implements this obligation by requiring any institutional investment manager that exercises investment discretion with respect to accounts holding "Section 13(f) securities" having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100 million to file a report on Form 13F with the Commission. The reports must be filed within 45 days after the last day of such calendar year and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year. The reports are filed on the Commission's EDGAR system and can be accessed by the public via the Internet.

Reducing the Current 45-Day Delay Period Would Harm Fund Shareholders

The Petition requests that the current requirement to file reports on Form 13F with the Commission within 45 days after the last day of each calendar quarter be reduced to two days. The Petition argues that "investors" would benefit from such a shortened time frame. It states that the length of the current reporting period keeps material information from reaching investors on a timely basis, thereby denying them the ability to use Form 13F filings to track "institutional investor holdings in their investments."[3] Further, the Petition states that "[t]he advantage that the 45-day delay period gives Managers comes at the expense of other investors who trade without the benefit of knowing the size and scope of institutional holdings, and in that manner erodes price discovery, market transparency and, ultimately, investor confidence."[4]

This portrayal of "Managers vs. other investors" is at odds with the reality that many institutional investment managers, such as those that manage funds, are investing *on behalf of* "other investors." It ignores the fact that the current 45-day reporting requirement is necessary to *protect* the interests of investors, particularly the millions of long-term, retail investors who participate in the securities markets through funds.[5] Reducing the timeframe for reporting would expand opportunities

[3] Petition at p. 3.

[4] Petition at p. 4

[5] *See, e.g.,* Investment Company Institute *2013 Investment Company Fact Book* (which reports that in 2012, an estimated 92 million individual investors owned mutual funds and held 89 percent of total mutual fund assets at year-end, an estimated 3.4 million U.S. households held exchange-traded funds in 2012, and an estimated 1.9 million U.S. households held closed-

for speculators and other professional traders to exploit the information in Form 13F reports in ways that would be detrimental to fund shareholders, particularly through "frontrunning" fund trades. The potential for frontrunning is particularly acute in the case of, for example, larger funds that have concentrated portfolios, funds that hold thinly-traded stocks, or where an extended period of time is needed to build or reduce a position.

As we have stated in several letters to the Commission,[6] any premature disclosure of information regarding fund trades can lead to frontrunning of those trades, adversely impacting the price of the stock that the fund is buying or selling. Numerous market participants conduct trading strategies utilizing sophisticated techniques that seek to ascertain from available information the existence of large buyers (or sellers) in the market and to buy (or sell) ahead of the large orders with the goal of capturing a price movement in the direction of the large trading interest. Information in a Form 13F report can be used to anticipate fund trades, and earlier or more frequent disclosure of this information would provide another crucial "piece of the puzzle" to those who intend to profit from fund orders. Generally speaking, the more current the disclosure, the easier and more profitable frontrunning will be, to the detriment of fund shareholders.[7]

Reducing the timeframe for reporting also would make it easier to obtain - for free - the benefits of fund research and investment strategies that fund shareholders pay for, a practice known as "free riding." Free riders could duplicate investment strategies, thus expropriating the results of proprietary research and strategies paid for by fund shareholders.

The Petition touts advancements in technology as a reason for reducing the delay period. But these same advancements have greatly increased the speed and ease with which the information in Form 13F reports may be accessed and packaged in ways that facilitate predatory trading practices. While

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end funds in 2012). As the Commission staff has recognized, protecting these investors is consistent with the purposes underlying Section 13(f). *See* Letter to [Section 13(f) Confidential Treatment Filer] from Douglas Scheidt, Associate Director and Chief Counsel (June 17, 1998) ("Scheidt Letter") (where the staff stated that "Congress also recognized that, in some instances, disclosure of certain types of information could have harmful effects, not only on an investment manager, but also on the investors whose assets are under its management"). The letter is available on the Commission's website at http://www.sec.gov/divisions/investment/guidance/13fpt2.htm.

[6] *See, e.g.*, Letters from Paul Schott Stevens, President, Investment Company Institute, to Christopher Cox, Chairman, Securities and Exchange Commission, dated September 14, 2005, August 29, 2006, and September 19, 2008.

[7] *See* Letter from Mortimer J. Buckley, Managing Director and Chief Investment Officer, Vanguard, to Elizabeth M. Murphy, Secretary, SEC, dated March 15, 2013, responding to Petition ("A shorter delay for the release of [Rule 13(f)] information could expand the opportunities for predatory trading practices that harm the interests of mutual fund shareholders."); and Letter from Kimberly Unger, CEO and Executive Director, Security Traders Association of New York to Elizabeth M. Murphy, Secretary, SEC, dated April 10, 2013, responding to Petition ("The proposed shortening of the 13(f) reporting deadline ... would significantly increase the opportunities for predatory practices and reverse engineering of positions that could be detrimental to the interest of investment company shareholders and provide unfair advantages to certain other market participants.").

funds have been concerned about frontrunning for years, that concern has increased as strides in technology have allowed better identification of, and execution against, fund trading strategies.[8] These developments, in turn, have made funds that are interested in buying and selling large positions more vulnerable to abuse by market participants that seek to trade in front of their orders. While Section 13(f) was, among other things, intended to provide greater public disclosure of institutional holdings, Congress could not possibly have anticipated the technological improvements that have greatly increased the ease with which predatory practices occur.

Shortening the Reporting Deadline Would Create Operational Concerns

The Petition states that the original reason the Commission cited for providing institutional investment managers with a 45-day delay period, (*i.e.*, that a shorter time requirement would have created an undue burden) is no longer valid and that technological advances in recordkeeping and reporting systems warrant a shorter delay period.

Even with strides in technology, our members report that compliance with a two-day delay period would be difficult at best and, for some members, would be a near impossibility. Such a compressed timeframe may not allow managers sufficient time to aggregate, verify, and file the information required by Form 13F, or to run the proper legal and compliance checks necessary for the filing of Form 13F. Such a requirement also would likely increase costs.

The Petition's Arguments Based on the Objectives Underlying Section 13(f) Do Not Withstand Scrutiny

The Petition quotes language from the Commission's 1978 release adopting Rule 13f-1 stating, in part, that: "by making the Commission responsible for all gathering, processing, and dissemination of the data, Congress intended to permit establishment of *uniform reporting standards* and a uniform centralized data base" (emphasis added).[9] The Petition seeks to use this statement as support for shortening the 45-day reporting period under Rule 13f-1; it points out that "having Managers report in a time frame that is more similar to those applicable to Forms 13D, 13G and 4 would make reporting standards more uniform . . . ."[10]

This assertion ignores that the uniformity Congress sought to achieve was not general uniformity across SEC reporting requirements. Rather, Congress's objective regarding "uniform reporting standards" related specifically to reporting requirements for institutional investment

[8] Indeed, commercial services, such as "stock surveillance" firms, have for some time offered the opportunity to monitor and uncover the holdings of institutional investors, partly relying upon the information in Form 13F reports.

[9] SEC Release No. 34-14852 (June 15, 1978).

[10] Petition at p. 5. The reference to the time frame applicable to "Form 13G" is curious given that Schedule 13G generally must be filed by February 14 following the calendar year covered by the report. *See infra* note 12.

managers, such as banks, which were subject to requirements to report the same or similar information to "numerous agencies for differing regulatory purposes."[11] Thus, the implication that a shorter reporting period would be consistent with the above-cited legislative history of Section 13(f) is erroneous.

More importantly, the Petition's suggestion that the Commission make the reporting period under Rule 13f-1 "more similar" to that under other Commission rules with shorter reporting periods fails to recognize that different reporting requirements serve different purposes and that there are valid policy and practical reasons for having reporting periods that vary.[12]

The Petition lists several examples of other SEC reporting requirements with shorter reporting periods than Rule 13f-1 in an attempt to show a "general trend towards substantially shorter reporting periods."[13] It provides no analysis, however, of the policy goals of those requirements, the work involved in assembling and reporting the required information, or any potential policy implications of the timing of reporting.[14] As a result, it fails to explain why these examples are relevant.[15] Moreover, the Petition omits mention of what is arguably the most analogous SEC reporting requirement - the requirement that registered management investment companies disclose their portfolio holdings on a quarterly basis with a 60-day delay.[16] In that context, the Commission stated that "[w]e are not

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[11] Frankel, The Regulation of Money Managers (2013 Supplement) at n. 85 and accompanying text (quoting Report of Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 85 (1975) ("Senate Report") at pp. 85-86.

[12] The requirements for reporting beneficial ownership on Schedule 13G provide a good illustration. Persons eligible to file reports of beneficial ownership on Schedule 13G generally must do so by February 14 following the calendar year covered by the report. Shorter reporting periods apply in certain circumstances, however, such as if the reporting person's direct or indirect beneficial ownership exceeds ten percent of the class of equity securities. In that event, the initial Schedule 13G must be filed within ten days after the end of the first month in which the person's direct or indirect beneficial ownership exceeds ten percent of the class of equity securities, computed as of the last day of the month.

[13] In this regard, the Petition mentions Form 4, Form 8-K, Regulation FD, Forms 10-K and 10-Q, and Schedule 13D.

[14] For example, with respect to Form 4, requiring directors and officers to report changes in their beneficial ownership of equity securities within two (instead of ten) days was necessary to satisfy the Sarbanes-Oxley Act's purpose to require immediate disclosure of insider transactions. *See* SEC Release No. 34-46421 (August 27, 2002) at p. 4. We fail to see the connection between the policy underlying Form 4 and Form 13F reporting.

[15] The Petition also notes that Section 929X of the *Dodd-Frank Wall Street and Consumer Protection Act*, which amended Section 13(f)(2) of the Exchange Act, requires the Commission to promulgate rules obligating institutional investment managers to publicly report short sale activity once every month at a minimum. The Petition asserts that the benefits to investors and public companies of long-position reporting justify a similarly substantial increase in the frequency of Form 13F reporting. We believe that Section 929X was intended to address concerns specific to short sale activity and therefore, as discussed above with respect to other rules with shorter reporting periods, should have no bearing on the appropriate frequency of Form 13F reporting.

[16] Registered management investment companies must disclose portfolio holdings in their annual and semi-annual reports to shareholders and, for the first and third fiscal quarters, on Form N-Q under the Investment Company Act of 1940.

requiring more frequent portfolio disclosure, or a shorter delay, because we take seriously concerns that frequent portfolio holdings disclosure and/or a shorter delay for the release of this information may expand the opportunities for predatory trading practices that harm fund shareholders."[17]

The Confidential Treatment Process Is Not an Adequate Substitute for Sufficiently Delayed Reporting

The Commission staff potentially could address many of the concerns discussed above by granting confidential treatment to Forms 13F in appropriate circumstances.[18] The legislative history accompanying Section 13(f) makes clear that Congress intended for the Commission to "prevent public disclosure of that portion of any report filed by an investment manager covering holdings or transactions which are part of a program of acquisition or disposition in which the investment manager is engaged both at the end of the reporting period and at the time the report is filed."[19] Reducing the timeframe for reporting likely would increase significantly the number of requests for individual grants of confidential treatment.

The confidential treatment process is not simple. With respect to each request for confidential treatment, the requestor must provide, and the Commission staff must evaluate, information supporting a finding that the investment manager has an ongoing program of acquisition or disposition (which itself must satisfy four elements: the investment manager must have a specific program; the program must be ongoing; disclosure would reveal the investment strategy; and demonstrable harm would result from disclosure). In addition, the requestor must support the time period for which the confidential treatment is requested in the context of the particular trading strategy involved, and the Commission staff must evaluate that information and determine the appropriate length of time to delay the disclosure. We strongly believe that it is a more efficient and effective use of the resources of both investment managers and the Commission staff to maintain the current delayed reporting deadline rather than relying on the resource-intensive, time-consuming confidential treatment process to provide adequate protection for investment managers' trading strategies consistent with Section 13(f).[20]

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[17] *See Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies*, SEC Release No. IC-26372 (February 27, 2004) at p. 14.

[18] *See* Section 13(f)(4).

[19] *See* Senate Report at p. 87.

[20] We are not suggesting that the 45-day delay period eradicates the need for confidential treatment. Rather, the need does not arise as often as it would with a two-day delay.

Issuers Have Alternative Means to Communicate with Their Shareholders

The Petition states that for public companies, the 45-day delay period impedes their ability to identify and engage with their shareholders in a timely manner, including their ability to consult with shareholders regarding "say on pay," proxy access and other key corporate governance issues. While we appreciate issuers' willingness to engage with investors on these important matters, we do not believe that Form 13F reporting is the appropriate tool for enhancing communication between issuers and their shareholders. As explained above, Form 13F reporting provides a great deal of information about an institutional investment manager's trading strategy, and its overly rapid dissemination harms fund shareholders. Instead, issuers should use the Commission's well established set of shareholder communications rules for these purposes.[21] The Commission already has begun to examine how these rules could be modified to make it easier for issuers to identify their beneficial owners and to communicate directly with them.[22] We support these efforts and encourage the Commission to devise more targeted means to allow issuers to more easily identify large shareholders who beneficially own their shares.[23]

Increasing the Frequency of Reporting Would Harm Fund Shareholders

The Petition states that while it is focused on addressing the length of the reporting delay under Rule 13f-1, the request is made in the context of the Commission's existing authority under Section 13(f), which provides that long-position reporting under Section 13(f) may not be required for periods shorter than one quarter. The Petition, nevertheless, encourages the Commission to raise with appropriate Congressional oversight committees the possibility of increasing the frequency of Form 13F reporting, such as requiring monthly reporting of positions.

Increasing the frequency of reporting raises concerns similar to those described above with respect to reducing the reporting delay. In particular, increasing the frequency of reporting similarly would facilitate frontrunning of fund trades and free riding of fund strategies to the detriment of fund shareholders. Monthly reporting actually could facilitate frontrunning even more than a reduction of the reporting delay by providing more data points (*i.e.*, 12 reporting periods instead of the current four reporting periods) and thereby more readily allow reverse engineering of trading strategies. We therefore strongly oppose the pursuit of such a legislative change.

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[21] *See, e.g.,* Rules 14a-13 and 14b-1 (providing detailed procedures for issuers to communicate with their beneficial shareholders).

[22] *See Concept Release on the U.S. Proxy System*, SEC Release No. 34-62495 (July 14, 2010) at p. 73 (where the Commission stated that it was considering whether regulatory action is needed to make it easier for issuers to communicate with their investors).

[23] *See, e.g.,* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, SEC, dated October 20, 2010 (where we recommended eliminating the objecting beneficial owner ("OBO")/not objecting beneficial owner ("NOBO") distinction for all shareholders as part of such efforts).

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For the reasons discussed above, the Commission should not act on the Petition. Rather, the same policy rationale that guided the Commission in adopting the requirement that funds disclose their full portfolio holdings quarterly with a 60-day delay should govern here. As discussed above, in that context, the Commission expressly recognized the need to balance competing policy goals and concluded that frequent portfolio holdings disclosure and/or a shorter delay for the release of this information could expand the opportunities for predatory trading practices that harm fund shareholders. Likewise, here the Commission should recognize that a shortened reporting time period and/or more frequent disclosure would harm fund shareholders and should not move forward with formal rulemaking or legislative recommendations based on the Petition.

If you have any questions concerning our comments, or need additional information, please contact me at (202) 326-5815.

Sincerely,

/s/
Karrie McMillan
General Counsel

cc: The Honorable Mary Jo White
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes
The Honorable Daniel M. Gallagher

John Ramsay, Acting Director
Division of Trading and Markets

Lona Nallengara, Acting Director
Division of Corporation Finance

Norm Champ, Director
Division of Investment Management
U.S. Securities and Exchange Commission