SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66839)

April 20, 2012

Order Temporarily Exempting Broker-Dealers from the Recordkeeping, Reporting, and Monitoring Requirements of Rule 13h-1 under the Securities Exchange Act of 1934 and Granting an Exemption for Certain Securities Transactions

I. Introduction

On July 27, 2011, the Securities and Exchange Commission ("Commission") adopted Rule 13h-1 under the Securities Exchange Act of 1934 ("Exchange Act") concerning large trader reporting to assist the Commission in both identifying, and obtaining trading information on, market participants that conduct a substantial amount of trading activity, as measured by volume or market value, in U.S. securities (such persons are referred to as "large traders").[1]

Pursuant to Exchange Act Section 13(h)(6) and Rule 13h-1(g) thereunder,[2] the Commission, by order, may exempt from the provisions of Rule 13h-1, upon specified terms and conditions or for stated periods, any person or class of persons or any transaction or class of transactions from the provisions of Rule 13h-1 to the extent that such exemption is consistent with the purposes of the Exchange Act.

Currently, the compliance date for the broker-dealer recordkeeping and reporting requirements of Rule 13h-1(d) and (e), respectively, as well as the requirement under Rule 13h-1(f) for broker-dealers to monitor their customers' accounts for activity that may trigger the large trader identification requirements of Rule 13h-1, is April 30, 2012. As discussed below, the Commission is temporarily exempting registered broker-dealers from the requirements of new

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1 See Securities Exchange Act Release No. 64976 (July 27, 2011), 76 FR 46960 (Aug. 3, 2011) ("Rule 13h-1 Adopting Release"). The effective date of Rule 13h-1 was October 3, 2011.

2 See 15 U.S.C. 78m and 17 CFR 240.13h-1(g), respectively.

Rule 13h-1 by extending the April 30, 2012 compliance date to provide them with additional time to comply with the recordkeeping, reporting, and monitoring requirements of the Rule.

Specifically, and as discussed more fully below, the Commission is extending the April 30, 2012 compliance date for registered broker-dealers to May 1, 2013, except for certain broker-dealers that: (1) are large traders or (2) have large trader customers that are either broker-dealers or that trade through a "sponsored access" arrangement, for which the Commission is extending the compliance date to November 30, 2012.[3] The extension of the compliance date will allow broker-dealers additional time to develop, test, and implement enhancements to their recordkeeping and reporting systems as required under Rule 13h-1 and, for those broker-dealer requirements for which the compliance date has been extended to May 1, 2013, for the Commission to consider requests for relief from certain provisions of the Rule.

In addition, the Commission is exempting certain transactions from the definition of the term "transaction" provided in Rule 13h-1(a)(6), but for the sole purpose of determining whether a person is a large trader.

II. Broker-Dealer Recordkeeping and Reporting

A. Introduction

Recordkeeping. In addition to requiring large traders to register with the Commission by filing and periodically updating Form 13H, Rule 13h-1 requires certain broker-dealers to, among other things, maintain specified records of transactions that they effect, directly or indirectly, for large traders, and to report to the Commission, upon request of the Commission, such records in electronic format. Specifically, Rule 13h-1(d) requires broker-dealers to maintain records of the

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[3] The effective date for Rule 13h-1 remains October 3, 2011. The compliance date for the requirement on large traders to identify to the Commission pursuant to Rule 13h-1(b) was December 1, 2011.

information specified in Rule 13h-1(d) for all transactions effected directly or indirectly by or through:

(i) An account such broker-dealer carries for a large trader or an Unidentified Large Trader,[4] or

(ii) If the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion.

(iii) Additionally, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such large trader or Unidentified Large Trader shall maintain records of all of the information required under the Rule for those transactions.

The information required to be maintained for large trader accounts includes the standard information currently captured pursuant to Rule 17a-25 and the Electronic Blue Sheets ("EBS") system, plus two new fields that are unique to Rule 13h-1: (1) the time that the transaction was executed ("execution time")[5] and (2) the large trader identification ("LTID") number(s) associated with the account.[6]

Reporting. Rule 13h-1(e) requires every registered broker-dealer who is itself a large trader or carries an account for a large trader or an Unidentified Large Trader to report

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4 The term "Unidentified Large Trader" means each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of Rule 13h-1 that a registered broker-dealer knows or has reason to know is a large trader. See 17 CFR 240.13h-1(a)(9). For purposes of determining whether a registered broker-dealer has reason to know that a person is large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer. See id.

5 See 17 CFR 240.13h-1(d)(2)(xii).

6 See 17 CFR 240.13h-1(d)(2)(xiii).

electronically to the Commission, at the Commission's request, the required transaction information on such persons whose activity is equal to or greater than the reporting activity level.[7] In addition, the Rule provides that where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting such transactions directly or indirectly for a large trader must electronically report such information, at the Commission's request.

Broker-dealers are required to report information to the Commission upon request of the Commission.[8] Information must be reported to the Commission no later than the day and time specified in the Commission's request for transaction information, which shall be no earlier than the open of business of the day following the request, unless in unusual circumstances same day submission of information is requested.[9]

B. Request for Extension of Compliance Date and Other Relief from Broker-Dealer Recordkeeping and Reporting Requirements

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7 The reporting activity level is 100 shares. See 17 CFR 240.13h-1(a)(8). Accordingly, in response to a Commission request for EBS information, broker-dealers are required to report information for each account in which any large trader's or Unidentified Large Trader's activity amounts to at least 100 shares in the aggregate.

In response to a Commission request for transaction records, in addition to reporting information for any identified large trader (i.e., a person for whom the broker-dealer has received an LTID number), the broker-dealer also should report records for each Unidentified Large Trader, as applicable, including any unique indentifying number that the broker-dealer has assigned to such person.

8 See 17 CFR 240.13h-1(e).

9 See 17 CFR 240.13h-1(e). See also 17 CFR 240.13h-1(d)(5) (requiring that the records required to be kept pursuant to the provisions of Rule 13h-1 must be available for reporting on the morning after the day the transactions were effected (including Saturdays and holidays)).

The Financial Information Forum ("FIF"), representing a variety of broker-dealers and other market participants, has requested that the Commission extend the compliance date to November 30, 2012 for the broker-dealer recordkeeping and reporting provisions of Rule 13h-1, and provide certain substantive relief with respect to those provisions.[10] The Securities Industry and Financial Markets Association ("SIFMA") also has approached Commission staff with an outline for relief similar to that requested by FIF, including a phased implementation approach.[11]

FIF and SIFMA believe that broker-dealers need additional time to perform the business analysis, development, and testing required to implement the Rule's recordkeeping and reporting requirements. FIF and SIFMA also believe that relief from certain of the substantive requirements of the Rule is warranted in order to reduce the implementation costs for some broker-dealers.[12] Among other things, FIF has requested relief from the reporting requirements for non-self clearing broker-dealers, such that only clearing broker-dealers (including large traders that are themselves self-clearing broker-dealers) would report large trader transaction data to the Commission through the EBS infrastructure. Further, for large trader customers other than those using "sponsored access" arrangements, FIF has requested relief from providing LTID numbers on executions in average price processing accounts, and execution time on allocations

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10 See Letter from Manisha Kimmel, Executive Director, Financial Information Forum, to Robert Cook, Director, and David Shillman, Associate Director, Division of Trading and Markets, Commission, dated January 25, 2012 ("FIF Letter"), available at: http://www.sec.gov/comments/s7-10-10/s71010.shtml.

11 See Letter from Ann L. Vlcek, Managing Director and Associate General Counsel, SIFMA, to David S. Shillman, Associate Director, Division, Commission, dated March 29, 2012, available at: http://www.sec.gov/comments/s7-10-10/s71010.shtml.

12 See FIF Letter, supra note 10, at 5.

made out of average price processing accounts.[13] FIF also requested relief for broker-dealers effecting transactions for a large trader other than the large trader's clearing broker.[14] FIF did not request relief from the substantive requirements of the Rule for clearing brokers[15] where the large trader customer either (1) is a U.S. registered broker-dealer or (2) has a "sponsored access" arrangement.[16] Finally, FIF and SIFMA requested that the Commission coordinate the Rule's implementation dates with those for a series of separate changes to the EBS record layout that have been proposed by the Intermarket Surveillance Group,[17] and that Commission staff provide guidance on a range of suggested "Frequently Asked Questions" relating to the Rule.[18]

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13 In other words, executions in average price processing accounts would be reported with the execution time for each trade but would not include the applicable LTID number(s) associated with the transaction, and allocations out of average price processing accounts would be reported with the applicable LTID number(s) but not the execution times of the constituent trades.

14 See FIF Letter, supra note 10, at 2.

15 This includes the large trader broker-dealer itself, if self-clearing.

16 See FIF Letter, supra note 10, at 2 and 22. FIF defines a "sponsored access" arrangement by reference to the Commission's Market Access release (Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (S7-03-10)), generally as an arrangement where a broker-dealer permits a customer to enter orders into a trading center without using the broker-dealer's trading system (i.e., using the customer's own technology or that of a third party provider). FIF indicates that compliance is easier for sponsored access customers because those arrangements typically are distinct from all other business lines of the broker-dealer, with infrastructure that processes this order flow that is separate from the platforms that handle other client and proprietary flows. See id. at 5.

17 See, e.g., FINRA Regulatory Notice 11-56 (December 2011) (concerning proposed enhancements to EBS submissions). As reflected in that Regulatory Notice, the ISG's proposed enhancements currently have an effective date of August 31, 2012. Commission staff are currently working with the ISG on the changes to the EBS record layout and expects to be able to coordinate the implementation dates as requested.

18 Commission staff have published written responses to a series of "Frequently Asked Questions" that staff have received since the Commission's adoption of Rule 13h-1 and Form 13H. See Responses to Frequently Asked Questions Concerning Large Trader Reporting, available at: http://www.sec.gov/divisions/marketreg/mrfaq.htm.

C. Extension of Compliance Date for the Broker-Dealer Requirements

The Commission believes that it is appropriate and consistent with the purposes of the Exchange Act to provide a temporary exemption from the broker-dealer recordkeeping, reporting, and monitoring requirements of Rule 13h-1 by extending the Rule's compliance date on a limited basis. FIF raised a variety of implementation concerns relating to the application of the Rule to broker-dealers other than the large trader's clearing broker, and in cases where the large trader customer is neither a U.S.-registered broker-dealer nor a sponsored access customer. An extension of the compliance date should provide the Commission an opportunity to work with market participants to more fully examine the implementation issues raised by FIF, assess the appropriateness of any exemptive relief, and allow broker-dealers time to develop, test, and implement the necessary systems changes once the examination of implementation issues is complete. However, the Commission believes a more modest extension of the compliance date is appropriate for those aspects of the Rule for which substantive relief was not requested – namely compliance by the large trader's clearing broker (including the large trader itself if it is a self-clearing broker-dealer) where the large trader customer either (1) is a U.S. registered broker-dealer or (2) has a "sponsored access" arrangement. The Commission believes that temporarily exempting registered broker-dealers from the recordkeeping, reporting, and monitoring requirements of Rule 13h-1 for the stated periods should facilitate the orderly and meaningful implementation of the requirements for those broker-dealers that need more time to comply with the new rule.

Recordkeeping and Reporting Requirements for Broker-Dealers. Accordingly, the Commission is providing a temporary exemption to extend the compliance date to May 1, 2013,

for the broker-dealer recordkeeping, reporting, and monitoring requirements of Rule 13h-1, except as described below.[19]

The Commission is providing a temporary exemption to extend the compliance date to November 30, 2012, for the broker-dealer recordkeeping and reporting requirements of Rule 13h-1 with respect to a clearing broker-dealer for a large trader[20] where the large trader:

(1) is a U.S.-registered broker-dealer,[21] or

(2) trades through a sponsored access arrangement.[22]

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19 In connection with any potential relief that the Commission may grant on or before the new May 1, 2013 date, the Commission would consider the appropriateness of an implementation period as well as a systems testing schedule beyond May 1, 2013.

20 In its request, FIF asked the Commission for "relief for broker dealers involved in Large Trader transactions that do not have a direct relationship with the Large Trader. Only the self-clearing and clearing broker dealers with a direct relationship with the Large Trader would perform Large Trader Reporting." See FIF Letter, supra note 10, at 2. In Appendix C of its letter, FIF provides an example of the entities for whom it recommends imposing a recordkeeping and reporting obligation. See id. at 25. Specifically, FIF recommends that the reporting of execution time should rest with the clearing broker for the originating broker, and any prime broker would be relieved from being required to report execution times. The term "a clearing broker-dealer for a large trader" refers to self-clearing and clearing broker-dealers that have a direct relationship with the large trader (including the large trader broker-dealer itself, if self-clearing).

21 The reportable activity would include proprietary trading by a large trader broker-dealer where the large trader is trading for its own account.

22 A "sponsored access arrangement" in this context refers to an arrangement in which a broker-dealer permits a large trader customer to enter orders directly to a trading center where such orders are not processed through the broker-dealer's own trading system (other than any risk management controls established for purposes of compliance with Rule 15c3-5 under the Exchange Act) and where the orders are routed directly to a trading center, in some cases supported by a service bureau or other third party technology provider. See Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (S7-03-10).

On November 30, 2012, these clearing brokers should be prepared to record and report disaggregated trade information, together with the LTID number (or numbers, if applicable) and execution time, for these two categories of large traders, in accordance with the requirements of Rule 13h-1.[23]

As explained in FIF's letter, the trading activity of these categories of large traders typically is processed by clearing brokers on infrastructure separate from that used for other customers, so that compliance with the Rule requires substantially less effort than for other types of large trader customers.[24] Further, the Commission believes that limiting the recordkeeping and reporting responsibility to clearing brokers for this initial compliance period is reasonable as it narrows the universe of reporting entities to broker-dealers that currently are connected to the EBS system.

Monitoring Requirements. The Commission also is providing a temporary exemption to extend the compliance date to May 1, 2013 for the requirement on registered broker-dealers to monitor their customers' accounts for activity that may trigger the large trader identification

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[23] Accordingly, large traders that are themselves registered broker-dealers but that are not self-clearing would not be required to connect to the EBS system to report their transactions as of November 30, 2012, and instead could rely on their clearing broker to perform the reporting responsibilities with respect to their reportable transactions during that interim period.

In addition, FIF requested in its letter that the Commission provide guidance on whether execution times are required to be reported in connection with options exercises and assignments as well as exchange traded fund creations and redemptions (i.e., the actual transfers involving the authorized participant and the exchange traded fund sponsor, not the underlying purchases or sales of securities in the secondary market by an authorized participant in connection with the creation or redemption process). See FIF Letter, supra note 10, at 1. While the Commission continues to consider FIF's broader request for relief, in the interim period, firms will not be required to provide execution times on any options exercises and assignments or exchange traded fund creations and redemptions that they report through EBS for large traders prior to May 1, 2013.

[24] See FIF Letter, supra note 10, at 5.

requirements of Rule 13h-1. This extension should allow firms to focus their resources on the recordkeeping and reporting provisions and facilitate the orderly implementation of those provisions.

III. Exemption for Certain Transactions

Rule 13h-1(a)(1)(i) defines a large trader as a person who, among other things, "effects transactions for the purchase or sale of any NMS security…"[25] Rule 13h-1(a)(6) defines the term "transactions" as "all transactions in NMS securities, excluding exercises or assignments of option contracts," except for certain specifically enumerated transactions.[26] The exceptions from the term "transaction" were designed to exclude certain transactions from the identifying activity level calculation that are not effected with an intent that is commonly associated with the arm's-length trading of securities in the secondary market and therefore would not fall within the types of transactions that are characterized by the exercise of investment discretion for purposes of Rule 13h-1.[27] Rather, these enumerated categories of transactions generally are effected for materially different reasons that reflect fundamental corporate decision-making or capital formation objectives and therefore are not effected with an intent that is normally associated with secondary-market trading activity in NMS securities.

SIFMA has requested that certain additional types of transactions involving securities offerings be excluded from being counted towards the identifying activity level.[28] Under the

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25 See 17 CFR 240.13h-1(a)(1)(i).

26 See 17 CFR 240.13h-1(a)(6).

27 See Rule 13h-1 Adopting Release, supra note 1, 76 FR at 46967.

28 See Letter from Sean Davy, Managing Director, SIFMA, to David S. Shillman, Associate Director, Division, Commission, dated March 26, 2012, available at: http://www.sec.gov/comments/s7-10-10/s71010.shtml ("SIFMA Capital Markets Letter").

Rule, offerings of securities by or on behalf of an issuer generally are excluded for purposes of determining whether a person is a large trader, but that exemption expressly does not apply to "an offering of securities effected through the facilities of a national securities exchange."[29] The Commission understands from SIFMA that, while the Rule does exclude the vast majority of primary offerings, certain offerings such as "dribble out" programs[30] or offerings "crossed" on a national securities exchange[31] occur with enough regularity to warrant relief for the reasons discussed below. In addition, while the Rule excludes offerings of securities by or on behalf of an issuer, it does not exclude sales of stock acquired as part of employee compensation by current or former selling employees of the issuer in connection with those offerings. SIFMA argues in its letter that offerings effected through the facilities of a national securities exchange, as well as sales by issuer employees in an initial public offering or registered secondary offering, similarly are effected for materially different reasons than those normally associated with

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29 See 17 CFR 240.13h-1(a)(6)(ii) (providing an exclusion for "[a]ny 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 (15 U.S.C. 77a), provided, however, that this exemption shall not include an offering of securities effected through the facilities of a national securities exchange").

30 SIFMA notes that a "dribble out program" enables an issuer to offer and sell its equity securities through one or more registered broker-dealers in incremental registered transactions that are effected over a period of time. See SIFMA Capital Markets Letter, supra note 28, at 3. Such offerings involve prospectus supplements, comfort letters, opinions of counsel, due diligence, officer's certificates, and filings with the SEC. See id. SIFMA states that these transactions can facilitate capital formation for issuers, particularly during periods of high volatility, by avoiding some of the risks of underwritten offerings. See id.

31 SIFMA notes that all of part of an offering of securities by an issuer may be "crossed" on a national securities exchange purely for ease of settlement. See id. SIFMA believes that the character of this type of offering makes it distinguishable from ordinary secondary market trading. See id.

secondary-market trading activity, and should be excluded for purposes of determining whether a person is a large trader.[32]

The Commission believes that it is appropriate and consistent with the purposes of the Exchange Act to not count these transactions for the purpose of determining whether a person meets the identifying activity level. Accordingly, the Commission hereby is exempting from the definition of the term "transaction," for the sole purpose of determining whether a person is a large trader: (1) 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, regardless of whether such transaction is effected through the facilities of a national securities exchange; and (2) sales of securities by a selling shareholder in connection with an initial public offering or in a registered secondary offering if such selling shareholder is a current or former employee of the issuer and the securities being sold were acquired as part of the person's compensation as an employee of the issuer. The Commission believes that providing this limited exemption will continue to ensure that Rule 13h-1 provides a mechanism for the Commission to gather data on persons that conduct a significant amount of secondary market trading in NMS securities, while providing limited relief to issuers and selling shareholders who would not otherwise meet the definition of large trader in the absence of these capital market transactions. Because such transactions typically are infrequent in nature and are distinguishable in character from the secondary market activity that is the focus of Rule 13h-1, this exemption should preserve the Commission's ability to identify large traders while reducing burdens on issuers and selling shareholders and thereby assist in the promotion of capital formation.

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32 See id.

IV. Conclusion

IT IS HEREBY ORDERED, pursuant to Exchange Act Section 13(h)(6) and Rule 13h-1(g) thereunder, that broker-dealers subject to the recordkeeping, reporting, and monitoring requirements of Rule 13h-1 are temporarily exempted from those requirements until May 1, 2013, except that clearing broker-dealers for a large trader that either (1) is a U.S.-registered broker-dealer,[33] or (2) trades through a sponsored access arrangement,[34] are temporarily exempted from the recordkeeping and reporting provisions of Rule 13h-1 only until November 30, 2012.

Further, IT IS HEREBY ORDERED, pursuant to Exchange Act Section 13(h)(6) and Rule 13h-1(g) thereunder, that: (1) transactions that are 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, or such transaction is effected through the facilities of a national securities exchange, and (2) sales of securities by a selling shareholder in connection with an initial public offering or in a registered secondary offering if such selling shareholder is a current or former employee of the issuer and

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33 This includes the large trader broker-dealer itself, if self-clearing.

34 A "sponsored access arrangement" in this context refers to an arrangement in which a broker-dealer permits a large trader customer to enter orders directly to a trading center where such orders are not processed through the broker-dealer's own trading system (other than any risk management controls established for purposes of compliance with Rule 15c3-5 under the Exchange Act) and where the orders are routed directly to a trading center, in some cases supported by a service bureau or other third party technology provider. See Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (S7-03-10).

the securities being sold were acquired as part of the person's compensation as an employee of the issuer, are hereby exempt from the definition of the term "transaction" under Rule 13h-1(a)(6) for the sole purpose of determining whether a person is a large trader.

By the Commission.

Elizabeth M. Murphy
Secretary