

Bullet Point ®

Large Trader Reporting Rule and Form 13H ¹

On July 26, 2011, the Securities and Exchange Commission (“SEC”) adopted a new rule under the Securities Exchange Act of 1934, as amended (the “Exchange Act”) requiring certain large traders of securities (“Large Traders”) to register with and report to the SEC. New Rule 13h-1 under the Exchange Act recently became effective on October 3, 2011 (the “Effective Date”). All persons that qualify as a Large Trader as of the Effective Date must register as such by filing a Form 13H with the SEC by December 1, 2011.

“Large Trader” Definition

The creation of Rule 13h-1 is an attempt by the SEC to collect information on the background and trading activities of those traders who execute a large volume of securities transactions in a specified time period. Rule 13h-1 defines a “**Large Trader**” as “any person that (i) directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security² for or on behalf of such accounts, by or through one or more registered broker-dealers, in an aggregate amount *equal to or greater than* the identifying activity level; or (ii) voluntarily registers as a large trader by filing electronically with the SEC Form 13H.” (emphasis added). The Rule defines a person with “investment discretion” as one who “is authorized to determine what securities or other property shall be purchased or sold by or for the account.”³

Identifying Activity Level

The Rule defines the “identifying activity level” as “aggregate transactions in NMS securities that are equal to or greater than: (1) during a calendar day, either 2 million shares or shares with a fair market value of \$20 million; or (2) during a calendar month, either 20 million shares or shares with a fair market value of \$200 million.”⁴

¹ This memorandum provides general information on the subject matter described, should not be relied on for legal advice in any jurisdiction and may constitute attorney advertising.

² An NMS security is generally any exchange-listed security such as any equity or option.

³ This incorporates the “investment discretion” definition from Section 2(a)(35) of the Exchange Act, which also includes any person that “makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions.”

⁴ Rule 13h-1(a).

Form 13H Filings

Form 13H requires information about the identification, structure and business operations of each Large Trader. The Form allows for six (6) types of filings: Initial Filings, Annual Filings, Amended Filings, Inactive Status, Termination Filings and Reactivated Status. All Form 13H filings must be made through EDGAR.

Initial Filing

A Large Trader must file a Form 13H Initial Filing promptly after effecting aggregate transactions equal to or greater than the identifying activity level.⁵ While the term “promptly” has not been specifically defined by the SEC (although in the adopting release the SEC stated that “promptly” means without delay, in order to ensure timeliness while affording filers a limited degree of flexibility), the SEC believes that it would be appropriate to make such Filing within ten (10) days’ after the Large Trader effects aggregate transactions equal to or greater than the identifying activity level.⁶

Annual Filing

Large Traders must submit an Annual Filing within forty-five (45) days’ after the end of each full calendar year. A Large Trader on Inactive Status (as defined below) is not required to file any Annual Filings during such period of inactivity.

Amended Filings

If any information contained in a Form 13H filing becomes inaccurate for any reason, a Large Trader must file an Amended Filing no later than the end of the calendar quarter in which the information became stale. A Large Trader on Inactive Status is not required to file any Amended Filings during such period of inactivity.

Inactive Status Filing

A Large Trader who has not effected aggregate transactions at any time during the previously full calendar year in an amount equal to or greater than the identifying activity level may file for “Inactive Status” through Form 13H. Such status will be effective upon filing. Note that Inactive Status relieves the Large Trader from the requirement to file an amended Form 13H and also permits the Large Trader to request that its broker-dealers stop maintaining record of its transactions by its LTID (as described herein).

⁵ See Rule 13h-1(b)(1).

⁶ See SEC Release No. 34-64976, page 38.

Reactivated Status Filings

A Large Trader on Inactive Status who effects aggregate transactions equal to or greater than the identifying activity threshold must file for “Reactivated Status” on Form 13H promptly after effecting transactions that equal or exceed the thresholds. At such time the Large Trader would once again become subject to the filing requirements of Rule 13h-1 and must inform its broker-dealers of its reactivated status.

Termination Filings

Under certain circumstances, a Large Trader may end its Large Trader status by submitting a “Termination Filing” which allows a Large Trader to inform the SEC that it has terminated operations and therefore has no chance to re-qualify for Large Trader status in the future.

Identifying Which Entity in an Organization Should Register as a Large Trader

The Large Trader definition is meant to focus on the ultimate parent company of an entity or entities that employ or otherwise control the individuals that exercise investment discretion. Therefore, an employee of an investment adviser who engages in transactions that reach or exceed the identifying activity level would not have to separately register as a Large Trader with the SEC. For the purposes of determining which related entities must file a Form 13H (or if the parent company may file on an entity’s behalf), “control” for the purposes of Rule 13h-1 is the ability to vote or direct the vote (or to sell or direct the sale) of twenty-five percent (25%) or more of a class of voting securities of any entity.⁷ In order to determine whether a person or entity meets the identifying activity level, the Rule requires that all traders must aggregate all stock and options transactions with any related or controlled entities. Note, however, that certain transactions are excluded from these aggregation calculations including, but not limited to, securities offerings by an issuer, gifts, the exercise or assignment of options, over-the-counter securities offerings, tender offers, and stock loan and equity repurchase agreements.⁸

Aggregation at the parent company level allows the SEC to collect data on the full extent of trading by persons and entities under common control. Parent company level aggregation should enhance the SEC’s ability to reconstruct trading by significant market participants by providing it with access to a broad set of useful data.⁹

Duties of a Large Trader

A Large Trader must self-identify its status by filing Form 13H with the SEC. It must also disclose its large trader identification number (“LTID”) to the registered

⁷ See Rule 13h-1(a)(3).

⁸ See Rule 13h-1(a)(6).

⁹ See SEC Release No. 34-64976, page 20.

broker-dealers effecting transactions on its behalf (as well as to identify each account to which the LTID applies for such broker-dealers). Once a Large Trader makes an Initial Filing, the SEC will issue that Large Trader its LTID. Large Traders must then disclose their LTID to their broker-dealers who will then be responsible for complying with the recordkeeping requirements under Rule 13h-1.

Voluntary Registration

The SEC allows voluntary Large Trader registration for persons or entities who are near the applicable trading activity threshold in order to eliminate the need for those traders to actively monitor their trading levels. A trader registering under the voluntary registration option will be required to indicate this choice in its initial filing with the SEC. Voluntary Large Trader registrants will be subject to all of the obligations under the Rule, notwithstanding the fact that the preordained identifying activity level has not yet been reached.

Initial Filing Deadline Requirement

Any person or entity who qualifies as a Large Trader by meeting or exceeding the identifying activity level on or after the Effective Date must register as such with the SEC by making its Initial Filing by December 1, 2011 via the EDGAR system. Following the December 1, 2011 deadline, any person or entity who qualifies as a Large Trader must file the Form 13H with the SEC *promptly* (as discussed above).

As all Large Traders must also submit an Annual Filing within forty-five (45) days' of the end of each calendar year beginning with the year during which the Initial Filing was made, if a Large Trader meets or exceeds the identifying activity level prior to the 2011 calendar year end, such Large Trader will be required to make its first Annual Filing within forty-five (45) days' after the 2011 calendar year-end.

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Should you have any questions regarding Rule 13h-1, Form 13H or any issues related to being a Large Trader, please feel free to contact Shelley Rosensweig (212-508-6774) or Richard Strohmenger (212-508-7520).

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