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SEC Adopts Large Trader Reporting Requirement

Client Alert

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On July 26, 2011, the Securities and Exchange Commission (“SEC”) adopted Rule 13h-1 and Form 13H. The Rule requires (i) large traders (such as hedge funds) to identify themselves on a confidential basis to the SEC and its broker-dealers and (ii) broker-dealers to maintain records of all transactions by such large traders and provide them to the SEC upon request.

The final rule is available at <http://www.sec.gov/rules/final/2011/34-64976.pdf>.

Definition of a Large Trader

A “large trader” is any person that exercises investment discretion over transactions in Regulation NMS securities (generally defined to be exchange listed securities including options) that equal or exceed (i) two million shares or \$20 million during any day or (ii) 20 million shares or \$200 million during any month. Advisers must aggregate the accounts over which they have investment discretion. Non-U.S. managers and unregistered advisers are not excluded from the definition.

Form 13H

Traders must file electronically Form 13H with the SEC when the thresholds above are met. Each trader will be assigned an identification number, which it must provide to its broker-dealers. The initial Form 13H filing must be made “promptly” after reaching the threshold. The release states that filing within 10 days will be deemed a prompt filing. Amendments to Form 13H must be filed within 45 days after the end of each full calendar year and then promptly following the end of a calendar quarter if any information on the Form 13H becomes inaccurate. A trader that has not effected transactions at any time during the prior full calendar year in an amount equal to or greater than the registered amounts may file for inactive status and reactivate its status after reaching the threshold again.

It should be noted that Form 13H is ambiguous in many respects and will likely lead to significant interpretation issues. For example, Item 5 of the Form asks for information regarding 10% holders of accounts of the large trader but it is unclear whether the question is asking for disclosure about 10% holders of the large trader itself or the investment vehicles it controls. While the section appears to address the ownership structure of the large trader entity, the reference to limited partners with 10% financial interests in accounts of the large trader could refer to fund investor interests. We believe the section more appropriately addresses 10% holders of interests in the large trader entity. In addition, Item 4 asks for the large trader to attach an organizational chart to the Form. This may be a nuisance for banks and other large financial institutions that

have many groups trading securities. The Form also asks for a list of every prime broker, executing broker and clearing broker used by the large trader. Some large traders may end up listing hundreds of such brokers.

Confidentiality

Form 13H filings with the SEC will be kept confidential and will be exempt from disclosure under the United States Freedom of Information Act. The SEC is permitted, however, to disclose such information to Congress and other federal agencies and when ordered by a court.

Effective Dates

This new rule is effective 60 days after publication in the Federal Register. Large traders must comply with the self-identification requirements within 60 days after the effective date assuming they have satisfied the necessary thresholds.

Broker-Dealers

A broker-dealer that receives a large trader identification number from a client must maintain records of all such trader's transactions. A broker-dealer must also monitor persons that have not complied with the self-identification requirements but that the broker-dealer knows or has reason to know are large traders and maintain records of all their transactions. Upon request of the SEC, broker-dealers must submit transaction records of registered and unregistered large traders.

Clients of the firm should contact their primary attorney at Proskauer if they have further questions regarding this client alert.