17 CFR Part 249

[Release No. 34-21539; File No. S7-40-84]

Requests for Confidential Treatment Filed by Institutional Investment Managers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed Amendments to Instruction to Form.

SUMMARY: The Commission is proposing for public comment amendments to the instructions to the form that prescribes the reporting requirements for institutional investment managers exercising investment discretion over accounts having in the aggregate more than $100,000,000 in exchange-traded or NASDAQ-quoted equity securities. The amendments would simplify the procedures for requesting confidential treatment of certain risk arbitrage positions filed on the form, and place time limitations on confidential treatment requests for securities holdings where the holdings constitute confidential commercial information.

DATE: Comments should be received on or before January 14, 1985.

ADDRESS: Comments should be submitted in triplicate to Shirley E. Hollis, Acting Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. Comment letters should refer to File No. S7-40-84. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: For questions relating specifically to the subject of this release, contact Susan P. Hart, Esq., Attorney/Adviser, Office of Disclosure Policy and Adviser Regulation, (202) 272-2098, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549; for questions relating generally to reporting requirements for institutional investment managers under section 13(f) of the Securities Exchange Act of 1934 and rules thereunder, contact Alice R. Latimer, Research Assistant, Office of Chief Counsel, (202) 272-2038, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: On June 15, 1978, the Securities and Exchange Commission (the "Commission") announced the adoption of rule 13f-1 (17 CFR 240.13f-1) and related Form 13F (17 CFR 249.325), under section 13(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq. as amended by Pub. L. No. 94-29 (June 4, 1975)) (the "Exchange Act").[1] Under Section 13(f) and rule 13f-1, as amended effective February 5, 1979,[2] an institutional investment manager exercising investment discretion (as defined in section 3(a)(35) of the Exchange Act (15 U.S.C. 78(c)(a)(35))) with respect to accounts having $100,000,000 or more in exchange-traded or NASDAQ-quoted equity securities on the last trading day of any of the twelve months of calendar year must file five copies of Form 13F with the Commission and, if a bank, with the appropriate bank regulatory agency. The form must be filed within 45 days after the last day of such calendar year and within 45 days after the last day of the first three calendar quarters of the succeeding year. The form requires the reporting manager to state the name of the issuer and the class of security, CUSIP number, number of shares or principal amount in the case of convertible debt, and aggregate fair market value of each security held. The form also requires information concerning the nature of investment discretion and voting authority possessed by the reporting manager.

Rule 13f-1 and Form 13F were adopted to implement the institutional disclosure program mandated by Congress in section 13(f) of the Exchange Act. In general, section 13(f)(3) of the Exchange Act requires that the Commission make the information in reports on Form 13F promptly available to the public. However, that section also provides for confidential treatment for two categories of information that for convenience are referred to in this release as "commercial" and "personal." If the criteria of section 13(f)(3) are met, the Commission's grant of confidential treatment to personal information is nondiscretionary. Decisions about whether to grant confidential treatment to commercial information must be made in accordance with the Freedom of Information Act ("FOIA") (5 U.S.C. 552).

General Instruction D of Form 13F establishes the procedures to be followed in requesting confidential treatment. As last amended, in 1979, General Instruction D provides that if a request for confidential treatment is based on a claim that the required information is commercial or financial, the reporting manager must, among other things: (1) Describe the investment strategy being followed; (2) demonstrate that disclosure of the investment strategy would be premature; and (3) demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the manager's competitive position.

The Commission is proposing an amendment to General Instruction D to Form 13F to provide a simplified procedure for requesting confidential treatment of certain arbitrage information filed on the form. Under the revised procedures, confidential treatment would be granted for a period of one year to security holdings which are open risk arbitrage positions if the reporting manager represents in writing at the time Form 13F is filed that: (1) The security holding represents a risk arbitrage position that is open on the last day of the calendar quarter for which the report is filed; and (2) the manager has no present intention to close the position on or before the date on which the report is required to be filed with the Commission. In addition, the Commission is proposing an amendment to require managers requesting confidential treatment requests for commercial information, other than open risk arbitrage information, to limit their requests to a period of one year or less.

[1] Exchange Act Release No. 14852 (June 15, 1978) [43 FR 26700, June 22, 1978].

[2] Exchange Act Release No. 15461 (January 5, 1979) [44 FR 3033, January 15, 1979].

Background

Many of the requests for confidential treatment of commercial information have been from managers who engage in risk arbitrage. Based on its experience with these requests, the Commission believes that it should consider whether decisions relating to confidential treatment of information about open risk arbitrage positions can be made without all of the information currently required by Instruction D. Since the potential harm of public disclosure of such positions is identifiable and similar for all open risk arbitrage positions as a class (for example, if a merger which was the subject of risk arbitrage activity was not consummated, an arbitrageur could be harmed when it attempted to liquidate its position in adverse market conditions, if the extent of its position were known to the public), the Commission is proposing to eliminate the requirement that managers supply full factual support on a holding-by-holding basis, and to grant confidential treatment for such security positions if certain representations are made in writing by the reporting manager. Commercial information may, however, be granted confidential treatment only in accordance with the FOIA, and the Commission requests comment on the extent to which it may grant confidential treatment to a class of holdings such as open risk arbitrage positions.

Amendments

Confidential Treatment for Open Risk Arbitrage Positions

The first of the proposed amendments to General Instructions D, contained in paragraph 2(f) of the revised instruction, would require managers requesting for confidential treatment for certain risk arbitrage positions to provide two good faith representations. The first of these is that the security holding represents a risk arbitrage position that is open on the last day of the calendar quarter for which the report is filed and the second is that the reporting manager has no present intention to close the position on or before the date the report is required to be filed with the Commission. Under the proposed amendment, if such representations are made, confidential treatment will be granted automatically for a period of one year from the calendar quarter end.[3]

a. *Definition of Risk Arbitrage.* For purposes of the revisions to Instruction D, the term "risk arbitrage" refers to the risking of capital in connection with a proposed merger, acquisition, tender offer, or similar transaction involving recapitalization ("risk arbitrage event" or "deal").[4] The term applies only to transactions effected after the public announcement of the deal and before completion or termination of the deal. The term also applies whether the deal involves a proposed exchange of securities or cash tender offer and whether transactions are effected with a view to profiting from the consummation of the deal or from its unsuccessful termination. The new procedures also are available where there is an anticipated program to liquidate a risk arbitrage position before completion or after termination of the deal or within a reasonable period of time thereafter.[5]

Some institutional managers have asserted in connection with confidential treatment requests under section 13(f) that there is a substantial likelihood of competitive harm if open risk arbitrage positions are prematurely disclosed to the public. The following argument is representative of their assertions. A risk arbitrageur who has reason to believe that an announced merger or tender offer may not occur or will occur only after protracted delays, most likely will want to liquidate its position as unobstrusively and rapidly as possible. If the extent of the arbitrageur's position as disclosed on Form 13F is publicly known, the price at which the position can be disposed of could be affected adversely. Thus, the arbitrageur could suffer significant harm if the position held became public knowledge before the holdings were liquidated. This proposed revision to General Instruction D is based on a belief that the potential for harm from disclosure is similar for all open risk arbitrage positions.

b. Duration of Confidential Treatment for Open Risk Arbitrage Positions. Once a manager has met the new criteria for requesting confidential treatment, the information concerning open risk arbitrage positions will be protected from disclosure for a period of one year from the date the report is required to be filed, a period during which all open positions are likely to be closed, or, if still open, to become no longer time-sensitive. Any request for an extension of the period for which confidential treatment has been granted under the new procedures would have to be made in the form of a new request filed with the Commission at least fourteen days before the end of the initial one-year period. Moreover, the new request would have to include the full factual support specified in General Instruction D 2(a)–(d) to Form 13F. Because both section 13(f) of the Exchange Act and the FOIA were intended by Congress to promote public disclosure of information and because there can be significant variations in the amount of time that risk arbitrage positions are held open, the Commission requests comments on the appropriateness of one year as the initial period for which confidential treatment will be granted under the proposed amendment.

c. Applicability. The simplified procedures for requesting confidential treatment set out in paragraph 2(f) of the amended instruction would apply only to open risk arbitrage positions. Managers requesting confidential treatment for other investment strategies such as block positioning and programs of acquisition and/or disposition that cannot appropriately be considered risk arbitrage would still be required to provide full factual support for the requests. Block positions have not been included in the proposal because they involve transactions which are completed during a very short period of time.[6] In the Commission's view, even if a reporting manager held a block position at the calendar quarter end, it is likely that the position would be disposed of by the date on which Form 13F is required to be filed (e.g., 45 days later). Any block position that might be maintained 45 days after the close of a calendar quarter would be presumed to be maintained for investment purposes, rather than as a block position, and would require the full factual support specified in Instruction D. Similarly, confidential treatment requests regarding acquisition or disposition programs, other than risk arbitrage, would have to be supported with facts as specified in paragraph 2(a)–(d) of

[3] In accordance with rule 24b-2 (17 CFR 240.24b-2), this grant of confidential treatment would not preclude reconsideration by the Commission at a later date of the decision concerning confidential treatment. If the Commission were to receive a FOIA request for such information during the one-year period, managers would be required to provide full-factual support to justify the continuation of confidential treatment.

[4] This definition of "risk arbitrage" is the same as that referred to in section 11(a)(1)(D) of the Exchange Act (15 U.S.C. 78(k)(a)(1)(D)). See Exchange Act Release No. 15533 (January 29, 1979), for a more detailed discussion of the definition. "Deal" is the term commonly used in the industry to refer to a risk arbitrage event; therefore, the term "deal" is used in this release to refer to such a transaction.

[5] Risk arbitrage in this context does not include a position assumed by a risk arbitrageur which is maintained for tax or investment purposes after the termination or completion of the deal.

[6] Rule 3b-8(c) of the Exchange Act (17 CFR 240.3b-8(c)) defines a block positioner as a dealer, who, among other things, acting as principal, buys short or sells long a block of stock with a market value of $200,000 or more in a single transaction and sells the stock as rapidly as possible commensurate with the circumstances.

Instruction D, and a showing of a likelihood of competitive harm if the positions are disclosed.

Limitation on Confidential Treatment for Other Commercial Information

The second amendment to General Instruction D, contained in paragraph 2(e) of the revised instruction, would require each institutional manager requesting confidential treatment for commercial information, other than information relating to an open risk arbitrage position, to limit the requested period of confidentiality to a specific time, not to exceed one year. In the Commission's view, this change balances the public disclosure concerns of the statute with the needs of managers to protect certain investment strategies and holdings from public disclosure under the standards of FOIA exemption four. The Commission believes that, in most cases, an investment strategy or holding that was the subject of a confidential treatment request under section 13(f) would within a year following the date that the 13F report is filed become no longer sensitive. Thus, the proposed amendment would require managers to designate a period of time for which confidential treatment of any commercial information, other than that relating to open risk arbitrage positions, is requested. The period requested may not exceed one year from the date the report is required to be filed with the Commission. Requests for extension of the period for which confidential treatment had been granted could be made by submitting a *de novo* request at least fourteen days in advance of the expiration of the original time period for which confidential treatment was granted. The Commission requests specific comment on whether it should limit confidential treatment requests for commercial information, other than open risk arbitrage information, to a specific time period, and if so, whether a one year time period is a reasonable time limit for such requests.

If the proposed amendments to Instruction D are adopted substantially as proposed, the Commission will automatically make public security holdings, for which confidential treatment has been granted, on the specified date without additional notice to managers, unless a new request for confidential treatment is filed at least fourteen days in advance of the expiration of the year specified for open risk arbitrage positions or, for other commercial information, at least fourteen days in advance of the time designated by the manager.

List of Subjects in 17 CFR Part 249

Reporting requirements, Securities.

Text of Proposed Amendment to General Instructions to Form 13F

Chapter II of Title 17 of the Code of Federal Regulations is proposed to be amended as follows:

PART 249—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. By revising paragraph 2 of General Instruction D of the form prescribed in § 249.325 of Title 17 of the Code of Federal Regulations to read as follows:

§ 249.325 Form 13F, report of institutional investment manager pursuant to section 13(f) of the Securities Exchange Act of 1934.

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General Instructions

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D. * * *

2. If a request for confidential treatment is based upon a claim that the subject information is confidential commercial or financial information, provide information required by paragraphs (a)–(e) except that if the subject information concerns security holdings which represent open risk arbitrage positions and no previous requests for confidential treatment of those holdings have been made, only the information required in paragraph (f) need be provided.

a. Describe the investment strategy being followed with respect to the relevant securities holdings, including the extent of any program of acquisition and disposition (note that the term "investment strategy," as used in this instruction, also includes activities such as block positioning);

b. Explain why public disclosure of the securities holdings would, in fact, be likely to reveal the investment strategy; consider this matter in light of the specific reporting requirements of Form 13F (e.g., securities holdings are reported only quarterly and may be aggregated in many cases);

c. Demonstrate that such revelation of an investment strategy would be premature; indicate whether the manager was engaged in a program of acquisition or disposition of the security both at the end of the quarter and at the time of the filing; address whether the existence of such a program may otherwise be known to the public;

d. Demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the manager's competitive position; show what use competitors could make of the information and how harm to the manager could ensue.

e. State the period of time period for which confidential treatment of the securities holdings is requested. The time period specified may not exceed of one year from the date the report is required to be filed with the Commission.

f. For security holdings which represent open risk arbitrage positions, the request must include good faith representations that:

(1) The security holding represents a risk arbitrage position open on the last day of calendar quarter for which the report is filed; and

(2) The reporting manager has no present intention to close the position on or before the date the report is required to be filed with the Commission.

If the representations stated above are made in writing at the time Form 13F is filed, the subject security holdings will automatically be accorded confidential treatment for a period of one year from the date the report is required to be filed with the Commission.

g. At the expiration of the period for which confidential treatment has been granted pursuant to item (e) or item (f) of this paragraph ("expiration date"), the Commission, without additional notice to the reporting manager, will make such security holdings public unless a *de novo* request for confidential treatment of the information that meets the requirements of items (a)–(e) of this paragraph, is filed with the Commission at least fourteen (14) days in advance of the expiration date.

Statutory Authority

The Commission hereby proposes this amendment to Form 13F pursuant to the authority set forth in section 3(b), 13(f) and 23 of the Exchange Act (15 U.S.C. 78c(b), 78m(f), and 78(w).

Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act, the Chairman of the Commission has certified that the amendments to General Instruction D of Form 13F proposed herein will not, if promulgated, have a significant impact on a substantial number of small entities. These amendments are being proposed under Section 13(f) of the Exchange Act. The Commission has defined small entities for the purposes of rulemaking under the Exchange Act; however, no specific definition is provided for institutional investment managers, the class of persons required to report pursuant to Section 13(f). Moreover, although a definition is provided for investment advisers. However, the Commission has defined small entities when that term is used in connection with the Investment Advisers Act ("Advisers Act"), in Rule 0–7 under the Act (17 CFR 249.0–7).

The term small entities is defined, under the Exchange Act, in Rule 0–10 (17 CFR 240.0–0). Although this definition does not include investment advisers, Rule 0–10 provides that the Commission may adopt a definition of small entities for purposes of a particular rulemaking proceeding. For purposes of the proposed amendments to Instruction D of Form 13F the Commission has

decided to use two definitions of the term small entities that were adopted previously by the Commission. The Commission believes that this action is necessary and appropriate to ensure that all persons or entities that might be institutional investment managers under section 13(f) of the Exchange Act will be included within a category addressed by the definition. The two definitions being used are those in Rule 0–10 under the Exchange Act and in Rule 0–7 under the Advisers Act. Public comment is invited on the Commission's use of this combined definition. Unless significant public comment is received presenting facts that indicate that the definition is not appropriate, the Commission does not propose to issue any further certification under the Regulatory Flexibility Act regarding adoption of the amendments proposed in this release.

The definition under the Advisers Act provides that an investment adviser is a small entity if it manages assets with total value of $50 million or less, in discretionary or nondiscretionary accounts. As relevant to the proposed amendments to Form 13F, the definition under the Exchange Act provides that: a broker or dealer is a small entity if on certain specified dates during the prior fiscal year it had total capital of less than $500,000 and it was not affiliated with any person that was not a small business organization as defined in Rule 0–10 (17 CFR 240.0–10(c)). The Commission is using the definition under the Advisers Act for all institutional investment managers that are not brokers or dealers. In the Commission's view, this is appropriate because functionally the activities of such managers most closely approximate those of investment advisers. The reason for the certification is that there are not a substantial number of institutional investment managers affected by the rule that come within the elements of this combined definition of small entities. First, the amendment would affect institutional investment managers who have at least $100 million under management. Thus, any investment adviser or other entity required to file 13F reports would not be a small entity under the Advisers Act definition of the term. In addition, the Commission does not believe that there are a significant number of brokers or dealers required to file on Form 13F that meet the definition of small entity in rule 0–10(c) under the Exchange Act.

By the Commission.

Dated: December 5, 1984.

Shirley E. Hollis,

Acting Secretary.

Regulatory Flexibility Act Certification

I, John S.R. Shad, Chairman of the Securities and Exchange Commission, hereby certify pursuant to 5 U.S.C. 605(b) that the proposed amendments to General Instruction D to Form 13F (17 CFR 249.325) under section 13(f) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78m(f)) set forth in Securities Exchange Act Release No. 21539, if promulgated, will not have a significant economic impact on a substantial number of small entities. For the purposes of this rulemaking, pursuant to Rule 240.0–10 the Commission is using a definition of small entities which is a combinaiton of two definitions of that term previously adopted by the Commission under the Exchange Act and under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) ("Advisers Act"). As to entities that meet the definition of an investment adviser in section 202(a)(11) of the Investment Advisers Act of 1940, and all institutional investment managers other than brokers and dealers, the definition of small entities used is that in Rule 9–7 under the Advisers Act (17 CFR 275.0–7). As to any broker or dealer required to file Form 13F, the term small entities is defined in Rule 0–10 under the Exchange Act (17 CFR 240.0–10). The Commission is adopting this definition because not all institutional investment managers required to file Form 13F would be included in a category addressed by either of the definitions cited if only one of the definitions were used. However, all institutional managers are included within a category addressed by the combined definition. The reason for this certification is that it does not appear that a substantial number of institutional investment managers affected by the rule that come with the definition of "small entities" as set forth in Rule 240.0–10 and Rule 275.0–7.

Dated: December 5, 1984.

John S.R. Shad,

Chairman.

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