

Form 13H Filing Considerations for Investment Managers

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I. Introduction

Introduction

- Who files Form 13H?
 - Any person that directly or indirectly exercises investment discretion over transactions in listed US equity securities and listed options in an aggregate amount equal to or greater than the Identifying Activity Level.
- What is the Identifying Activity Level?
 - during a calendar day, either two million shares or shares with a fair market value of \$20 million; or
 - during a calendar month, either twenty million shares or shares with a fair market value of \$200 million.

Introduction

- What is reported?
 - Information related to a Large Trader's business, affiliates, other SEC filings, regulatory status, organizational structure and the names of the broker-dealers where a Large Trader and certain of its affiliates have accounts
- When must a Large Trader file?
 - Promptly after first effecting aggregate transactions equal to or greater than the Identifying Activity level and annually thereafter. The Rule is effective October 3, 2011, entities that meet the Large Trader definition after that date must file Form 13H by December 1, 2011.

Introduction

- How does a Large Trader file Form 13H?
 - With the SEC.
 - Electronically on EDGAR.
- Link to Form 13H and Adopting Release:
 - <http://www.sec.gov/rules/final/2011/34-64976fr.pdf>

II. Background

Background

- Section 13(h) of the Securities Exchange Act of 1934 was adopted in 1990 as part of the Market Reform Act of 1990.
- Section 13(h) established a large trader reporting system in accordance with regulations to be adopted by the SEC.
- In 1991 and 1994, the SEC proposed but never adopted reporting requirements.

What is the purpose of Form 13H?

- The SEC Adopting Release indicates that Form 13H is intended to :
 - serve as a source of data for SEC investigative and enforcement action;
 - facilitate the SEC's ability to assess the impact of Large Trader activity on markets; and
 - help the SEC reconstruct trading activity after unusual market volatility (such as the events of May 6, 2010).

Large Trader reporting obligations

- Large Traders must register with the SEC by filing Form 13H electronically through EDGAR.
- The SEC will assign each filing Large Trader a Large Trader identification number (an “LTID”).
- Each Large Trader must disclose its LTID to all registered broker-dealers effecting transactions on its behalf.

Rule 13h-1 broker-dealer obligations

- Rule 13h-1 requires registered broker-dealers to:
 - maintain certain information and records with respect to transactions effected by or through an account carried by the broker-dealer for a Large Trader; and
 - provide such information and records to the SEC upon its request.

III. Who is a Large Trader?

Definition of a Large Trader

- A “Large Trader” is any person that, directly or indirectly, including through other persons **controlled** by such person, exercises **investment discretion** over transactions in **NMS securities**, by or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the **Identifying Activity Level**.
- Large Trader filing obligations apply to all U.S. and non-U.S. persons that meet the definition.
- To the extent that an entity employs a natural person who individually meets the definition of a Large Trader, the entity that controls that person would be a Large Trader (i.e., an entity’s employees who exercise investment discretion within the scope of their employment are deemed to be doing so on behalf of the entity).

Investment discretion

- For purposes of the Large Trader determination, a person is deemed to exercise “investment discretion” with respect to an account if, directly or indirectly, such person:
 - is authorized to determine what securities or other property shall be purchased or sold by or for the account;
 - 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; or
 - otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the SEC, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of the Securities Exchange Act of 1934 and the rules and regulations thereunder.

What types of entities may qualify as Large Traders?

- Investment advisers (whether or not registered) to private funds and/or registered funds
- Broker-dealers
- Futures Commission Merchants
- Commodity Pool Operators
- Bank Holding Companies
- Non-Bank Holding Companies
- Banks
- Pension Trustees
- Non-Pension Trustees
- Insurance Companies

IV. Who has the filing obligation?

Parent Company Level Registration

- Form 13H filing obligations are imposed on the ultimate parent company of an entity (or entities under common control) which meets the definition of a Large Trader.
- To determine whether a parent company is a Large Trader, the trading activity of all entities controlled by the parent company must be aggregated.
- If the aggregate amount and/or value of the trading activity of such entities equals or exceeds the Identifying Activity Level, the parent company will have a Form 13H filing obligation (unless all of its affiliates comply on its behalf).

Definition of “Control” for purposes of determining whether a parent company is a Large Trader

- For purposes of the Rule, control means the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise.
 - For an entity, a person has control when it directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% of more of a class of voting securities of such entity.
 - For a partnership, a person has control if it has the right to receive, upon dissolution, or has contributed, 25% of more of the capital of the partnership.

Determining the ultimate parent company for private fund managers

- A typical private fund manager entity which acts as the investment adviser for one or more pooled investment vehicles (or separately managed accounts) will have the Form 13H filing obligation.
- In the event that a private fund manager with a Form 13H filing obligation is controlled by an entity, the filing obligation may be pushed up to the entity that controls the private fund manager.
- Where both U.S. and non-U.S. pooled investment vehicles are advised by an investment manager and a general partner under common control, the investment manager entity will typically have the Form 13H filing obligation, because it exercises investment discretion over the investment vehicles.

V. Calculating the Identifying Activity Level

What is the “Identifying Activity Level”?

- The Identifying Activity Level is triggered if aggregate transactions in NMS securities are equal to or greater than the Daily or Monthly Threshold:
 - Daily Threshold: during a calendar day, either two million shares or shares with a fair market value of \$20 million; or
 - Monthly Threshold: during a calendar month, either twenty million shares or shares with a fair market value of \$200 million.

NMS securities

- NMS securities are any securities or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.
- NMS securities refer generally to U.S. exchange-listed securities, including equities and options.
- A list of NMS securities will not be available.

Treatment of options for purposes of calculating the Identifying Activity Level

- For purposes of calculating the Identifying Activity Level, the volume and value of options purchased or sold would be determined by reference to the securities underlying the option.
- For example, 50,000 shares of XYZ stock and 500 XYZ call options (to buy 100 shares per option) would count as aggregate transactions of 100,000 shares in XYZ (i.e., $50,000 + 500 \times 100 = 100,000$).

Excluded transactions

- The Rule includes specified excluded transactions which are not typically effected by an arm's length purchase or sale. For purposes of calculating the Identifying Activity Level, the following transactions are excluded:
 - any journal or bookkeeping entry made to an account to record or memorialize the receipt or delivery of funds or securities pursuant to the settlement of a transaction;
 - any transaction that is part of an offering of securities by or on behalf of an issuer, or by an underwriter on behalf of an issuer, or an agent for an issuer, whether or not such offering is subject to registration under the Securities Act of 1933, provided, however, that this exemption shall not include an offering of securities effected through the facilities of a national securities exchange;

Excluded transactions continued

- any transaction that constitutes a gift;
- any transaction effected by a court-appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate;
- any transaction effected pursuant to a court order or judgment;
- any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(c)(1) of the Internal Revenue Code; and
- any transaction between an employer and its employees effected pursuant to the award, allocation, sale, grant or exercise of a NMS security, option or other right to acquire securities at a pre-established price pursuant to a plan which is primarily for the purpose of an issuer benefit plan or compensatory arrangement.

VI. Confidentiality

Confidentiality

- Information that a Large Trader will be required to disclose on Form 13H or provide in response to a SEC request will be exempt from disclosure under the Freedom of Information Act (“FOIA”).
- Any transaction data that a registered broker-dealer reports to the SEC under the Rule is also exempt from disclosure under FOIA.

Confidentiality continued

- The Form 13H Adopting Release states that the SEC is committed to maintaining the information collected pursuant to the Rule in a manner consistent with Section 13(h)(7) of the Securities Exchange Act of 1934.
- Section 13(h) specifies that the SEC shall not be compelled to disclose information collected from Large Traders and registered broker-dealers under a Large Trader reporting system, subject to limited exceptions.
- Specifically, the statute provides that the SEC is not authorized to withhold information:
 - from Congress and other federal departments or agencies acting within the scope of their jurisdictions; and
 - in connection with an order of a court of the United States in an action brought by the United States or the SEC.

VII. Timing of Form 13H filing requirements

Transition/initial filing requirements for Large Traders

- By **December 1, 2011**, entities meeting the definition of Large Trader after **October 3, 2011** (the effective date of the Rule) must:
 - make the initial SEC filing to be assigned a LTID; and
 - disclose the LTID to registered broker-dealers effecting transactions on their behalf.
- Entities meeting the definition of Large Trader **after December 1, 2011** must file an initial Form 13H with the SEC promptly after first effecting aggregate transactions equal to or greater than the Identifying Activity Level.

Voluntary registration

- An entity (or individual) may voluntarily register as a Large Trader by filing Form 13H with the SEC.
- A Large Trader must indicate on its initial Form 13H filing whether it has chosen to voluntarily register.
- A voluntary filer will be treated as a Large Trader for purposes of the Rule and will be subject to all of the obligations of a Large Trader under the Rule at the time it registers as a Large Trader.

Transition/initial filing requirements for broker-dealers

- Broker-dealers must comply with the requirements to maintain records, report transaction data when requested, and monitor Large Trader activity by **April 30, 2012**.

Annual filing requirement

- After the initial Form 13H all filing Large Traders must file Form 13H annually with the SEC within 45 days after the end of each full calendar year.

Amended Filing Requirement

- An amendment must be filed immediately if any information contained in a filed Form 13H becomes inaccurate.
 - For example, when a Large Trader adds a broker-dealer, it must amend its Form 13H to reflect the additional broker-dealer in Item 6.
- Form 13H amendments must be filed no later than the end of the calendar quarter in which such information becomes inaccurate.

Inactive Status

- A Large Trader who has previously filed a Form 13H may file for “inactive status” on its annual Form 13H filing so long as it:
 - has not effected aggregate transactions at any time during the previous calendar year in an amount equal to or greater than the Identifying Activity Level.
- During inactive status, a Large Trader:
 - is relieved of additional filing obligations; and
 - may request that its broker-dealers cease tagging its transactions with its LTID.
- Promptly after effecting transactions in an amount that equals or exceeds the Identifying Activity Level, an inactive Large Trader must reactivate its Large Trader status by filing a Form 13H.

Termination Filings

- In limited circumstances, a Large Trader may terminate its Large Trader reporting status by filing a “Termination Filing” on Form 13H.
- A Large Trader should file a Termination Filing in order to indicate that it does not expect to file future Form 13H filings, such as under circumstances where a Large Trader is dissolving, ceasing to do business, or being acquired.

VIII. Overview of Form 13H

Summary of information that must be disclosed on Form 13H

- Form 13H will require disclosure of:
 - contact persons
 - the business of the Large Trader
 - certain affiliates and governance
 - other SEC filings
 - regulatory status
 - organizational structure
 - the names of the broker-dealers where the Large Trader and certain of its affiliates have accounts

Form 13H – Background Information

- A Large Trader must provide contact information about the Large Trader and its Authorized Person
- A Large Trader’s “Authorized Person” is the natural person authorized to submit the Form 13H and make the certification on behalf of the Large Trader.

Form 13H – Item 1: Business of the Large Trader

- A Large Trader must indicate the businesses that are engaged in by the Large Trader and its “affiliates”.
 - An affiliate is any person that directly or indirectly controls, is under common control with, or is controlled by the Large Trader.
 - The term "person" means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

Form 13H – Item 1: Business of the Large Trader continued

- In addition, a Large Trader must provide a short description of its businesses and of the business of any of its affiliates that exercise investment discretion over NMS securities (each, a “Securities Affiliate”).
 - For example, an investment adviser Large Trader may describe its business by stating: “Investment adviser specializing in fundamental analysis,” and a broker-dealer Large Trader may describe its business by disclosing it is “An options market maker”.

Form 13H – Item 2: Securities and Exchange Commission Filings

- A Large Trader must indicate whether it, or any of its Securities Affiliates, files any other forms with the SEC (e.g., a Form 13F filing).
- If the Large Trader and/or its Securities Affiliates make SEC filings, the Large Trader must identify all:
 - filing entities;
 - forms filed; and
 - CIK numbers

Form 13H – Item 3: CFTC Registration and Foreign Regulators

- A Large Trader must disclose whether it or any of its affiliates is registered with the Commodity Futures Trading Commission (“CFTC”) or regulated by a foreign regulator.
- If so, the Large Trader must identify each such entity and its corresponding CFTC registration number or primary foreign regulator, as applicable.

Form 13H – Item 4: Organizational Information

- This Item is intended to assist the SEC in understanding the affiliate structure of a Large Trader.
- In Item 4(a), a Large Trader must attach an organizational chart which depicts the Large Trader, its parent company (if applicable), all of its Securities Affiliates, and any of the Large Trader's affiliates that are registered with the CFTC and identified in Item 3(a).
- In Item 4(b), a Large Trader must provide a narrative description of the relationships between all of the entities and persons depicted in the organizational chart.

Form 13H – Item 5: Governance of the Large Trader

- A Large Trader must indicate whether it is an: individual, partnership, limited liability partnership, limited partnership, corporation, trustee or limited liability company.
 - If it is a partnership, it must identify each general partner and each limited partner that holds more than a 10% interest in its accounts.
 - If it is a corporation or a trustee, it must identify each executive officer, director or trustee.
- A Large Trader must also disclose the jurisdiction in which it is incorporated or organized.

Form 13H – Item 6: List of Broker-Dealers at which the Large Trader or its Securities Affiliates has an Account

- A Large Trader must identify all of the broker-dealers at which it, or any of its Securities Affiliates, has an account.
- In addition, it must disclose whether each such broker-dealer provides prime broker, executing broker, and/or clearing broker services.

IX. Questions?

X. Speaker Biographies

John E. Tavss

John E. Tavss is the head of Seward & Kissel's Investment Management Group. John has practiced at the Firm since 1979, and has been a partner since 1988.

John advises clients on a wide variety of securities, tax and business law matters relating to the investment management business. John has significant expertise in the investment management area including the representation of "hedge funds," other private investment vehicles (both onshore and offshore) and private equity funds. John is a frequent speaker on "hedge fund" and other private investment fund issues.

John is a member of the New York State Bar Association (Tax Section) and the International Bar Association (Private Funds Section). John is actively involved with a not-for-profit organization supported by the hedge fund industry dedicated to the prevention and treatment of child abuse.

John has been regularly recognized in Chambers Global, Chambers USA and The International Who's Who of Business Lawyers as a leading fund formation lawyer for private investment funds.

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Steven B. Nadel

Steven B. Nadel is a partner in Seward & Kissel's Investment Management Group. He joined the Firm in 1997. He is also the founding editor of *The Private Funds Report*, the Group newsletter.

Steve has extensive experience in issues relating to the establishment and ongoing operation of hedge funds, funds of funds (U.S. and offshore), private equity funds, separate accounts, registered investment advisers, commodity pool operators and commodity trading advisers, as well as related matters, including management company structuring, fund marketing, employment agreements, solicitation agreements, joint ventures, seed capital arrangements, regulatory compliance and general organizational matters.

Steve is a member of the American Bar Association and the New York State Bar Association. Steve also sits on the Boards of Directors of the charities Hedge Funds Care and the RBaby Foundation.

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Patricia A. Poglinco is a partner in Seward & Kissel's Investment Management group. Pat joined Seward & Kissel in 1986 and has been a partner since 1994.

Pat's practice specialties include the representation of investment advisers and related regulatory compliance; the formation and representation of private investment partnerships, group trusts and various offshore investment vehicles; the formation and CFTC registration of commodity pools, commodity pool operators and commodity trading advisors; the formation and ongoing representation of registered investment companies (open-end and closed-end funds) and their managers, distributors, underwriters and other service providers; and general securities and general corporate matters.

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Rob specializes in the formation and representation of private funds (U.S., offshore, single and multi-strategy, fund of funds and private equity), investment advisers (federal or state registered and non-registered), broker-dealers, commodity pool operators and commodity trading advisers. Rob advises clients on a wide variety of securities, tax and business law matters relating to the investment management business, including compliance and regulatory matters, fund and management company structuring, counseling on mergers and acquisitions, buy-sell agreements, employment matters, non-compete and confidentiality agreements, marketing and distribution arrangements and presentation materials, joint ventures, seed capital arrangements, soft dollar and other brokerage arrangements, and general organizational matters.

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