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17 CFR Parts 240 and 249
Large Trader Reporting; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 240 and 249

[Release No. 34–64976; File No. S7–10–10]

RIN 3235–AK55

Large Trader Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting new Rule 13h–1 and Form 13H under Section 13(h) of the Securities Exchange Act of 1934 (''Exchange Act'') 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 the U.S. securities markets. Rule 13h–1 will require a ''large trader,'' defined as a person whose transactions in NMS securities equal or exceed 2 million shares or $20 million during any calendar day, or 20 million shares or $200 million during any calendar month, to identify itself to the Commission and make certain disclosures to the Commission on Form 13H. Upon receipt of Form 13H, the Commission will assign to each large trader an identification number that will uniquely and uniformly identify the trader, which the large trader must then provide to its registered broker-dealers. Such registered broker-dealers will then be required to maintain records of two additional data elements in connection with transactions effected through accounts of such large traders (the large trader identification number, and the time transactions in the account are executed). In addition, the Commission is requiring that such broker-dealers report large trader transaction information to the Commission upon request through the Electronic Blue Sheets systems currently used by broker-dealers for reporting trade information. Finally, certain registered broker-dealers subject to the Rule will be required to perform limited monitoring of their customers' accounts for activity that may trigger the large trader identification requirements of Rule 13h–1.

The large trader reporting requirements are designed to provide the Commission with a valuable source of useful data to support its investigative and enforcement activities, as well as facilitate the Commission's ability to assess the impact of large trader activity on the securities markets, to reconstruct trading activity following periods of unusual market volatility, and to analyze significant market events for regulatory purposes.

DATES: *Effective Date:* October 3, 2011.

Compliance Dates: December 1, 2011 for the requirement on large traders to identify to the Commission pursuant to Rule 13h–1(b). April 30, 2012 for broker-dealers to maintain records, report, and monitor large trader activity pursuant to Rule 13h–1(d), (e), and (f).

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SUPPLEMENTARY INFORMATION

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I. Introduction

The Commission's ability to analyze market movements and investigate the causes of market events in an expeditious manner, as well as efficiently conduct investigations of regulated entities and bring and prosecute enforcement matters, is influenced greatly by its ability to promptly and efficiently identify significant market participants across equities and options markets and collect uniform data on their trading activity. Though the large trader rule was proposed before the market events of May 6, 2010, that incident has emphasized the importance of enhancing the Commission's ability to quickly and accurately analyze and investigate major market events, and has highlighted the need for an efficient and effective mechanism for gathering data on the most active market participants.[1]

[1] On May 6, 2010, the prices of many U.S.-based equity products experienced an extraordinarily rapid decline and recovery. *See* Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues at *http://www.sec.gov/news/studies/2010/marketevents-report.pdf*. *See also* Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging

The large trader reporting requirements that the Commission is now adopting will enhance, in the near term, the Commission's ability to identify, and collect information on the trading activity of, the most significant participants in the U.S. markets.[2]

On April 23, 2010, Proposed Rule 13h–1 was published for public comment in the **Federal Register**.[3] The Commission received 87 comment letters on the proposal from investment advisers, broker-dealers, institutional and individual investors, industry trade groups, and other market participants.[4] Commenters generally supported the goals of the proposal. As further discussed below, however, some commenters expressed concern about certain aspects of the proposal and recommended that the proposal be amended or clarified in certain respects. Some commenters also expressed concern with the proposed rule in light of the separate proposal to establish a consolidated audit trail.[5]

After careful review and consideration of the comment letters, the Commission is adopting Rule 13h–1 (the ''Rule'') and Form 13H (the ''Form'') with certain modifications, discussed below, to address concerns expressed by some commenters.

II. Background

The Commission is in the process of conducting a broad and critical look at U.S. market structure in light of the rapid development in trading technology and strategies. The Commission has proposed several rulemakings, including this rulemaking, to address potential discrete issues in the current market structure.[6] In addition, last year the Commission published a concept release on equity market structure designed to further the Commission's broad review of whether its rules have kept pace with, among other things, changes in trading technology and practices.[7]

The Commission's ongoing review of market structure comes at a time when U.S. securities markets are experiencing a dynamic transformation, reflecting a decades-long evolution from a market structure with primarily manual trading to a market structure with primarily automated trading. Electronic trading allows ever-increasing volumes of securities transactions to take place across an expanding multitude of trading systems that together constitute the U.S. national market system. Competition among markets has facilitated the ability of large institutional and other professional market participants to employ sophisticated trading methods to trade electronically on multiple venues simultaneously in huge volumes with great speed.[8]

Given the dramatic changes to the securities markets, the Commission believes it is appropriate to exercise its authority under Section 13(h) of the Exchange Act[9] to establish large trader reporting requirements. Large trader reporting requirements will provide the Commission with a valuable source of useful data that will greatly enhance the Commission's ability to identify large market participants, and collect and analyze information on their trading activity.

Currently, to support its regulatory and enforcement activities, the Commission collects transaction data from registered broker-dealers through the Electronic Blue Sheets (''EBS'') system.[10] The EBS system generally is used to analyze trading in a small sample of securities over a limited period of time.[11] However, the EBS system lacks two important data elements that limit its usefulness when reconstructing market activity: Time of execution for the order and a uniform identifier to identify the participant that effected the trade.[12] In addition, EBS does not require, as is contemplated by the large trader reporting system outlined by Section 13(h)(2) of the Exchange Act,[13] that transaction data be available on a next-day basis, which can delay the Commission's ability to promptly collect and begin to analyze transaction data following a market event. The Commission's adoption today of Rule 13h–1 and Form 13H is designed to address certain of these limitations of EBS.

A. The Market Reform Act

Following declines in the U.S. securities markets in October 1987 and

Regulatory Issues at *http://www.sec.gov/sec-cftc-prelimreport.pdf.*

[2] Longer term, the Commission expects the consolidated audit trail proposal, if adopted, to further enhance access by the Commission and self-regulatory organizations to order and trade data from all market participants. *See* Securities Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32556 (June 8, 2010) (proposed Consolidated Audit Trail) (File No. S7–11–10) (''CAT Proposal''). As discussed further below, the aspects of the large trader reporting rule that enable the collection of information on the identity of large traders, including a large trader identification number, would not be replicated or superseded by the consolidated audit trail and would remain as a key tool in the Commission's oversight of the markets for the long term.

[3] *See* Securities Exchange Act Release No. 61908 (April 14, 2010), 75 FR 21456 (April 23, 2010) (File No. S7–10–10) (''Proposing Release'').

[4] Copies of comments received on the proposal are available on the Commission's Web site at *http://www.sec.gov/comments/s7-10-10/s71010.shtml.*

[5] *See* CAT Proposal, *supra* note 2.

[6] *See, e.g.,* Securities Exchange Act Release Nos. 60684 (September 18, 2009), 74 FR 48632 (September 23, 2009) (proposal to eliminate flash order exception from Rule 602 of Regulation NMS) (File No. S7–21–09); 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009) (proposal to regulate non-public trading interest) (File No. S7–27–09); 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File No. S7–03–10) (adopting Rule 15c3–5 under the Exchange Act addressing risk management controls for brokers or dealers with market access); and CAT Proposal, *supra* note 2.

[7] *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (File No. S7–02–10).

[8] Market analysts have offered a wide range of estimates for the level of activity attributable to one category of large traders—high frequency traders—but these estimates typically exceed 50% of total volume. *See, e.g.,* Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010, at Appendix A–11 (''Estimates of HFT volume in the equity markets vary widely, though they often are 50 percent of total volume or higher.''). *See also, e.g.,* Scott Patterson and Goeffrey Rogow, What's Behind High-Frequency Trading, Wall Street Journal, August 1, 2009 (''High frequency trading now accounts for more than half of all stock-trading volume in the U.S.''); and Rob Iati, The Real Story of Trading Software Espionage, Advanced Trading, July 10, 2009, *available at http://advancedtrading.com/algorithms/showArticle.jhtml?articleID=218401501* (high frequency trading accounts for 73% of U.S. equity trading volume). One source estimates that, five years ago, that number was less than 25%. *See* Rob Curran & Geoffrey Rogow, Rise of the (Market) Machines, Wall Street Journal, June 19, 2009, *available at http://blogs.wsj.com/marketbeat/2009/06/19/rise-of-the-market-machines/.* The trend is clear that high frequency traders now play an increasingly prominent role in the securities markets.

[9] 15 U.S.C. 78m(h), as adopted by the Market Reform Act of 1990 (''Market Reform Act''), PL 101–432 (HR 3657), October 16, 1990.

[10] *See* 17 CFR 240.17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers).

[11] The difficulties in collecting trading data for analysis are reflected in the Commission's preliminary report on the events of May 6, 2010. *See* Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010, at 1 (''The reconstruction of even a few hours of trading during an extremely active trading day in markets as broad and complex as ours—involving thousands of products, millions of trades and hundreds of millions of data points—is an enormous undertaking. Although trading now occurs in microseconds, the framework and processes for creating, formatting, and collecting data across various types of market participants, products and trading venues is neither standardized nor fully automated. Once collected, this data must be carefully validated and analyzed.'')

[12] The shortcomings of the EBS system were noted by the Senate Committee on Banking, Housing and Urban Affairs in the Senate Report accompanying the Market Reform Act of 1990. *See* Senate Report, *infra* note 14, at 48.

[13] *See* 15 U.S.C. 78m(h)(2) (''* * * records shall be available for reporting to the Commission * * * on the morning of the day following the day the transactions were effected * * *.'').

October 1989, Congress recognized that the Commission's ability to analyze the causes of a market crisis was impeded by its lack of authority to gather trading information.[14] To address this concern, Congress passed the Market Reform Act, which, among other things, amended Section 13 of the Exchange Act to add new subsection (h), authorizing the Commission to establish a large trader reporting system under such rules and regulations as the Commission may prescribe.[15]

The Market Reform Act authorizes the Commission to require large traders to self-identify to the Commission.[16] In addition, the Market Reform Act authorizes the Commission to collect from registered brokers or dealers information on the trading activity of large traders.[17] In particular, the Commission is authorized to require every registered broker or dealer to make and keep records with respect to securities transactions of large traders that equal or exceed a certain ''reporting activity level'' and report such transactions upon request of the Commission.[18]

B. Rule 17a–25 and the Enhanced EBS System

In 2001, the Commission adopted Rule 17a–25 to enhance the EBS system and facilitate the Commission's ability to collect electronic transaction data to support its investigative and enforcement activities.[19] Rule 17a–25 enhanced the EBS system in three primary areas. First, it requires broker-dealers to submit to the Commission securities transaction information responsive to a Blue Sheets request in *electronic* format.[20] Second, the rule modified the EBS system to take into account evolving trading strategies used primarily by institutional and professional traders. Specifically, the rule requires broker-dealers to supply three additional data elements (beyond what was required under Exchange Act Rules 17a–3 and 17a–4)—namely, prime brokerage identifiers,[21] average price account identifiers,[22] and depository institution identifiers [23]—to assist the Commission in aggregating securities transactions by entities trading through multiple accounts at more than one broker-dealer.[24] Finally, the rule requires broker-dealers to update their contact person information to provide the Commission with up-to-date information necessary for the

[14] The legislative history accompanying the Market Reform Act also noted the Commission's limited ability to analyze the causes of the market declines of October 1987 and 1989. *See generally* Senate Comm. on Banking, Housing, and Urban Affairs, Report to accompany the Market Reform Act of 1990, S. Rep. No. 300, 101st Cong. 2d Sess. (May 22, 1990) (reporting S. 648) (''Senate Report'') and House Comm. on Energy and Commerce, Report to accompany the Securities Market Reform Act of 1990, H.R. Rep. No. 524, 101st Cong. 2d Sess. (June 5, 1990) (reporting H.R. 3657) (''House Report'').

[15] *See* Market Reform Act, *supra* note 9.

[16] Section 13(h) of the Exchange Act defines a ''large trader'' as ''every person who, for his own or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level.'' *See* 15 U.S.C. 78m(h)(8)(A). The term ''identifying activity level'' is defined in Section 13(h) as ''transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule or regulation, specifying the time interval during which such transactions shall be aggregated.'' *See* 15 U.S.C. 78m(h)(8)(C). The ''identifying activity level'' is set forth in paragraph (a)(7) of new Rule 13h–1.

[17] *See* Senate Report, *supra* note 14, at 4, 44, and 71. In this respect, though self-regulatory organization (''SRO'') audit trails provide a time-sequenced report of broker-dealer transactions, those audit trails do not identify the large trader in a uniform manner on an inter-market basis. Accordingly, the Commission is not presently able to utilize existing SRO audit trail data to accomplish the objectives of the Market Reform Act.

[18] *See* 15 U.S.C. 78m(h)(2). Section 13(h) also provides the Commission with authority to determine the manner in which transactions and accounts should be aggregated, including aggregation on the basis of common ownership or control. *See* 15 U.S.C. 78m(h)(3). The term ''reporting activity level'' is defined in Section 13(h)(8)(D) of the Exchange Act to mean ''transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated.'' *See* 15 U.S.C. 78m(h)(8)(D). The ''reporting activity level'' is set forth in paragraph (a)(8) of new Rule 13h–1.

[19] *See* Securities Exchange Act Release No. 44494 (June 29, 2001), 66 FR 35836 (July 9, 2001) (S7–12–00) (final rulemaking) (''Rule 17a–25 Release''); and 42741 (May 2, 2000), 65 FR 26534 (May 8, 2000) (proposed rulemaking) (''Rule 17a–25 Proposing Release''). In the late 1980s, the Commission and the SROs worked together to develop and implement a system with a uniform electronic format, commonly known as the EBS system, to replace the process by which the Commission would request and collect securities trading records from broker-dealers through mailed questionnaires (known as ''blue sheets''). *See* Rule 17a–25 Proposing Release, 65 FR at 26534–35.

In the 1990s, the Commission twice proposed to use its authority under Section 13(h) of the Exchange Act to establish a large trader reporting system; neither system was adopted. In 1991, the Commission proposed a large trader reporting system that would have required large traders to disclose to the Commission their accounts and affiliations, and would have imposed recordkeeping and reporting requirements on broker-dealers with respect to the activity of their large trader customers. *See* Securities Exchange Act Release No. 29593 (August 22, 1991), 56 FR 42550 (August 28, 1991) (S7–24–91) (''1991 Proposal''). The 1991 proposal included an ''identifying activity level,'' the triggering level at which large traders would be required to identify themselves to the Commission, of aggregate transactions during any 24-hour period that equals or exceeds either 100,000 shares or fair market value of $4,000,000, or any transactions that constitute program trading. *See* 1991 Proposal, 56 FR at 42551. Commenters expressed concerns about the initial proposal, including about the definition of large trader, the identifying activity level, the duty to supervise compliance, its costs, as well as various technical aspects of reporting. *See* Securities Exchange Act Release No. 33608 (February 9, 1994), 59 FR 7917 (February 17, 1994) (S7–24–91) (''1994 Reproposal''). In 1994, the Commission again proposed a large trader reporting system which, among other things, included an increased ''identifying activity level'' of aggregate transactions in publicly traded securities effected during a calendar day where the account is located that are equal to or greater than the lesser of 200,000 shares and fair market value of $2,000,000 or fair market value of $10,000,000. *See* 1994 Reproposal.

[20] *See* 17 CFR 240.17a–25. Rule 17a–25 requires submission of the same standard customer and proprietary transaction information that SROs request in connection with their market surveillance and enforcement inquiries. For a proprietary transaction, the broker-dealer must include the following information: (1) Clearing house number or alpha symbol used by the broker-dealer submitting the information; (2) clearing house number(s) or alpha symbol(s) of the broker-dealer(s) on the opposite side to the trade; (3) identifying symbol assigned to the security; (4) date transaction was executed; (5) number of shares, or quantity of bonds or options contracts, for each specific transaction; whether each transaction was a purchase, sale, or short sale; and, if an options contract, whether open long or short or close long or short; (6) transaction price; (7) account number; (8) identity of the exchange or market where each transaction was executed; (9) prime broker identifier; (10) average price account identifier; and (11) the identifier assigned to the account by a depository institution. For customer transactions, the broker-dealer also is required to include the customer's name, customer's tax identification number, customer's address(es), branch office number, registered representative number, whether the order was solicited or unsolicited, and the date the account was opened. If the transaction was effected for a customer of another member, broker, or dealer, the broker-dealer must include information on whether the other party was acting as principal or agent on the transaction.

[21] The Commission requires prime brokerage identifiers to avoid double-counting of transactions where EBS submissions reflect the same trade by both the executing broker-dealer and the broker-dealer acting as the prime broker. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35838.

[22] Some broker-dealers use ''average price accounts'' as a mechanism to buy or sell large amounts of a given security for their customers. Under this arrangement, a broker-dealer's average price account may buy or sell a security in small increments throughout a trading session and then transfer the accumulated long or short position to one or more accounts for an average price or volume-weighted average price after the market close. Similar to prime brokerage identifiers, the Commission requires average price account identifiers to avoid double-counting where the EBS submission reflects the same transaction for both the firm's average price account and the accounts receiving positions from the average price account. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35838–39.

[23] The inclusion of a depository identifier in EBS reports was designed to expedite the Commission's efforts to aggregate trading when conducting complex trading reconstructions. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35839.

[24] *See* 17 CFR 240.17a–25(b).

Commission to direct EBS requests to the appropriate staff.[25]

C. The Need for Large Trader Reporting

While Rule 17a–25 enhanced the Commission's EBS system and improved the Commission's ability to obtain electronic transaction records, it is insufficient to accomplish the objectives of Section 13(h) of the Exchange Act and is inadequate with respect to the Commission's efforts to monitor the impact of large trader activity on the securities markets.[26] The limitations of the current EBS system also inhibit the usefulness of EBS data in the conduct of the Commission's investigative and enforcement activities.

Most importantly, the data gathered by the EBS system does not include information on the time of the trade or the identity of the trader.[27] While the Commission may be able to use price as a proxy for execution time when reconstructing trading history in a particular security when, in limited cases, the trading therein is characterized by a generally unidirectional trend in price, such analysis does not necessarily produce accurate results, is resource intensive, and hinders the Commission's ability to promptly analyze data.[28] Further, information to identify each large trader in a uniform manner across markets is necessary to permit the Commission to fully track and analyze large trader activity, especially with respect to large traders that trade through multiple accounts at multiple broker-dealers or trade using direct market access arrangements.[29]

The Commission believes that the Rule is necessary because, as noted above, large traders appear to be playing an increasingly prominent role in the securities markets. For example, market observers have offered a wide range of estimates for the percent of overall volume attributable to one potential subcategory of large trader—high frequency traders—which is typically estimated at 50% or higher of total volume.[30] The large trader reporting requirements will provide the Commission a mechanism for obtaining the information necessary to reliably identify the most significant of these market participants and promptly and efficiently obtain information on their trading on a market-wide basis.

As the events of May 6, 2010 demonstrated, the reconstruction of trading activity during an extremely active trading day in our high-speed, diverse, and complex markets can involve an enormous undertaking to collect uniform data and analyze thousands of products, millions of trades, and hundreds of millions (and perhaps even billions) of data points.[31] While the large trader reporting requirements will not be a panacea for the challenges facing the Commission in its oversight of the markets, it represents an important enhancement to the Commission's capabilities to uniformly identify large traders and quickly obtain information on their trading activity in a manner that can be implemented expeditiously by leveraging an existing reporting system.

This release first gives a general description of Rule 13h–1 as adopted and then discusses the specific provisions of the Rule and the accompanying Form 13H on which large traders will self-identify to the Commission. It then discusses the recordkeeping, reporting, and monitoring responsibilities applicable to registered broker-dealers under the Rule. The release highlights various comments received and outlines the modifications made to the Rule and Form 13H from the Proposing Release in light of these comments.

D. Relation to Consolidated Audit Trail Proposal

Separately from this rulemaking, the Commission has also proposed to establish a consolidated audit trail for equities and options that would capture customer and order event information for most orders in NMS securities across all markets, from time of order inception through routing, cancellation, modification, or execution.[32] For the reasons described below, the large trader requirements adopted today, while important, are much more limited in terms of their scope, objectives, and implementation burden than the consolidated audit trail system that is still under consideration by the Commission.

The recordkeeping and reporting provisions of Rule 13h–1 are based substantially on existing Rule 17a–25 and the Commission's current EBS system, and therefore can be implemented more expeditiously and at less cost than the consolidated audit trail proposal. In particular, the large trader reporting requirements would involve an enhancement to the existing EBS system for broker-dealers to add two new data fields (*i.e.,* LTID and execution time of the trade) and require that transaction records be available for reporting on a next-day basis. In addition, the large trader reporting requirements would involve a new web-based form (Form 13H) that large traders would file and update to identify themselves to the Commission. Accordingly, through relatively modest steps, the large trader reporting requirements will address the Commission's near-term need for access to more information about large traders and their trading activities and begin to improve the Commission's ability to analyze such information. In contrast, the consolidated audit trail, if adopted, would require the development over a longer time frame of significant technology systems to collect and consolidate more extensive information regarding orders, trades, and customers in a uniform manner across all markets and other execution venues.

In addition, key aspects of the large trader reporting requirements adopted today are not addressed by, and would continue to be necessary upon any adoption of, a consolidated audit trail. In particular, Rule 13h–1 requires large traders to self-identify to the Commission by filing Form 13H, obtain a unique LTID, and provide that LTID to their broker-dealers. As noted above, this requirement will assist the Commission in efficiently identifying and obtaining trading and other information on market participants that conduct a substantial amount of trading activity. Further, these requirements are compatible with, rather than duplicative of, the Commission's proposed consolidated audit trail. Indeed, by incorporating the LTID information into the data elements that would be

[25] This provision was designed to address the recurring problem of frequent staff turnover and re-organizations at broker-dealers to ensure the Commission directs EBS requests to the appropriate personnel. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35839.

[26] *See* 15 U.S.C. 78m(h)(1).

[27] As noted above, the Commission has proposed to establish a consolidated audit trail for equities and options that would collect and consolidate detailed information about orders entered and trades executed on any exchange or in the over-the-counter market. *See* CAT Proposal, *supra* note 2. The large trader reporting requirements we are adopting today are designed to address the near-term need for access to more information about large traders and their activities.

[28] In addition, Rule 17a–25 does not require EBS data to be available for reporting to the Commission on a next-day basis, and therefore the Commission may face delays when obtaining transaction data.

[29] The Commission has separately adopted a rule that addresses direct market access to exchanges and alternative trading systems (''ATSs''). *See* Securities and Exchange Act Release Nos. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File No. S7–03–10) (final rule) and 61379 (January 26, 2010), 75 FR 4713 (January 29, 2010) (proposed rule).

[30] *See supra* note 8 (discussing analyst estimates of high frequency trader activity).

[31] *See supra* note 11 (citing from the Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010).

[32] *See* CAT Proposal, *supra* note 2.

reported through the consolidated audit trail, the large trader requirements adopted today will ultimately enrich the data that would be available for regulatory purposes through the proposed consolidated audit trail system.

The Commission recognizes the concerns of some commenters that unnecessary overlap or duplication between large trader reporting requirements and a consolidated audit trail could result in additional costs and other burdens for market participants.[33] Although for the reasons described above the Commission believes that adoption of the large trader rule is appropriate at this time, it expects to take these concerns into account in considering the scope and requirements of any consolidated audit trail.

III. Description of Adopted Rule and Form

The large trader reporting requirements have two primary components: (1) Registration of large traders with the Commission; and (2) recordkeeping, reporting, and monitoring duties imposed on registered broker-dealers that service large trader customers. First, large traders must register with the Commission by filing and periodically updating Form 13H on which they will provide contact information and report general information concerning their business, regulatory status, affiliates, governance, and broker-dealers. Upon receipt of an initial Form 13H, the Commission will assign and issue to a large trader a unique LTID. The large trader must disclose its LTID to all of its broker-dealers and must highlight to each such broker-dealer all accounts to which the LTID applies. Second, registered broker-dealers must: (1) Maintain specified records of transactions effected by or through accounts of large traders as well as Unidentified Large Traders; [34] (2) electronically report all transactions by such persons to the Commission upon request utilizing the existing EBS infrastructure; and (3) perform a limited monitoring function to promote awareness of and foster compliance with the Rule. The specific requirements applicable to large traders and registered broker-dealers are discussed in detail below.

A. Large Traders

1. Large Trader Status

Rule 13h–1(a)(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 security 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 Commission Form 13H.'' This definition is substantially the same as the proposed definition of the term but, as discussed below, takes into account comments received on that proposed definition.

a. Who should register as a large trader?

The definition of large trader is designed to focus on the ultimate parent company of an entity or entities that employ or otherwise control the individuals that exercise investment discretion. Accordingly, the definition of large trader, in conjunction with the provision that allows the parent company to comply with the self-identification requirement on behalf of its subsidiaries,[35] is intended to allow the Commission to gather information about the primary institutions that conduct a large trading business while at the same time mitigating the burden of the Rule by focusing the filing requirement on persons and entities that control large traders.

The Commission received several comments relating to the proposed scope of the term large trader.[36] The various components of the definition of large trader, and the comments received about them, are discussed below. In addition, one commenter questioned whether the Rule would violate the Fourth and Fifth Amendments of the U.S. Constitution.[37] The Commission believes that the Rule does not infringe upon these rights.[38]

i. Persons Who Exercise Investment Discretion

A large trader is any person that ''directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts * * *'' [39] Rule 13h–1(a)(4) provides that the term ''investment discretion'' has ''the same meaning as in Section 3(a)(35) of the Securities Exchange Act of 1934.'' One commenter objected to this definition, asserting that the definition under the Exchange Act is ''fraught with ambiguities'' and therefore would be unhelpful in ''deciphering investment relationships.'' [40] The commenter offered no alternative definition, but asked for clarification regarding what is meant by ''exercising investment discretion.'' The definition of ''investment discretion'' in Section 3(a)(35) of the Exchange Act encompasses a person who is ''authorized to determine what securities or other property shall be purchased or sold by or for the account'' as well as a 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 * * *.'' [41] Rule 13h–1(a)(4) further specifies that a ''person's employees who exercise investment discretion within the scope of their employment are deemed to do so on behalf of such person.'' To the extent that an entity employs a natural person that individually, or collectively with others, meets the definition of a ''large trader,'' then, for purposes of Rule 13h–1, the entity that controls that person or those persons would be a large trader.

One commenter recommended excluding regulated investment

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[33] *See, e.g.,* Managed Funds Association Letter and Wellington Management Letter.

[34] *See* new Rule 13h–1(a)(9) (defining the term ''Unidentified Large Trader'') and discussion *infra* at Section III.B.

[35] The rule, however, also permits compliance by a controlled person. *See* new Rule 13h–1(b)(3)(ii), which is discussed *infra* at Section III.A.2.a.0.

[36] *See, e.g.,* SIFMA Letter at 7; American Benefits Council Letter at 2–3; and Financial Engines Letter at 2–4.

[37] *See* Harris Letter.

[38] The United States Court of Appeals for the District of Columbia Circuit has found that disclosure to the Commission does not constitute a regulatory taking. *See Full Value Advisors LLC* v. *SEC,* 633 F.3d 1101, 2011 WL 339210 (DC Cir. February 4, 2011). The Commission believes that the same reasoning applies in the case of Rule 13h–1. The Commission also, to the extent permissible under the federal securities laws, holds and treats as confidential certain legally-protected proprietary information that it receives in connection with its regulatory activities. Further, the Commission believes that Rule 13h–1 is an appropriate exercise of its regulatory authority and does not violate the Fourth Amendment.

[39] *See* new Rule 13h–1(a)(1).

[40] *See* SIFMA Letter at 17, n.23.

[41] 15 U.S.C. 78c(a)(35). *See also* Rule 13h–1(a)(3) (defining control the term ''control'' to mean ''the possession, direct or indirect, of 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 purposes of this rule only, any person that 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% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity'').

companies and pension fund managers from the definition of large trader.[42] The Commission notes that an investment company is a legal structure for the management of pooled assets by an investment adviser. As such, the investment adviser exercises investment discretion over the assets of the investment company. Accordingly, the Commission believes that the requested exclusion for regulated investment companies is not necessary because an investment adviser to an investment company, like a pension manager to a pension fund, is the entity that exercises investment discretion either solely or in connection with other investment managers. The large trader reporting requirements are designed to collect information about important market participants that exercise investment discretion. Accordingly, the Commission is not adopting the suggested exclusion for pension fund managers because it would undermine the purposes of the large trader reporting requirements. The Commission is adopting the definition of investment discretion substantially as proposed.

ii. Parent Company Level Registration

As noted above, the definition of large trader is designed to focus on the ultimate parent company of an entity or entities that employ or otherwise control the individuals that exercise investment discretion. A number of commenters recommended limiting the application of the Rule to include as large traders only those entities that directly exercise investment discretion.[43] These commenters also raised a number of concerns with the proposal's focus on placing the filing requirement at the parent company level.

After considering the comments received, the Commission has determined to adopt the scope of the large trader identification requirement substantially as proposed. While the Rule's broader focus on identification at the parent company level may provide less detailed information on the activity of individual traders within a large trader complex,[44] it nevertheless will facilitate the Commission's ability to collect data on the full extent of trading by persons and entities under common control. The Commission also notes that, in addition to promoting the Commission's regulatory and enforcement responsibilities, the large trader reporting requirements also are intended to facilitate the reconstruction of market events using transaction data. To that end, parent company-level aggregation should enhance the Commission's ability to reconstruct trading by significant market participants by providing the Commission with access to a broad set of useful data.

Some commenters noted that parent companies of financial services organizations often do not take part in the day-to-day activities of their subsidiaries and, as a result, employees of those parent companies are not knowledgeable about the trading activities of their subsidiaries and would not be able, for example, to readily respond to any follow-up questions from the Commission.[45] The Commission notes that, to determine whether a parent company is a large trader, the aggregate trading activity of all entities controlled by the parent company must be collected. Controlled entities need produce only aggregated statistics in summary form, which would be added together at the parent level to determine whether the identifying activity level has been met. If it has, then the parent company is a large trader and will be required to provide information about itself and its affiliates, unless all of its affiliates comply on its behalf pursuant to Rule 13h–1(b)(3)(ii). Further, the Commission believes that the additional identifying information requested on Form 13H could most easily be collected by a parent company employee from the entities controlled by the parent company. The Commission expects that communication of the basic information required by the Form, as well as aggregate securities transactions to determine whether the identifying activity threshold has been met, between a parent company and the entities that it controls should not be burdensome and should not require the development of new integrated trading systems. To the extent a parent company is unaware of its subsidiaries' aggregate transaction levels and other basic identifying information, the Commission believes that implementing control systems to capture such information will be consistent with appropriate risk management considerations.

One commenter expressed concern that the filing by a parent company of a Form 13H on behalf of its subsidiaries may give the impression that its firewalls are weak.[46] The Commission does not believe a parent company's duty to determine whether it is a large trader based on aggregated statistics that summarize the trading activity of its subsidiaries should violate or undermine the effectiveness of existing firewalls. The Rule only requires that a parent company aggregate and consider daily and monthly share volume and dollar value of certain transactions in NMS securities effected by the persons it controls. The Rule does not require the disclosure of any particular transaction information (*e.g.,* the identity of or additional information on the securities bought or sold). Rather, persons need only produce a total figure of the relevant transactions for which they exercised investment discretion. The parent company would then aggregate together those figures when measuring its overall activity against the applicable trading activity threshold.

(a) Use of LTID Suffixes

Some commenters questioned the utility of the information that would be collected if large traders were identified at the parent company level, including whether grouping together persons who make trading decisions independently of each other would cloud the Commission's view when investigating for certain trading behavior, such as manipulation.[47] As an alternative, some commenters suggested that the Rule permit, but not compel, identification at the parent company level.[48] Another commenter suggested eliminating the requirement that an LTID be affixed to the trades of affiliates that do not independently qualify as large traders.[49] With respect to the concern about the Commission's ability to identify trading activity within a large trader with more particularity, as discussed further below,[50] Item 4(d) of Form 13H permits a large trader to assign LTID suffixes to sub-identify persons, divisions, groups, and entities under its control. For example, a large trader may choose to assign a suffix to each independent division within the large trader. Use of suffixes to identify various sub-groups within a large trader could facilitate a large trader's ability to accurately and efficiently track with more particularity the trading for which it exercises investment discretion, and as a consequence, could facilitate the ability

[42] *See* SIFMA Letter at 18.

[43] *See* Financial Information Forum Letter at 5; Managed Funds Association Letter at 3; T. Rowe Price Letter at 2; and SIFMA Letter at 9.

[44] For purposes of the large trader reporting rule, references to the ''large trader complex'' is intended to refer to all entities under the control of the large trader parent company.

[45] *See, e.g.,* Prudential Letter at 3.

[46] *See* Prudential Letter at 3.

[47] *See, e.g.,* Prudential Letter at 2 and Investment Adviser Association Letter at 4.

[48] *See* Investment Company Institute Letter at 6 and Prudential Letter at 3.

[49] *See* Investment Adviser Association Letter at 5.

[50] *See infra* Section III.A.3.0.

of a large trader to respond to any Commission request to further identify accounts or disaggregate trading data, as discussed below. To the extent large traders utilize LTID suffixes, the need for the Commission to contact large traders for assistance in further identifying their accounts should be diminished. Accordingly, the Commission encourages large traders to utilize LTID suffixes.

The Commission notes that, ultimately, the information limitation identified by commenters may be addressed by the Commission's separate rulemaking for a consolidated audit trail which, if adopted as proposed, would require collection of information about the person with investment discretion for each order as well as information to identify the beneficial owner for each order.[51] In the meantime, allowing a parent company to comply on behalf of related entities should provide the Commission with important information at lower cost to the industry, by reducing the complexity and burdens of the large trader reporting requirements—such as those proposed by the Commission during the 1990s—that could have required reporting at multiple levels within a control group. At the same time, this provision addresses the Commission's near-term need for access to more information about large traders and their trading activities, which will enable the Commission to more efficiently analyze market events.

(b) Control and Minority-Owned Entities

With respect to which persons under a parent company's control should be considered in determining the parent company's large trader status, Rule 13h–1(a)(3) defines ''control'' (and the terms ''controlling,'' ''controlled by,'' and ''under common control with'') as ''the possession, direct or indirect, of 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 purposes of this rule only, any person that 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% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity.''

One commenter stated that including minority-owned entities would be problematic because it may be difficult for a large trader to obtain the information from a minority-owned entity that would be necessary for it to complete Form 13H.[52] Furthermore, according to this commenter, the minority-owned entity may resist attaching the large trader's LTID to its trades.[53] Another commenter suggested attributing to a large trader only the activity of majority-owned entities that are actual operating subsidiaries, and not attributing the activity of more remote, partially-owned entities.[54] After considering the comments received, the Commission has decided to adopt as proposed the definition of control solely for purposes of this Rule. In particular, the Commission continues to believe that a minority shareholder holding at least 25% of the ownership interests of an entity would be in a position to exercise the influence necessary to secure that entity's cooperation in facilitating a large trader's compliance with the federal securities laws, especially given that all that this entails for the controlled entity would be providing its registered broker-dealers with the large trader's LTID and the accounts to which it applies. In addition, if the controlled entity refuses to cooperate, the large trader itself may be able to notify the broker-dealer of its LTID. The Commission also continues to believe that the definition of control is appropriate and will allow the Commission to identify, and obtain trading data from, controlled persons for whom a large trader is in a position to materially influence the investment decisions made by such person.[55]

b. Identifying Activity Level

Rule 13h–1(a)(7) defines the term ''identifying activity level'' as ''aggregate transactions in NMS securities that are equal to or greater than: (1) During a calendar day, either two million shares or shares with a fair market value of $20 million; or (2) during a calendar month, either twenty million shares or shares with a fair market value of $200 million.'' One commenter expressly supported these threshold levels.[56] Another commenter recommended increasing the daily threshold limit to shares with a fair market value of $100 million during any calendar day.[57] Others advocated increased thresholds, but did not identify a particular level or provide empirical support for their recommendations.[58]

Some commenters thought that the proposed identifying activity level would capture infrequent traders, who they believe should not attract regulatory interest under a large trader reporting rule.[59] The Commission notes that nothing in Section 13(h) of the Exchange Act suggests that the Commission should focus its attention only on those large traders that are frequent traders. The statute permits the Commission to monitor the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value or exercise value. While frequency of trading is one factor that the Commission considered in defining who is a large trader, it was not the only factor. In explaining why it proposed to exclude certain transactions, the Commission stated that the proposed exclusions were designed to exclude certain small and otherwise infrequent traders from the definition of a large trader, but also stated: ''the proposed excepted transactions are not effected with an intent that is commonly associated with an arm's length purchase or sale of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion.'' [60] To the extent that a market participant trades only infrequently, but does so in large volume in the course of exercising investment discretion, the Commission seeks to identify that participant as a

[51] *See* CAT Proposal, *supra* note 2, 75 FR at 32572.

[52] *See* Prudential Letter at 3. The Commission notes that proposed Form 13H would have required a large trader to identify its accounts and disclose for each account the LTID of any unaffiliated large trader with whom it shares investment discretion. As discussed below, the Commission has not adopted the provisions in the Form relating to the identification of accounts, and, as a consequence, a large trader would not need to obtain the LTID of any unaffiliated large trader for purposes of completing the Form.

[53] *See* Prudential Letter at 3.

[54] *See* SIFMA Letter at 18.

[55] The Commission considered other thresholds for control and determined that a 25% threshold would be the appropriate level for purposes of new Rule 13h–1. As discussed in the Proposing Release, the Commission notes that the definition of control is similar to the definition of control contained in Form 1 (Application for Registration or Exemption from Registration as a National Securities Exchange). *See* Proposing Release, *supra* note 3, 75 FR at 24161. *Cf.* Rule 19h–1(f)(2) under the Exchange Act, 17 CFR 240.19h–1(f)(2) (featuring a 10% threshold with respect to the right to vote 10% or more of the voting securities or receive 10% or more of the net profits).

[56] *See* T. Rowe Price Letter at 2.

[57] *See* Financial Engines Letter at 7.

[58] *See, e.g.,* Managed Funds Association Letter at 2.

[59] *See* Investment Adviser Association Letter at 10; Howard Hughes Medical Institute Letter at 1; Managed Funds Association Letter at 2; and SIFMA Letter at 8.

[60] *See* Proposing Release, *supra* note 3, 75 FR at 21463.

large trader. Nevertheless, the Commission recognizes the filing burden that could be placed on a trader whose activity only on very rare occasions meets the identifying activity threshold. These persons may be eligible for Inactive Status, a concept which is discussed below.

The Commission continues to believe that the identifying activity level is appropriate because it will identify large traders that engage in a substantial amount of trading activity relative to overall market volume—specifically, approximately 0.01% of the daily volume and market value of trading in NMS securities.[61] Moreover, as discussed below, Inactive Status is available for large traders whose trading activity reaches the identifying activity level infrequently.

Transactions Counted Towards the Identifying Activity Level. As proposed, Rule 13h-1(a)(6) defined the term ''transactions'' as ''all transactions in NMS securities, including exercises or assignments of option contracts,'' except for certain specifically enumerated transactions.[62] To more closely align this definition with the aggregation provisions contained in paragraph (c) of the Rule, the Commission is adopting a revised definition that provides that the term ''transaction'' means ''all transactions in NMS securities, excluding exercises or assignments of option contracts,'' except for certain specifically enumerated transactions.[63] As noted in the Proposing Release, for purposes of the identifying activity level with respect to options, only purchases and sales of the options themselves, and not transactions in the underlying securities pursuant to exercises or assignments of such options, need to be counted. However, for purposes of the identifying activity level, the volume and value of options purchased or sold would be determined by reference to the securities underlying the option.[64] Thus, the Rule is intended to focus on the trading of options and the potential impact of those options positions on the underlying markets. By excluding purchases and sales pursuant to exercises or assignments, the Rule avoids double-counting towards the applicable identification threshold. The revised definition of ''transaction'' more closely aligns it with the explanation of the aggregation provision applicable to options provided in the Proposing Release. The Commission believes that the definition as adopted is consistent with Section 13(h)(1) of the Exchange Act, and will advance its stated goals, including ''monitoring the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value or exercise value * * *'' [65]

In addition, the Commission received comments on the enumerated exclusions from the term ''transaction.'' [66] As indicated in the Proposing Release, the proposed exceptions from the term ''transaction'' were designed to exclude certain transactions from the identifying activity level calculation because they are not effected with an intent that is commonly associated with the arm's-length trading of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion.[67] One commenter requested that the Commission allow registered broker-dealers to include the excluded transactions when reporting transaction data to the Commission pursuant to Rule 13h–1(e).[68] The commenter explained that registered broker-dealers' existing infrastructure may not collect sufficient data to allow the broker-dealer to exclude excepted transactions when reporting transaction data to the Commission. In response to this comment, the Commission is adopting a definition of ''transaction'' in the Rule to reflect its limited application, as discussed in the Proposing Release. Specifically, to underscore that the enumerated transactions are excluded from the definition of transaction *only* for the purpose of determining who is a large trader, the Commission is adopting the introductory portion of the second sentence of Rule 13h–1(a)(6) to provide that: ''The term transaction or transactions means all transactions in NMS securities, including exercises or assignments of option contracts. *For the sole purpose of determining whether a person is a large trader,* the following transactions are excluded from this definition * * *.'' Accordingly, a person need not count trading activity that falls within one of the listed categories of excluded transactions when it determines whether it meets the applicable identifying activity threshold. However, in response to a Commission request for data, a broker-

[61] *See* Proposing Release, *supra* note 3, 75 FR 21463–64. An ''NMS security'' is ''any security 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.'' 17 CFR 242.600(b)(46). The term refers generally to exchange-listed securities, including equities and options.

[62] Specifically, under the proposal, the following would not be counted as ''transactions'' for purposes of the proposed Rule: (i) Any journal or bookkeeping entry made to an account in order to record or memorialize the receipt or delivery of funds or securities pursuant to the settlement of a transaction; (ii) 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; (iii) any transaction that constitutes a gift; (iv) any transaction effected by a court appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate; (v) any transaction effected pursuant to a court order or judgment; (vi) any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(a)(5) of the Internal Revenue Code; or (vii) 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.

[63] As noted in the Proposing Release, the aggregation provisions in paragraph (c) are designed to require market participants to use a ''gross up'' approach in calculating their activity levels. Accordingly, offsetting or netting transactions among or within accounts, even for hedged positions, would be added to a participant's activity level in order to show the full extent of a trader's purchase and sale activity. This approach reflects the fact that substantial trading activity has the potential to impact the market regardless of the trader's net position. *See* Proposing Release, *supra* note 3, 75 FR at 21464.

[64] *See id.* For example, 50,000 shares of XYZ stock and 500 XYZ call options would count as aggregate transactions of 100,000 shares in XYZ (*i.e.,* 50,000 + 500 × 100 = 100,000). With respect to index options, the market value would be computed by multiplying the number of contracts purchased or sold by the market price of the options and the applicable multiplier. For example, if ABC Index has a multiplier of 100, a person who purchased 200 ABC call options for $400 would have effected aggregate transaction of $8 million (*i.e.,* 200 × 400 × 100 = $8,000,000). Transactions in index options are not required to be ''burst'' into share equivalents for each of the underlying component equities.

[65] *See* 15 U.S.C. 78m(h)(1).

[66] *See, e.g.,* American Benefits Council Letter; Financial Engines Letter; Howard Hughes Medical Institute Letter; and SIFMA Letter.

[67] *See* Proposing Release, *supra* note 3, 75 FR at 21463 (''The proposed exclusions are designed to exempt certain small and otherwise infrequent traders from the definition of a large trader as well as activity that is not characterized by active investment discretion or is associated with capital raising or employee compensation. Specifically, the Commission preliminarily believes that the proposed excepted transactions are not effected with an intent that is commonly associated with an arm's-length purchase or sale of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion. While a large enough one-time transaction in the proposed categories could have an impact on the market, the Commission would be able to obtain information on that trade through other means, including the EBS system. The Commission preliminarily believes that the benefit to the Commission of identifying such person as a large trader solely through one of the enumerated excepted transactions would not be justified by the costs that would be imposed on the person and their registered broker-dealer that accompany meeting the definition of large trader.'')

[68] *See* Financial Information Forum Letter at 3.

dealer must report all transactions that it effected through the accounts of a large trader without excluding any transactions listed in Rule 13h–1(a)(6).

In the Proposing Release, the Commission requested comment about whether any of the proposed exclusions from the definition of transaction should be eliminated or whether any other types of transactions should be excluded.[69] While no commenter recommended eliminating any of the excluded transactions, several commenters suggested the Commission consider additional exclusions. For example, some commenters suggested excluding all or some transactions effected on behalf of defined contribution plans.[70] The Commission does not believe that a blanket exclusion for transactions effected on behalf of defined contribution plans is warranted because such trades are effected through the exercise of investment discretion and are within the scope of activity contemplated by the statute. Instead, the Commission believes it is appropriate to provide additional guidance regarding the application of the Rule to transactions effected on behalf of defined contribution plans. As highlighted by commenters, investment discretion may be exercised on behalf of defined contribution plans differently, depending on the particular structure of the plan. For example, in some defined contribution plans, participants select their own investments from among the choices offered by their employer.[71] A trustee then effects the transactions pursuant to the instructions it receives from the plan participants. For purposes of determining who is a large trader, the participants in such plans are the ones who exercise investment discretion over the transactions that are effected on their behalf. In such plans, the Commission does not view the trustee as exercising investment discretion over the transactions for purposes of the Rule.[72] Additionally, solely for purposes of determining who is a large trader pursuant to Rule 13h–1, the Commission considers an employer to not exercise investment discretion merely by establishing investment options for its employees. Other types of defined contribution plans may be structured differently.[73]

Another commenter requested clarification that only the trustee of a retirement plan, not the plan sponsor and other parties involved in plan administration, must self-identify as a large trader.[74] As discussed above, the Rule requires the person who exercises investment discretion over a certain level of transactions to identify as the large trader, which may be the trustee but would generally not be the plan sponsor or administrator if neither exercises investment discretion.

One commenter argued for broadly excluding transactions associated with corporate actions, including mergers and acquisitions and other purchases of assets, self-tenders, buybacks (including Rule 10b–18 buybacks), and certain internal corporate actions (such as journals between accounts within the same entity where there is no change in the beneficial owners).[75] The commenter also recommended excluding stock loans, equity repurchases, and in-kind creations of exchange-traded funds (''ETFs''). As discussed below, the Commission agrees that many, but not all,[76] of the additional categories of transactions identified by the commenter can be excluded for purposes of determining large trader status. Accordingly, the Commission is adopting subparagraph (viii) to Rule 13h–1(a)(6), which excludes the following additional transactions for purposes of calculating the identifying activity level: ''any transaction to effect a business combination, including a reclassification, merger, consolidation, or tender offer subject to Section 14(d) of the Securities Exchange Act; an issuer tender offer or other stock buyback by an issuer; or a stock loan or equity repurchase agreement.''

Consistent with the views outlined in the Proposing Release, the Commission believes that these additional categories of transactions are effected for materially different reasons than those commonly associated with the arm's-length trading of securities in the secondary market and the associated exercise of investment discretion. For example, transactions to effect a business combination, as well as an issuer tender offer or other stock buyback by an issuer, reflect fundamental corporate decision-making that involves matters much broader than those traditionally associated with trading activity in NMS securities. Such transactions are discrete corporate actions to effect the acquisition of a business or to manage the extent of the distribution of an issuer's securities. Further, stock loan and equity repurchase agreements typically are entered into to facilitate short sale transactions or as part of a larger financing transaction, and not as part of an investment decision traditionally associated with trading activity in NMS securities. Accordingly, the Commission believes it appropriate to not count these transactions for the purpose of determining whether a person meets the identifying activity level contained in the definition of large trader.

For purposes of the identifying activity level for large trader reporting, the Commission believes that it is appropriate to count transactions effected in the secondary market to assemble, or dispose of, securities that are transferred between an ''authorized participant'' and an ETF. An authorized participant is a trader that, on its own behalf or on behalf of others, presents securities (or other assets) to an ETF in order to create ETF shares or receives securities (or other assets) from an ETF in connection with the redemption of ETF shares. Among other reasons, authorized participants engage in such creations and redemptions to take advantage of arbitrage opportunities resulting from differences in the market prices of the securities held by the ETF and the market prices of the ETF shares. The Commission expects that, if authorized participants are large traders, it will be useful to monitor their secondary market trading and to be able to access records of their trading activity across broker-dealers. However, the Commission does not believe that the actual transfer of the basket of securities between an authorized participant and an ETF should be counted for purposes of large trader reporting. Accordingly, the Commission will count toward the

[69] *See* Proposing Release, *supra* note 3, 75 FR at 21472.

[70] *See* Financial Engines Letter at 7 and American Benefits Council Letter at 2 (suggesting exempting significant repositioning of portfolio balances by very large defined benefit plans; investment lineup changes by defined contribution retirement plan sponsors; and plan activity in connection with acquisitions and divestitures of businesses which may precipitate a large movement of participants out of a plan).

[71] *See* American Benefits Council Letter at 2.

[72] The Commission expects that few individual defined contribution plan participants will effect aggregate transactions greater than or equal to the identifying activity level, and the Commission therefore expects that generally they will not meet the definition of large trader.

[73] The Commission notes that, pursuant to Section 13(h)(6) of the Exchange Act and new Rule 13h–1, the Commission may by order exempt, 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 this rule to the extent that such exemption is consistent with the purposes of the Exchange Act. *See* new Rule 13h–1(g), which is discussed *infra* at Section III.0.

[74] *See* American Benefits Council Letter at 2–3.

[75] *See* SIFMA Letter at 8.

[76] For example, the Commission is not making any changes in response to the suggestion of one commenter to essentially exempt all transactions effected on behalf of organizations dedicated to a charitable purpose. *See* Howard Hughes Medical Institute Letter. *See also infra* text accompanying note 255 and the subsequent discussion.

identifying activity level trading activity in the secondary market that relates to the acquisition or disposition of securities in connection with, for example, the creation or redemption of ETF shares, but not the transfer of such securities between an authorized participant and an ETF.[77]

c. Voluntary Registration

One commenter suggested that the Commission allow a person to register voluntarily as a large trader as that person nears the applicable trading activity threshold in order to reduce its need to actively monitor its trading levels.[78] The Commission agrees with the commenter that the ability to voluntarily register will mitigate the monitoring burden on market participants who expect to effect transactions equal to or greater than the identifying activity level at some point in the future. Accordingly, the Commission is adopting: (1) A definition of large trader that includes those persons who voluntarily register as large traders; and (2) changes to Form 13H to require a large trader to indicate in its initial filing with the Commission whether it has chosen to voluntarily register. Any such person that elects to voluntarily file 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, notwithstanding the fact that the person had not effected the requisite level of transactions at the time it registered as a large trader.

2. Duties of a Large Trader

Pursuant to Rule 13h–1, a large trader must self-identify by filing Form 13H with the Commission. In addition, a large trader must disclose its LTID to the registered broker-dealers effecting transactions on its behalf and identify for them each account to which it applies.

a. File Form 13H With the Commission

Form 13H provides for six types of filings: Initial Filing; Annual Filing; Amended Filing; Inactive Status; Termination Filing; and Reactivated Status. Each type is discussed below. As reflected in the instructions to the Form, large traders must file all Forms 13H through EDGAR,[79] which is being updated to accept these submissions.[80] Accordingly, large traders will need to have or obtain permission to access and file through EDGAR, and can obtain the necessary access codes, if they do not already have them, by filing a Form ID (Uniform Application for Access Codes to File on EDGAR).[81] Among other things, large traders will be given a Central Index Key (''CIK'') number that uniquely identifies each filer and allows them to submit filings through EDGAR. While Form 13H filings will be processed through the Commission's EDGAR system, once filed, the Form 13H filings will not be accessible through the Commission's Web site or otherwise be publicly available.

i. Initial filings—who must file?

Except as provided below, each large trader must file a Form 13H ''Initial Filing'' to identify itself to the Commission.[82] In complex organizations, more than one related entity can qualify as a large trader. Consider the following example:

- Holding Company owns a 100% ownership interest in Broker-Dealer and Investment Adviser. However, as a practical matter, Holding Company is not engaged in the day-to-day operation of either entity.
- Broker-Dealer owns a 33% ownership interest in Proprietary Trading Firm. None of the firm's other investors own a controlling interest of 25% or more of the firm, and therefore no LTIDs, other than that of Broker-Dealer, would be attached to the trades of Proprietary Trading Firm.
- Investment Adviser owns a 100% ownership interest in Sub-Adviser #1 and Sub-Adviser #2.
- Sub-Adviser #1, on behalf of its clients, exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount *greater than* the identifying activity level.
- Sub-Adviser #2, on behalf of its clients, exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount *less than* the identifying activity level.
- While engaging in proprietary trading, Broker-Dealer exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount *greater than* the identifying activity level.
- The Proprietary Trading Firm effects transactions in NMS securities in an aggregate amount *greater than* the identifying activity level.

All of the identified entities, except Sub-Adviser #2, independently qualify as large traders under the Rule. Therefore, as discussed below, unless these entities rely on the provisions of Rule 13h–1(b)(3)(i), each of them must file separate Forms 13H with the Commission.[83]

Rule 13h–1(b)(3)(i) provides that a large trader shall not be required to separately comply with the requirements of paragraph (b) if a person who controls the large trader complies with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) applicable to such large trader with respect to all of its accounts. This provision allows the identification requirement to be pushed up the corporate hierarchy to the parent entity (*i.e.,* Holding Company, in the example above).

Conversely, Rule 13h–1(b)(3)(ii) applies the same principle on a ''top down'' basis, providing that a large trader shall not be required to comply with the requirements of paragraph (b) if one or more persons controlled by such large trader collectively comply with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) applicable to such large trader with respect to all of its accounts. A controlling person of one or more large traders (such as Holding Company, in the example above) would be required to comply with all of the requirements of paragraph (b) unless the entities that it controls discharge all of the

[77] Specifically, then, in connection with creation or redemption: (1) Purchases of securities by an authorized participant for the purpose of assembling a basket would count toward an authorized participant's identifying activity level; (2) transfers of those securities by an authorized participant to the ETF would not be counted toward the ETF's identifying activity level; (3) acquisitions of securities by an authorized participant from the ETF would not count toward the authorized participant's identifying activity level; and (4) sales of securities by an authorized participant into the secondary market would count toward the authorized participant's identifying activity level. No transactions effected would be counted toward an ETF's identifying activity level because the ETF would not be exercising investment discretion by creating or redeeming ETF shares.

[78] *See* Investment Company Institute Letter at 7.

[79] One commenter requested that the Commission not require filing of Forms 13H until it has an electronic filing system in place because, while the rule requires electronic filing, the Commission noted the possibility in the Proposing Release that paper filings might be required for a limited period of time. *See* T. Rowe Price Letter at 3. *See also* Proposing Release, *supra* note 3, 75 FR at 21465, n. 80. The Commission shares the concern expressed by the commenter. Form 13H will be a web-based application and will be submitted through EDGAR, a secure web interface, on the applicable compliance date.

[80] *See generally* 17 CFR 232 (Regulation S–T—General Rules and Regulations for Electronic Filings).

[81] An applicant must file Form ID in electronic format via the Commission's EDGAR Filer Management website. *See* 17 CFR 232 (Regulation S–T) and the EDGAR Filer Manual for instructions on how to file electronically, including how to use the access codes.

[82] *See* new Rule 13h–1(b)(1).

[83] *See* new Rule 13h–1(b)(1).

responsibilities of the controlling person under paragraph (b). This provision maintains the focus on the parent company by allowing, for example, a corporate entity to comply on behalf of one or more natural persons who are its controlling owners. In the above example, if Investment Adviser and Broker-Dealer separately register as large traders, Holding Company would not have to separately register as a large trader, assuming that those two entities capture all transactions and accounts controlled by Holding Company.[84] Instead, Investment Adviser and Broker-Dealer would identify (in Item 4(c) of the Form) the other as an affiliate filing separately, and identify Holding Company as their affiliate's parent company on their respective Form 13H filings. In this way, the Commission will be able to tell that the entities are under the common control of Holding Company, and the Commission could assign LTIDs that reference their common parent.

When must an Initial Filing be submitted? A large trader must file a Form 13H Initial Filing promptly after effecting aggregate transactions equal to or greater than the identifying activity level.[85] The Commission solicited [86] and received comments about the Initial Filing deadline.[87] Some commenters requested additional guidance on what constitutes ''promptly.'' [88] One commenter recommended that the Commission specify a 10-day filing deadline.[89] In contrast, another commenter suggested that the Commission define promptly as without delay, but in no circumstances later than 30 days after the trader qualifies as a large trader.[90] Another commenter assumed that promptly means within 30 days.[91] The Commission continues to believe that ''promptly'' is an appropriate standard because it emphasizes the need for filings to be submitted without delay to ensure their timeliness while affording filers a limited degree of flexibility.[92] However, given the requests for additional guidance, the Commission believes that under normal circumstances, it would be appropriate for Initial Filings (and Reactivated Filings, discussed below) to be filed within 10 days after the large trader effects aggregate transactions equal to or greater than the identifying activity level.[93]

ii. Annual Filings

All large traders must submit an Annual Filing within 45 days after the end of each full calendar year,[94] except that large traders on Inactive Status (discussed below) are not required to file Form 13H while they are on Inactive Status.[95]

iii. Amended Filings

If any of the 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.[96] While not required by the Rule, a large trader may voluntarily file an amended filing more frequently than quarterly at its discretion. A large trader on ''Inactive Status'' (described below) is not required to file any Amended Filings while it is on Inactive Status.

iv. Inactive Status

Rule 13h–1(b)(3)(iii) permits a large trader who has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level to obtain inactive status by filing for ''Inactive Status'' through a Form 13H submission.[97] Inactive Status would be effective upon such filing.

Inactive status is designed to reduce the burden on infrequent traders who may trip the threshold on a particular occasion but do not regularly trade at sufficient levels to support continued status as a large trader. In particular, Inactive Status is designed to minimize the impact of the Rule on natural persons who infrequently effect transactions of a magnitude that otherwise warrant the added regulatory requirements under the Rule. Inactive status relieves the large trader from the requirement to file amended Forms 13H. It also permits the large trader to request that its broker-dealers stop maintaining records of its transactions by LTID.

The Commission requested comment about whether the proposed provision for Inactive Status is appropriate and sufficient and whether it should be modified or eliminated.[98] The Commission did not receive any comments regarding Inactive Status.[99] The Commission is adopting this provision, as proposed.

v. Reactivated Status

A person on Inactive Status who effects aggregate transactions that are equal to or greater than the identifying activity threshold must file a ''Reactivated Status'' Form 13H promptly after effecting such transactions.[100] Upon filing for Reactivated Status, the person once again would be subject to the filing requirements of Rule 13h–1 and must inform its broker-dealers of its reactivated status.[101] The Commission

[84] In this case, Investment Adviser would be responsible for providing its LTID to each registered broker-dealer that effects transactions on its behalf, on behalf of Sub-Adviser #1, or on behalf of Sub-Adviser #2. Additionally, Broker-Dealer would be responsible for providing its LTID to each registered broker-dealer that effects transactions on its behalf or on behalf of Proprietary Trading Firm. Further, Investment Adviser would be responsible for identifying each of the accounts to which its LTID applies, which would include the accounts of Sub-Adviser #1, Sub-Adviser #2, and Broker-Dealer would be responsible for identifying each of the accounts to which its LTID applies, which would include the accounts of Proprietary Trading Firm.

[85] *See* new Rule 13h–1(b)(1).

[86] *See* Proposing Release, *supra* note 3, 75 FR at 21472.

[87] *See* Investment Adviser Association Letter at 9; SIFMA Letter at 18–19; and Investment Company Institute Letter at 10.

[88] *See, e.g.,* Investment Adviser Association Letter at 9 and SIFMA Letter at 18–19.

[89] *See* Investment Adviser Association Letter at 9.

[90] *See* Investment Company Institute Letter at 10.

[91] *See* SIFMA Letter at 18–19.

[92] *See* Securities Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564, 33567 (June 18, 2007) (in declining to define the term ''promptly'' as used on Section 15E(b)(1) of the Exchange Act, the Commission stated that whether an amendment is furnished promptly will depend on the facts and circumstances such as the amount of information being updated).

[93] The Commission notes that the guidance provided here regarding the ''promptly'' standard for Form 13H filings is based on the scope of the Form, the expected time to complete the Form, and the required submission thereof through EDGAR, and accordingly this guidance is applicable only to Form 13H filings.

[94] *See* new Rule 13h–1(b)(1)(ii).

[95] *See* new Rule 13h–1(b)(3)(iii).

[96] *See* new Rule 13h–1(b)(1)(iii). The Commission expects that significantly less information will need to be inputted for an Amended Filing and the large trader may have a considerable amount of lead time before the end of the calendar quarter to submit the Amended Filing.

[97] New Rule 13h–1(b)(3)(iii) provides: ''A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level shall become inactive upon filing a Form 13H and thereafter shall not be required to file Form 13H or disclose its large trader status unless and until its transactions again are equal to or greater than the identifying activity level. A large trader that has ceased operations may elect to become inactive by filing an amended Form 13H to indicate its terminated status.''

[98] *See* Proposing Release, *supra* note 3, 75 FR at 21472.

[99] One commenter, however, asked about broker-dealers' duties regarding inactive persons. *See* Financial Information Forum Letter at 5; *see also infra* text accompanying note 167.

[100] *See* new Rule 13h–1(b)(1)(i). In addition, a person may voluntarily elect to file for Reactivated Status prior to effecting aggregate transactions that are equal to or greater than the identifying activity threshold. As with initial filings, a person may elect to file for Reactivated Status if it did not wish to monitor its trading for purposes of the identifying activity threshold.

[101] New Rule 13h–1(b)(2) provides that each large trader shall disclose to the registered broker-dealers effecting transactions on its behalf its large trader identification number and each account to which it applies. Additionally, a large trader on Inactive

did not receive any comments regarding Reactivated Status. The Commission is adopting this provision, as proposed. In particular, the provision for reactivated status is designed to ensure that a large trader on Inactive Status that becomes active above the identifying activity threshold is once again required to file and update Form 13H and inform its broker-dealers of the need to record its trading activity by its LTID.

vi. Termination Filings

Under Rule 13h–1(b)(3)(iii), a person, under certain narrow circumstances, may permanently end its large trader status by submitting a ''Termination Filing.'' This filing is designed to allow a large trader to inform the Commission that it has terminated operations, and therefore there is no chance of it requalifying for large trader status in the future.[102] Termination status is designed to signal to the Commission to not expect future amended or annual Form 13H filings from that large trader, such as when a large trader dissolves, ceases doing business, or, in some cases, is acquired, as described below.

The Commission believes it may be helpful to provide additional examples to illustrate the narrow circumstances under which a large trader may file a ''Termination Filing.'' These examples also should provide guidance to large traders on how to amend their Forms 13H when a large trader is involved in a merger.

• *Example 1:* A large trader merges into another large trader, resulting in only one entity. The non-surviving large trader would submit a ''Termination Filing'' that specifies the effective date of the merger. The surviving large trader, in an Amended Filing or its next Annual Filing (depending on the effective date of the merger), would update Item 4 to list the non-surviving company as an affiliate that files separately and provide the additional identifying information required in Item 4. Specifically, in the Description of Business and Relationship to the Large Trader fields, the surviving entity would disclose that the non-surviving entity has been acquired and no longer exists as a separate entity. The non-surviving company's market participation identification number (''MPID'') and LTID number (including suffix, if any) should also be listed. Capture of this information will allow the Commission to track the control of the non-surviving entity. In this scenario, the surviving large trader would continue using its LTID.

• *Example 2:* An existing large trader acquires another large trader and the target is maintained as a separate subsidiary. Following the acquisition, the target's trading would need to be tagged with the acquirer's LTID. The acquired subsidiary company may file a Termination Filing so long as all of its trading is tagged with its new parent's LTID.[103] Alternatively, the acquired entity may maintain its original LTID and have its trading tagged with both its original LTID and its new parent's LTID. If a Termination Filing is not made, then both companies would have to amend Items 4 of their Forms 13H to list the other as an affiliate and disclose their affiliate's information, including its MPID and LTID.

• *Example 3:* A large trader is acquired by a company that was not previously a large trader. The new parent company is now a ''large trader'' due to acquiring control of a large trader. Accordingly, the acquirer would file an ''Initial'' Form 13H and obtain a new LTID, which would be used to identify all of its trades and the trades of its affiliates (including its newly acquired large trader subsidiary). The acquired subsidiary company may file a Termination Filing so long as all of its trading is tagged with its new parent's LTID.[104] Alternatively, the acquired entity may maintain its original LTID and have its trading tagged with both its original LTID and its new parent's LTID. If a Termination Filing is not made, then both companies would have to identify the other as an affiliate in Items 4 of their Forms 13H.

The Commission did not receive any comments regarding Termination Filings. The Commission is adopting this provision, as proposed. In particular, the ability to submit Termination Filings will allow the Commission to accurately track only active large traders and will allow large traders that cease operation to formally terminate their filing obligations under Rule 13h–1.

b. Self-Identification to Broker-Dealers

As proposed, Rule 13h–1(b)(2) would have required a large trader to disclose to the registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies. Second, the provision, as proposed, would have required a large trader to disclose its LTID to all others with whom it collectively exercises investment discretion. The Commission received comments about the latter requirement.[105]

Proposed Schedule 6 to the Form would have required a large trader, in connection with disclosing its brokerage accounts, to also list the LTID(s) of all other large traders that exercise investment discretion over the particular account. To assure that large traders had access to other large traders' LTIDs, the proposed rule would have required large traders to disclose their status to one another. One commenter requested clarification regarding whether a large trader would be obligated to identify unaffiliated large traders only if investment discretion is exercised collectively.[106]

As discussed below, the Commission is not adopting the requirement to disclose brokerage account numbers on Form 13H and instead is requiring a large trader to provide a list of all registered broker-dealers with whom it has an account. Consequently, the requirement to provide the LTID(s) of all other large traders that exercise investment discretion over the particular account now is no longer relevant and is not being adopted. Because the requirement to disclose the information is not being adopted, it would not be necessary for large traders to inform others of their LTIDs, and the Commission is similarly not adopting the proposed requirement for a large trader to disclose its LTID to all others with whom it collectively exercises investment discretion. Accordingly, Rule 13h–1(b)(2), as adopted, requires a large trader to disclose to the registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies.

Lastly, the requirements that a large trader provide its LTID to all registered broker-dealers who effect transactions on its behalf, and identify each account to which it applies, are ongoing responsibilities that must be discharged promptly. For example, if a subsidiary of a large trader is acquired by another large trader, to the extent that subsidiary effects transactions in NMS securities equal to or greater than the reporting activity level, both large traders must

Status pursuant to paragraph (b)(3) of new Rule 13h–1 must notify broker-dealers promptly after filing for reactivated status with the Commission.

[102] By contrast, as described above, Inactive Status may be only temporary.

[103] If a Termination Filing is elected, the acquirer may wish to use an LTID suffix to separately identify the acquired entity's trading activity.

[104] If a Termination Filing is elected, the acquirer may wish to use an LTID suffix to separately identify the acquired entity's trading activity.

[105] *See, e.g.,* Wellington Management Letter at 5.

[106] *See* Wellington Management Letter at 5–6. Another commenter recommended that the Commission not require investment advisers to identify other advisers of a client account that trade separately and without collaboration in a different custodial account. *See* Investment Company Institute Letter at 10.

promptly notify their registered broker-dealers of the LTID change.[107]

3. Overview of Form 13H

Form 13H is designed to collect basic identifying information about large traders that will allow the Commission to understand the character and operations of the large trader. The Commission solicited [108] and received [109] many comments regarding various aspects of proposed Form 13H. The Commission, for example, received comments requesting clarification regarding certain information required by the proposed Form, as well as suggestions designed to reduce and streamline the reporting burden on large traders.[110] One commenter noted that the large trader reporting rule is only one of many proposed new regulations that are being contemplated by Congress and various federal regulators that would affect commercial banks.[111] The Commission is sensitive to the burdens imposed by the large trader rule.[112] As discussed below, the Commission is incorporating some commenters' suggestions in the Form as adopted, and many of the changes from the proposed version of the Form are intended to reduce further the burdens of the Form. The Commission believes that the version of Form 13H it is adopting today will be less burdensome than the proposed version, most notably because, as discussed further below, it replaces the proposed requirement to provide account numbers with a more general requirement to identify broker-dealers at which the large trader or any of its Securities Affiliates maintains an account.[113] In addition, the Commission is seeking to design the electronic filing system for Form 13H to minimize the filing burden. For example, a selection of previously filed Form 13H submissions, including the most recently submitted version, will be readily accessible so that large traders can simply edit and resubmit the Form when amendments are required. The Commission believes that filing Form 13H in an electronic format will be less burdensome and more efficient for both large traders and the Commission.

The Commission is adopting the Form with some format-driven modifications from the proposed version to better reflect its format as an electronic, rather than paper, filing. For example, the Commission is not adopting the proposed fields that would have required filers of Annual Filings and Amended Filings to identify the Items and Schedules being updated since the Commission will be able to distinguish this information more readily in an electronic filing environment. In addition, the Commission is not adopting the Schedules to the Form, and the information previously contained in the proposed Schedules has been realigned into the body of the Form. References to paper-based ''continuation sheets'' are not being adopted. Similarly, the concept of Schedules, while relevant to a paper-based form, is unnecessary in the context of an all-electronic filing.[114] These and other related non-substantive changes from the proposed version of the Form reflect that the Form will be accessed electronically and filed by large traders exclusively online.

Voluntary Registration. For the reasons discussed above,[115] in response to a comment, the Commission is revising Form 13H from the proposed version of the Form to allow a market participant to register voluntarily as a large trader, even if it has not yet effected transactions equal to or greater than the identifying activity level at the time of filing. Correspondingly, Form 13H requires a large trader to indicate whether its ''Initial Filing'' is voluntary. A large trader that elects to voluntarily file is required to disclose the date upon which it filed the Form, rather than the date on which its trading activity equaled or exceeded the identifying activity level.

Background Information About the Large Trader and Its Authorized Person. Form 13H requires the large trader to provide its mailing address, which may be different than its business address. Additionally, the Form requires that the following information be provided about the Authorized Person (*i.e.,* the natural person authorized to submit the Form 13H on behalf of the large trader): business address, telephone number, facsimile number, and e-mail address. This information was proposed to be required by Schedule 6 of the Form and has been relocated to the introductory section of the Form. Proposed Item 3 of Schedule 4, which would have mandated disclosure of the large trader's principal place of business (if different from the information disclosed on the cover page), has not been adopted. Instead, the requested information has been moved to the beginning of the adopted Form, where both business and mailing addresses are requested. All of this information is necessary for the Commission to identify and contact large traders.

a. Item 1

In Item 1(a) of the Form, the large trader must indicate the types of businesses that it or any of its affiliates engage in: [116] broker or dealer; bank holding company; [117] non-bank holding company; government securities broker or dealer; municipal securities broker or dealer; bank; pension trustee; non-pension trustee; [118] investment adviser to one or more registered investment companies; investment adviser to one or more hedge funds or other funds not registered under the Investment Company Act; insurance company; commodity pool operator; or futures commission merchant. A large trader also may check ''Other'' and disclose other types of financial businesses engaged in by the large trader.

Item 1(b) of the Form requires that the large trader provide the following for itself and each of its Securities Affiliates: a description of the nature of its operations, including a general description of its trading strategies.[119] The instructions provide guidance regarding the level of detail expected.[120]

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[107] This responsibility is in addition to the large traders' duty to amend Form 13H pursuant to Rule 13h–1(b)(1).

[108] *See* Proposing Release, *supra* note 3, 75 FR at 21472–73.

[109] *See, e.g.,* Wellington Management Letter at 3–6; American Bankers Association Letter at 2; David L. Goret Letter at 1–3; Anonymous e-mail dated June 22, 2010; and Prudential Letter at 3–4.

[110] *See, e.g.,* SIFMA Letter; Wellington Management Letter; Investment Company Institute Letter; and American Bankers Association Letter.

[111] *See* American Bankers Association Letter at 2.

[112] As discussed *infra* (*see* Section III.0), Section 13(h)(5) of the Exchange Act expressly requires the Commission to take into account, among other things, the costs associated with maintaining information with respect to transactions effected by large traders and reporting such information to the Commission.

[113] As defined in the instructions to Form 13H, ''Securities Affiliate'' means an affiliate of the large trader that exercises investment discretion over NMS securities.

[114] In addition, in response to comments and as discussed in greater detail below, the Commission is revising the scope of the data that would have been collected in the proposed Schedules.

[115] *See supra* at Section III.A.1.0.

[116] Unless otherwise specified, the Form requires information about the large trader that is filing the Form 13H. Typically, the filing large trader would be the large trader's ultimate parent company, which means the person at the highest level of the organizational chart required under Item 4(a) that controls a large trader or multiple large traders.

[117] The use of the term ''Holding Company'' in the proposal has been clarified in the adopted Form by dividing it into two options ''Bank Holding Company'' and ''Non-Bank Holding Company.''

[118] To clarify that all trustees that are large traders would be required to report, the adopted Form includes categories for ''Pension Trustee'' as well as ''Non-Pension Trustee.''

[119] Item 5 of proposed Schedule 4 would have required the large trader to describe the nature of the large trader's business. Form 13H as adopted contains this requirement in Item 1.

[120] For example, a large trader may describe its operations as including an ''investment adviser specializing in fundamental analysis'' or it may describe a broker-dealer as a ''proprietary trader

Collection of this basic descriptive information will allow the Commission to better understand each large trader and will allow the Commission to more carefully tailor requests both to registered broker-dealers for large trader transaction data and, if necessary, to large traders for additional information pursuant to Rule 13h–1(b)(4).

The Commission does not believe that the changes to the Form from the proposed version discussed above are substantive. Instead, the changes are intended to clarify the scope of information elicited by Item 1 and to reflect the fully-electronic nature of the Form.

b. Item 2

Item 2 of the Form requires the large trader to indicate whether it or any of its Securities Affiliates files any other forms with the Commission.[121] If so, Item 2 requires identification of each filing entity, the form(s) filed, and the CIK number.

The Commission is narrowing the scope of Item 2 from the proposal to require the large trader to disclose whether it or any of its affiliates that exercise investment discretion over NMS securities (as distinguished from all of its affiliates) file any forms with the Commission. Additionally, rather than disclosing the filers' Central Registration Depository (''CRD'') Numbers [122] and SEC File Numbers [123] as proposed, Item 2 as adopted requires only disclosure of their CIK numbers.[124]

One commenter objected to the collection of information under proposed Item 2, pointing out that the Commission already has access to this information.[125] The Commission believes that Item 2 is useful because it centralizes information about a large trader's various SEC filing obligations and will thereby allow the Commission to more promptly access records of those filers using their CIK numbers. Especially given the circumscribed scope of Item 2 as adopted, the Commission believes that this requirement will not be unduly burdensome. Further, each large trader should have ready access to this information and be able to summarize it with minimal additional burden.

c. Item 3

Item 3 of the Form requires a large trader to 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 is required to identify each entity and the CFTC registration number or primary foreign regulator, as applicable.

The Commission received one comment about the aspect of proposed Item 3 of the Form that would have required disclosure about bank regulation.[126] The commenter argued that the required information did not further the underlying purpose of the proposal, and recommended that the Commission, to the extent necessary, obtain this information directly from applicable banking regulators instead of from the large trader.[127] In response to this comment, the Commission has significantly narrowed the scope of this item by not adopting the proposed requirement in Item 3(b) of the proposed Form to disclose information on bank regulators. Instead, as mentioned above, the Commission is adopting the requirement to disclose whether the large trader includes a bank [128] or bank holding company. The Commission believes that collection of this basic information will be sufficient to characterize a large trader's operations, and should reduce the burdens of the Form while focusing the collection of information on the securities trading operations of each large trader.

Further, as proposed, Item 3(c) would have required the large trader to disclose whether it or any of its affiliates is an insurance company and identify each such regulated entity and its respective insurance regulators. One commenter recommended limiting Item 3(c) to only the large trader and its large trader affiliates, and suggested that the Form require identification only of their primary regulators.[129] Otherwise, the commenter stated, its list of regulators would include a long list of state insurance regulators.[130] In balancing the benefits of collecting such information against the burden on large traders to provide it, the Commission has decided to not adopt the requirements of proposed Item 3(c). The Commission again notes that Item 1 of Form 13H requires that the large trader disclose whether the large trader includes an insurance company. The Commission believes that collection of this basic information will be sufficient to characterize a large trader's operations, and should reduce the burdens of the Form while focusing the collection of information on the large trader's securities trading operations.

In addition, proposed Item 3(d) would have required the large trader to disclose whether it or any of its affiliates is regulated by a foreign regulator and identify each such regulated entity and all of its foreign regulators. One commenter recommended that the information requested in Item 3(d) only be required of the large trader and its large trader affiliates.[131] It further suggested that the Form require identification only of the primary foreign regulators.[132] The commenter stated that its list of regulators would be very long, as some of its foreign affiliates may have 25 foreign regulators.[133] In balancing the benefits of collecting such information against the burden on large traders to provide it, the Commission is not adopting the requirement as proposed. This adopted item, renumbered as Item 3(b), requires identification only of the primary foreign regulator. Further, the Commission is making the requirement applicable only to the large trader and its Securities Affiliates. In addition, two separate questions proposed on CFTC registration have been combined into one question to streamline the presentation of those items. No substantive change has been made to either question. The Commission believes that the requirement as adopted should not be as burdensome and yet should provide the Commission with access to the basic information it needs to understand the identity and

focusing on statistical arbitrage'' or ''options market maker.''

[121] The title of Item 2 of the adopted Form has been slightly amended; its title is ''Securities and Exchange Commission Filings,'' not ''Securities and Exchange Commission Registration.'' This non-substantive change reflects that registration is not the effect of all forms filed with the Commission.

[122] The CRD is a computerized database that contains information about most brokers, their representatives, and the firms for whom they work.

[123] As discussed above, an SEC File Number is assigned by EDGAR to registrants and others who file materials with the Commission through EDGAR. *See supra* discussion at text accompanying notes 79–81.

[124] CIK numbers, which are assigned to persons that file material with the Commission, are applicable to a broader universe of entities that may be large traders, as opposed to CRD numbers which are only applicable to broker-dealers.

[125] *See* American Bankers Association Letter at 2.

[126] *See id.*

[127] Item 3(b) of the proposed Form would have required the large trader to disclose: (1) Whether it or any of its affiliates is a bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank; if so, the large trader would have been required to identify each such affiliate and its banking regulators.

[128] As adopted, the instructions for Form 13H define the term *''bank''* to mean a national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank.

[129] *See* Prudential Letter at 4.

[130] *See id.*

[131] *See id.*

[132] *See id.*

[133] *See id.*

regulatory status of a large trader and its affiliates.

d. Item 4

Item 4(b) of the Form requires information on affiliates of the large trader that exercise investment discretion over NMS securities (*i.e.,* Securities Affiliates).[134] Item 5 of the proposed Form would have required a large trader to identify each affiliate that either exercises investment discretion over accounts that hold NMS securities or that beneficially owns NMS securities. In response to comments received, the Commission is not adopting the requirement to disclose affiliates that merely beneficially own NMS securities.[135] Accordingly, large traders will not have to identify or further describe affiliates who merely beneficially own NMS securities. The Commission believes that limiting the scope of required information to focus on affiliates that exercise investment discretion over NMS securities is appropriate and may reduce reporting burdens, while providing the Commission with important information about affiliates that are engaged in trading activities consistent with the primary focus of the Rule.

Given the narrower scope of affiliates about which information is now requested, the Commission is adopting as Item 4(a) a requirement to attach an organizational chart. At a minimum, the organizational chart must depict the large trader, its parent company (if applicable), all of its Securities Affiliates, and all entities identified in Item 3(a).[136] The organizational chart requirement is intended to help the Commission to quickly understand the affiliate structure of the large trader and should be useful, among other things, in assigning LTIDs and understanding any suffixes that are assigned. At the same time, a narrative description of the relationship between affiliates can also be useful where the relationships are difficult to portray in an organizational chart.[137] Accordingly, as part of Item 4(b), the Commission is requiring a narrative description of the relationship between (1) the large trader; and (2) each Securities Affiliate and each entity identified in Item 3(a).

As part of Item 4(b), the Commission is adopting a requirement that the large trader list its Securities Affiliates and all entities identified in Item 3(a). Additionally, the large trader must describe the business and disclose the MPID (if any) for each of those entities. The MPIDs of Securities Affiliates will be useful to the Commission when analyzing trading data on affiliates identified on the Form. The Commission believes that MPIDs will allow the staff to more carefully tailor requests to registered broker-dealers for large trader trade data, and they may reduce the need for the Commission to send disaggregation requests to a large trader.[138]

Item 4(c) of the Form requires the provision of the LTIDs, including LTID suffixes, for all entities within the large trader that file separately (if any). This requirement is very similar to what was proposed under Item 5. Item 4(c) as adopted, however, expressly requires that a large trader include the LTID suffix (if any) of all identified entities.

Item 4(d) of the Form allows a large trader to assign suffixes to its affiliates. In the Proposing Release, the Commission specified that a large trader could elect to append additional characters (a suffix) to sub-identify particular units that directly control an account.[139] Use of a suffix might be useful, for example, to facilitate a large trader's internal recordkeeping and to facilitate responses to Commission disaggregation requests.[140] The instructions to Item 4(d) of the Form provide guidance on the format for suffixes.[141] A list of the entities within the large trader complex that have been assigned suffixes will help the Commission understand the large trader's use of suffixes and may facilitate the ability of a large trader to track and manage its assigned suffixes.

The Commission believes that the information about large trader affiliates required by Item 4 of the Form is necessary to provide the Commission with the background necessary to understand the character and trading activities of a large trader.

e. Item 5

Item 5 of Form 13H requires information about the governance of the large trader.[142] Item 5(a) mandates disclosure of one or more of the following statuses of the large trader: individual;[143] partnership; limited liability partnership; limited partnership; corporation; trustee; or limited liability company. Additionally, the Form permits the large trader to check ''Other'' and specify a form of organization that is not comparable to any of the enumerated organization types.

Item 5(b) requires the identification of each partner in the large trader partnership and partnership status (*i.e.,* general partner or limited partner).

Item 5(c) requires the identification of each executive officer, director, or trustee of a large trader corporation or trustee. The column title in Item 5(c) reflects the instruction that the large trader identify its Executive Officers.[144]

f. Item 6

Item 6 of Form 13H requires large traders to identify broker-dealers at which the large trader has an account. As proposed, Item 6 would have required large traders to provide information concerning each broker-dealer account through which it or certain of its affiliates trade. The Commission received several comments concerning Schedule 6 to the proposed

[134] Information from proposed Item 5 (on affiliates) has been integrated into Item 4 of the adopted Form, which covers the organization of the large trader generally. This change was intended to consolidate under one Item similar information that is requested on the organization of each large trader.

[135] One commenter suggested that the Commission require identification of only those affiliates that trade in NMS securities. *See* SIFMA Letter at 17.

[136] As long as its organizational chart lists all required entities, a large trader may submit its standard organizational chart that it keeps in the ordinary course of its business. The organizational chart, as part of the Form 13H submission, would be treated as confidential by the Commission. *See infra* Section III.A.3.g (discussing confidentiality).

[137] As proposed, Item 5 of the Form would have collected information about the relationships of affiliates in a list form.

[138] One commenter suggested that assignment of a LTID to track the trades of large traders does not go far enough. *See* GETCO Letter at 3. The commenter recommended that all market participants be required to have and use a unique MPID when entering orders on market centers, either directly or through sponsored market access arrangements. The Commission believes that such an initiative is beyond the scope of this particular rulemaking, which requires *large traders* to provide such information to the Commission. If the Commission were to consider extending such a requirement to other market participants, it would be subject to a separate rulemaking providing interested persons an opportunity to comment.

[139] *See* Proposing Release, *supra* note 3, 75 FR at 21460, n.40.

[140] *See id.* at 75 FR at 21460, n.44.

[141] Specifically, suffixes must have three characters, all of which must be numbers. No letters or special characters may be used in a suffix. Further, the same suffix should not be assigned to more than one entity using the same LTID, and large traders should avoid reusing suffixes.

[142] Information from proposed Schedule 4 (on governance) has been integrated into Item 5 (also on governance). Specifically, the Commission is consolidating proposed Schedule 4 of Form 13H into Item 5 and re-titling it ''Governance of the Large Trader.'' This change was intended to consolidate under one Item similar information concerning the governance of each large trader.

[143] The proposed categories for individuals (''self employed'' and ''otherwise employed'') have been condensed into a single requirement to identify a large trader as an individual.

[144] Although proposed Schedule 4 to Form 13H did not specify that only the identities of executive officers were required, the proposed instructions to the Form indicated that the proposed Form did not seek to collect the identities of all officers of the large trader.

Form.[145] As discussed below, some commenters, particularly investment advisers, noted that this requirement would be impractical or at least very burdensome and could require disclosure of potentially hundreds of thousands of account numbers.[146] One commenter explained that many investment advisers do not know the account numbers assigned to them by broker-dealers because that information is not required by the software they use to communicate order allocation and settlement instructions to broker-dealers.[147] Other commenters stated that some investment advisers for defined contribution plans do not have access to account information because the plan record-keepers, not the investment advisers who provide instructions to the record-keepers, establish and maintain the relationships with the broker-dealers.[148] Even for large traders that have ready access to their brokerage account numbers, commenters suggested that the sheer volume of that information, and the frequency with which it might change, would make regular disclosure extremely burdensome.[149] Other commenters stated that account numbers sometimes are embedded with personally identifiable information and objected to the requirement because: (1) The Commission should not require investment advisers to disclose their clients' identities;[150] and (2) the burdens necessary for the Commission to establish sufficiently robust safeguards to protect the confidentiality of this information would be considerable.[151]

Some commenters suggested alternatives to disclosing account numbers in the proposed Form. One commenter suggested that the Commission instead require large traders to maintain and submit only upon request the required brokerage account information.[152] Two other commenters suggested revising the proposed Form to instead collect the names of broker-dealers through which the large trader executes transactions.[153]

Based on the comments received, the Commission understands that the provision of brokerage account information through Form 13H could burden some large traders in light of current industry practices. While this information could be of value to the Commission, the Commission has determined to not adopt Schedule 6 as proposed. Instead, the adopted Form requires that large traders identify the registered broker-dealers at which the large trader or any of its Securities Affiliates has an account and disclose whether each such broker-dealer provides prime broker, executing broker, and/or clearing broker services. If the Commission needs more specific individual account-level information, it can use the provided list of broker-dealers and the services they provide to make targeted requests to those entities for more detailed information.[154] In addition, the Commission notes that it may contact the large trader directly pursuant to Rule 13h–1(b)(4) to seek additional information to further identify the large trader and all accounts through which the large trader effects transactions.[155]

One of the commenters who suggested this approach cautioned that any list of broker-dealers provided by large traders should be kept confidential because leakage of such information (and particularly leakage of changes to such a list) could impact the stock price of publicly traded broker-dealers on that list.[156] The confidential treatment of all information collected through Form 13H is discussed below.

g. Confidentiality

A number of commenters underscored the sensitive nature of the information collected on Form 13H and expressed support for the Commission's position that the information would be protected as contemplated by the Market Reform Act.[157] Two commenters expressed concern about the risk of theft and/or inadvertent disclosure of private client names and account numbers.[158] One commenter asked whether the Commission would share information about Unidentified Large Traders with other regulatory agencies for supervisory or enforcement purposes.[159] Additionally, two commenters suggested that the Commission monitor for misuses of confidential information such as front-running.[160]

The Commission is committed to maintaining the information collected pursuant to Rule 13h–1 in a manner consistent with Section 13(h)(7) of the Exchange Act.[161] The statute specifies that the Commission 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:

> Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.[162]

The legislative history of Exchange Act Section 13(h) suggests that Congress: (1) Understood that confidential information that could reveal proprietary trading strategies to competitors would be collected and correspondingly restricted public access to this information; and (2) crafted the exceptions to (a) ensure that it could obtain information from the

[145] *See, e.g.,* Anonymous e-mail dated June 22, 2010; Wellington Management Letter at 3–6; and Financial Engines Letter at 4–6.

[146] *See, e.g.,* Wellington Management Letter at 3–4.

[147] *See id.*

[148] *See* Financial Engines Letter at 4–5 and Investment Adviser Association Letter at 6. One commenter added that some investment managers do not have account number information because they execute trades with registered broker-dealers with whom they have only an informal relationship and no contract. *See* Investment Adviser Association Letter at 6.

[149] For example, one investment adviser stated that there are over 400,000 separate broker-dealer account numbers associated with its clients. *See* Wellington Management Letter at 3. It further stated that it currently does not maintain a list of those account numbers. *See id.*

[150] One commenter stated the requirement, which would disclose client information, may: (1) raise numerous privacy issues, particularly with respect to transmission of confidential information from foreign jurisdictions such as members of the European Union and Switzerland and (2) harm relationships between investment managers and their clients. *See* Investment Adviser Association Letter at 6.

[151] *See* David L. Goret Letter at 3.

[152] *See* American Banking Association Letter at 2.

[153] *See* Wellington Management Letter at 4 and Investment Company Institute Letter at 8–9.

[154] Under Exchange Act Rules 17a–25 and 13h–1, broker-dealers are required to maintain and report the applicable account numbers in which a transaction was effected. Accordingly, the Commission will obtain information on account numbers in connection with a particular request for data.

[155] One commenter suggested it was unnecessary to collect brokerage account information because, if necessary, the Commission could request more detailed information from the large trader pursuant to proposed Rule 13h–1(b)(4). *See* Investment Adviser Association Letter at 7.

[156] *See* Investment Company Institute Letter at 9, n.18.

[157] *See, e.g.,* Wellington Management Letter at 6; Financial Engines Letter at 7; Investment Adviser Association Letter at 10; and Investment Company Institute Letter at 2, 4.

[158] *See* Anonymous e-mail dated June 22, 2010 and Managed Funds Association Letter at 3–4.

[159] *See* SIFMA Letter at 19.

[160] *See* T. Rowe Price Letter at 2 and Investment Adviser Association Letter at 10.

[161] *See* 15 U.S.C. 78m(h)(7).

[162] 15 U.S.C. 78m(h)(7).

Commission; (b) allow the Commission to grant access to federal departments and other federal agencies acting within the scope of their jurisdictions; and (c) allow the Commission to comply with an order of a court of the United States in certain actions.[163]

While the Commission must share the information it collects on large traders as outlined above, the Commission is committed to protecting the confidentiality of that information to the fullest extent permitted by applicable law. By assuring large traders of the confidentiality of information they provide to the Commission, the Commission is addressing commenters' concerns.

B. Broker-Dealers: Recordkeeping, Reporting, and Monitoring

As proposed, Rule 13h–1 would impose recordkeeping and reporting responsibilities on the following: registered broker-dealers that are large traders; registered broker-dealers that, together with a large trader or Unidentified Large Trader, exercise investment discretion over an account; and registered broker-dealers that carry accounts for large traders or Unidentified Large Traders or, with respect to accounts carried by a non-broker-dealer, broker-dealers that execute transactions for large traders or Unidentified Large Traders. In addition, the proposed rule would require certain registered broker-dealers to implement procedures to encourage and foster compliance with the self-identification requirements of the proposed rule. As discussed in greater detail below, after considering the comments received on the Rule's application to registered broker-dealers, the Commission is adopting these provisions of the Rule substantially as proposed, but with some modifications to reflect certain comments and to clarify the requirements applicable to registered broker-dealers.

1. Recordkeeping Requirements

The Commission received few comments concerning the proposed recordkeeping requirements,[164] and is adopting Rule 13h–1(d) substantially as proposed with one modification.[165] As proposed, every registered broker-dealer would have been required to maintain records of information for, among others, ''(i) an account such broker-dealer carries for a large trader or an Unidentified Large Trader, (ii) an account over which such broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader, or (iii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion.'' The Commission is not adopting the requirement to maintain records for accounts over which such broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader.

As described above, in connection with the requirement for large traders to disclose on Form 13H a list of broker-dealers at which a large trader or any Securities Affiliate has an account rather than a list of account numbers at such broker-dealers as proposed, the Commission is not adopting the proposed requirement that large traders disclose their LTIDs to other large traders.[166] Therefore, large traders will not be required to communicate their LTIDs to other traders, and, consequently, there is no mechanism in the Rule for a large trader to be informed of the status of another trader with whom it jointly exercises investment discretion.

Similarly, the Commission believes it is appropriate to narrow the scope of the recordkeeping duty concerning accounts over which a broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader. Accordingly, under the Rule as adopted, registered broker-dealers must maintain records 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 or (ii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion. As a practical matter, however, the Commission will continue to have access to records of any account over which a broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader by virtue of the fact that such an account is an account of a large trader subject to the recordkeeping requirements.

In addition, the Commission is adopting as proposed the requirement that, 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 maintain records of all of the required information.

One commenter asked whether registered broker-dealers would be required to maintain records of transactions by inactive large traders.[167] In the Proposing Release, the Commission stated that an inactive large trader could inform its broker-dealers of its Inactive Status and request that they discontinue tagging its transactions with its LTID.[168] The Rule does not require a broker-dealer to maintain records of transactions by an inactive large trader after receiving notice from the large trader that the trader had filed for inactive status with the Commission on Form 13H.

One commenter asked the Commission to clarify Rule 13h–1(d)(5),[169] which requires that the ''records and information required to be made and kept pursuant to the provisions of this rule shall be available on the morning after the day the transactions were effected (including Saturdays and holidays).'' [170] Specifically, the commenter asked whether, by requiring that records be available on Saturdays and holidays, the Commission expects that broker-dealers might be required to submit transaction data on Saturdays and holidays. The Commission notes that the Rule contemplates that broker-dealers might be called upon by the Commission to report data to the Commission on a Saturday or holiday, consistent with the legislative history that accompanies Section 13(h).[171] Depending on the

[163] *See* Senate Report, *supra* note 14, at 41.

[164] *See* SIFMA Letter at 10, 14 and Financial Information Forum Letter at 5.

[165] While paragraph (d)(2) of the Rule sets forth the information that is to be maintained for each transaction, subparagraph (xiii) requires that the broker-dealer record the LTIDs ''associated with the account, unless the account is for an Unidentified Large Trader.'' This provision effectively requires that a broker-dealer tag an LTID to an account rather than to each transaction. In addition, for an Unidentified Large Trader, the Commission expects broker-dealers to assign their own unique identifier to the applicable account(s).

[166] *See* discussion *supra* at Section III.A.2.b. The proposed requirement that large traders disclose their LTIDs to other large traders was intended to facilitate the ability of a large trader to complete Form 13H, including the provisions that required it to identify its account numbers and the LTID of any trader with whom it shared investment discretion over the account.

[167] *See* Financial Information Forum Letter at 5.

[168] *See* Proposing Release, *supra* note 3, at 21464. As discussed above, Inactive Status relieves a former large trader from having to file and amend Form 13H with the Commission. The Rule, however, does not specifically require a registered broker-dealer to discontinue tagging the trader's transactions with its LTID. As discussed below, Form 13H and the information contained therein, is confidential. Accordingly, the Commission would not reveal a large trader's status to a broker-dealer that sought to confirm a reported Inactive Status.

[169] *See* Financial Information Forum Letter at 3.

[170] *See id.*

[171] *See* Senate Report, *supra* note 14, at 40. *See also* Section 13(h) of the Exchange Act, 15 U.S.C. 78m(h)(2), providing that ''[r]ecords shall be

urgency of the situation, the Commission may need prompt access to large trader data and the Rule contemplates that possibility.[172] The provisions applicable to the reporting of data to the Commission are discussed below.

2. Reporting Requirements

As proposed, Rule 13h–1(e) would require every registered broker-dealer who is itself a large trader, exercises investment discretion over an account together with a large trader or an Unidentified Large Trader, or carries an account for a large trader or an Unidentified Large Trader to report to the Commission upon request records they keep pursuant to Rule 13h–1(d)(1). In addition, as proposed, 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 would be required to report such records.

As described above, the Commission is not adopting the proposed requirement on large traders to disclose their LTIDs to other large traders.[173] The Commission believes it is appropriate to similarly narrow the scope of the reporting duty to not extend the reporting requirement to broker-dealers that exercise investment discretion over an account together with a large trader or an Unidentified Large Trader.

Accordingly, as adopted, upon the request of the Commission, every registered broker-dealer who is itself a large trader or carries an account for a large trader or an Unidentified Large Trader shall electronically report to the Commission all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and Unidentified Large Traders, equal to or greater than the reporting activity level. Additionally, 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 shall electronically report such information.

Broker-dealers will be required to report a particular day's trading activity if it equals or exceeds the ''reporting activity level'' of 100 shares.[174] Transaction reports must be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.[175]

The Commission solicited [176] and received comments regarding the reporting duty of registered broker-dealers.[177] One commenter, in observing that the proposed rule would require registered broker-dealers to submit transaction data to the Commission before the close of business on the day specified in the request for such transaction information, asked for clarification about whether the day could be the same day the request is made.[178] The same commenter suggested that the Commission should allow registered broker-dealers a full business day, based on the time of the request, to respond to data requests.[179] Other commenters suggested longer periods. One suggested two days,[180] and one suggested affording registered broker-dealers 10 business days to respond, which could be shortened over time to three business days.[181] The latter commenter opposed the proposed deadline, stating that broker-dealers' existing infrastructure cannot respond to data requests for large trader transactions within one business day. As noted in the Proposing Release, the Commission expects that certain system enhancements will be required to prepare broker-dealers' existing EBS infrastructure for compliance with Rule 13h–1, including the provisions regarding the availability of data.[182] While the Commission does not anticipate that, under normal circumstances, it would request delivery of large trader transaction data on the same day the request is made, the Commission believes it is important that it have the flexibility to do so if required by the urgency of the situation.[183]

In response to the requests of commenters to provide additional guidance on the expected timeframe within which broker-dealers would need to submit transaction data to the Commission, the Commission is adopting a modified version of Rule 13h–1(e) to provide that reports of transactions must be ''submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.''

The Commission understands from one commenter that EBS data processes are normally done during overnight batch runs.[184] In light of these considerations, the Commission believes it would be appropriate for broker-dealers to utilize any overnight process they may have currently in production, and the Rule as adopted provides that the Commission will normally request reports to be submitted in manner that allows time for such overnight processing.

However, under unusual circumstances, the Commission may request more immediate responses that may require some broker-dealers to perform a manual process in order to provide reports to the Commission

*reported to the Commission * * * immediately upon request by the Commission * * *.''*

[172] The Commission notes that while new Rule 13h–1(d)(5) governs the *availability* of data, new Rule 13h–1(e) governs the *reporting* of transaction data by broker-dealers to the Commission. Specifically, that provision requires registered broker-dealers to submit transaction data ''no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.'' Accordingly, while information must be available on the morning after the transaction was effected, the reporting deadline is based upon the day of the Commission's request.

[173] *See* discussion *supra* at Section III.A.2.b.

[174] New Rule 13h–1(a)(8) defines the reporting activity level as: ''(i) Each transaction in NMS securities, effected in a single account during a calendar day, that is equal to or greater than 100 shares; (ii) any other transaction in NMS securities, effected in a single account during a calendar day, that a registered broker-dealer may deem appropriate; or (iii) such other amount that may be established by order of the Commission from time to time.'' The Commission solicited comment about a number of aspects of the proposed reporting activity level, *see* Proposing Release, *supra* note 3, 75 FR at 21473, but received no comments regarding the proposed threshold.

[175] *Cf.* Exchange Act Section 13(h)(2), 15 U.S.C. 78m(h)(2), which requires that ''[s]uch records shall be available for reporting to the Commission, or any self-regulatory organization that the Commission shall designate to receive such reports, on the morning of the day following the day the transactions were effected, and shall be reported to the Commission or a self-regulatory organization designated by the Commission immediately upon request by the Commission or such a self-regulatory organization.''

[176] *See* Proposing Release, *supra* note 3, 75 FR at 21473.

[177] *See, e.g.,* Financial Information Forum Letter at 4 and SIFMA Letter at 13–17.

[178] *See* Financial Information Forum Letter at 2.

[179] *See id.*

[180] *See* Prudential Letter at 5.

[181] *See* SIFMA Letter at 15.

[182] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[183] The Commission notes that the Rule requires that trade data be available for reporting to the Commission on the morning after the day the transactions were effected (which could include Saturdays and holidays). As specified in new Rule 13h–1(e), in response to a Commission request for transaction data, the information must be reported to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.

[184] *See* Financial Information Forum Letter at 3.

sooner than could be accommodated by an overnight batch process. For example, on the morning following a market event such as May 6, 2010, the Commission could request data about the prior day to be submitted the same day as the request is made. The Commission recognizes that under these circumstances, depending on the nature of broker-dealer's systems, the report data may be preliminary and require updating by the opening of business of the day following the request. One commenter inquired whether registered broker-dealers would be required to submit transaction data directly to the Commission instead of through the normal channel for EBS submissions.[185] As adopted, Rule 13h–1(e) requires that reports be submitted ''electronically, in machine-readable form and in accordance with a format specified by the Commission that is based on the existing EBS system format.'' Like Exchange Act Rule 17a–25, this provision does not require (or prohibit) preparation or transmission of reports by any intermediary. However, as stated in the Proposing Release, in order to mitigate costs on registered broker-dealers, the Commission intends to utilize the existing infrastructure of the EBS system for the large trader reporting rule.

Another commenter asked whether the Commission intended to request transaction data according to LTID.[186] The Commission expects that it would, on occasion, request EBS data according to LTID. A narrowly-focused request for transaction records of a particular large trader would help the Commission obtain in the most efficient manner possible targeted and limited data and should reduce the burden on broker-dealers by allowing them to provide smaller files in response to an EBS request for records of specific large traders.

One commenter recommended using the OATS system maintained by the Financial Industry Regulatory Authority (''FINRA'') instead of the EBS system for the large trader reporting rule. The commenter pointed out that, unlike the EBS system, OATS processes are tied to front office order and execution systems and thus could more readily incorporate the proposed new field of execution time.[187] Further, the commenter noted that OATS should be able to provide next day reporting.[188] The Commission, however, believes that the large trader reporting requirements can be most efficiently implemented and operated through relatively modest enhancements to the existing EBS system. Use of OATS, which is maintained by FINRA, would involve expanding OATS to additional categories of securities (*e.g.,* options) and making additional enhancements to accommodate the records that would need to be kept pursuant to the Rule. For these reasons, the Commission does not believe basing the large trader reporting rule on OATS is appropriate at this time.

3. Monitoring Requirements

Overview of Proposed Rule. Under proposed Rule 13h–1(d) and (e), certain registered broker-dealers would be subject to recordkeeping and reporting responsibilities for their customers that meet the criteria for Unidentified Large Traders. Proposed Rule 13h–1(a)(9) defined ''Unidentified Large Trader'' as ''each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader.'' The proposed Rule provided that a registered broker-dealer ''has reason to know whether a person is a large trader based on the transactions in NMS securities effected by or through such broker-dealer.''

In assessing whether a broker-dealer ''has reason to know'' whether one of its customers may be a large trader, the proposed rule effectively would have required the broker-dealer to take into account trading activity in its own customer accounts.

Proposed Rule 13h–1(f) also contained a safe harbor that was designed to reduce the broker-dealer's burdens in connection with monitoring its customers' trading for purposes of identifying possible large traders.[189] The safe harbor in proposed Rule 13h–1(f) required reasonably designed systems to detect and identify persons that may be large traders—based upon transactions effected through an account or group of accounts or other information readily available to the broker-dealer. Further, the proposed safe harbor required reasonably designed systems to inform such persons of their potential obligations under Rule 13h–1.

The proposed monitoring requirements were intended to promote awareness of and foster compliance with Rule 13h–1 by customers who might not be aware of their large trader reporting responsibilities. As noted in the Proposing Release, the proposed rule placed ''the principal burden of compliance with the identification requirements on large traders themselves'' [190] while the broker-dealer monitoring requirements were intended to be ''limited'' and ''a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act.'' [191]

Comments Received. In the Proposing Release, the Commission requested comments on the proposed monitoring requirements and the related safe harbor.[192] The Commission received several comments that addressed the proposed duty to monitor customers for purposes of Rule 13h–1.[193] One commenter asserted that the Commission lacks the statutory authority to impose a monitoring requirement on registered broker-dealers in connection with the large trader reporting rule.[194] A few commenters asked for clarification of the monitoring requirements and offered alternatives.[195] Of those commenters that addressed the issue, most were critical of the proposed monitoring requirements.[196] One commenter characterized the role of broker-dealers under the proposed rule as ''gatekeepers,'' and asserted that ''the proposed rule would impose on broker-dealers much of the operational monitoring regarding registration of large traders.'' [197] Two commenters asked whether the Rule would require broker-dealers to stop doing business with Unidentified Large Traders.[198] One of those commenters asserted that it should not because that would have the unintended consequence of driving customers to broker-dealers who may be less diligent in monitoring for large traders.[199] These two commenters also requested guidance about whether the monitoring provisions required any

[185] *See id.*

[186] *See id.* at 2.

[187] *See* SIFMA Letter at 15.

[188] *See id.*

[189] *See* Proposing Release, *supra* note 3, 75 FR at 21470.

[190] *Id.*

[191] *Id.*

[192] *See id.* at 21472–73.

[193] *See, e.g.,* Financial Information Forum Letter at 4–5; GETCO Letter at 3; and SIFMA Letter at 9–13.

[194] *See* SIFMA Letter at 11.

[195] *See, e.g.,* Financial Information Forum Letter; SIFMA Letter; and GETCO Letter.

[196] One commenter described the proposed safe harbor as ''anything but safe'' and, as discussed above, asserted that the proposal exceeds the Commission's statutory authority because, among other reasons, the safe harbor provided that a registered broker-dealer would have reason to know that a customer is an Unidentified Large Trader based on other readily available information, as well as transactions effected through the broker-dealer. *See* SIFMA Letter at 11.

[197] *Id.* at 9.

[198] *See id.* at 11 and Financial Information Forum Letter at 5.

[199] *See* SIFMA Letter at 11.

specific policies and procedures.[200] Another commenter asked whether a broker-dealer has a duty to proactively determine whether a customer is an Unidentified Large Trader based on the broker-dealer's knowledge that its customer maintains accounts at other broker-dealers.[201]

Summary of Monitoring Requirements in Final Rule. The Commission addresses these comments below, but for purposes of clarity we also will briefly summarize the monitoring requirements in the final Rule. As adopted, the Rule requires that a registered broker-dealer treat as an Unidentified Large Trader (for purposes of the recordkeeping and reporting provisions in paragraphs (d) and (e) of the Rule) any person that the broker-dealer ''knows or has reason to know'' is a large trader where such person has not complied with the identification requirement applicable to large traders (*i.e.,* identified itself as a large trader to the broker-dealer and disclosed the accounts to which its LTID applies). As noted in Rule 13h–1(a)(9), in considering whether the broker-dealer has ''reason to know'' that a person is a large trader, however, the broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer (*i.e.,* it need not seek out information on transactions effected by that person through another broker-dealer). Moreover, a broker-dealer may determine that it has no ''reason to know'' that a person is a large trader through two methods. First, the broker-dealer may simply conclude, based on its knowledge of the nature of its customers and their trading activity with the broker-dealer, that it has no reason to expect that any of these customers' transactions approach the identifying activity level.[202] Second, the broker-dealer may rely on the safe harbor provision in paragraph (f) of the Rule. Under the safe harbor, a registered broker-dealer would be deemed not to know or have reason to know that a person is a large trader if it does not have actual knowledge that a person is a large trader and it establishes policies and procedures reasonably designed to identify customers whose transactions at the broker-dealer equal or exceed the identifying activity level and, if so, to treat such persons as Unidentified Large Traders and notify them of their potential reporting obligations under this Rule. Under either approach, a broker-dealer's obligation with respect to an Unidentified Large Trader is limited to compliance with the requirements of paragraphs (d) and (e) of the Rule, and the broker-dealer would not be required to cease trading or take other action with respect to that Unidentified Large Trader.[203] The Commission notes that, pursuant to the reporting requirements of the Rule, it may periodically request reports from broker-dealers regarding all customers they may be treating as Unidentified Large Traders.

Response to Comments and Discussion of the Final Rule. The Commission carefully considered the comments on the proposed rule, and therefore is providing responses and additional clarifications below regarding the monitoring requirements required under this Rule. In response to the comment asserting that the Commission lacks authority to impose monitoring requirements, we note that the explicit authority under Section 13(h) of the Exchange Act to adopt this Rule is supplemented by Section 23(a) of the Exchange Act, which allows the Commission to ''make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title. * * *'' [204] Further, Section 13(h)(2) of the Exchange Act specifically authorizes the Commission to require registered broker-dealers to report transactions that ''equal or exceed the reporting activity level effected directly or indirectly by or through [them] * * * for any person that such broker or dealer *has reason to know* is a large trader on the basis of transactions in securities effected by or through such broker or dealer'' (emphasis added).[205] That section, then, contemplates that registered broker-dealers would take into account their own customers' trading (which they have reason to know). The Commission believes, therefore, that it is reasonable to require broker-dealers to take into account a customer's trading activity through the broker-dealer's accounts to implement Section 13(h).

The Commission is, however, making several modifications to the proposed rule in response to commenters' requests for additional clarification. First, in response to questions regarding the scope of the information that a broker-dealer must consider in determining whether a person may be a large trader, the Commission is adopting a definition of Unidentified Large Trader to clarify what was intended in the proposed Rule—that a broker-dealer does not have ''reason to know'' that a person is a large trader other than by reference to transactions in accounts of the broker-dealer. In particular, proposed paragraph (a)(9) of the Rule would have defined an Unidentified Large Trader as a ''person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader.'' It further provided that ''[a] registered broker-dealer has reason to know whether a person is a large trader based on the transactions in NMS securities effected by or through such broker-dealer.'' To clarify the Commission's intent for determining whether a registered broker-dealer has reason to know, the Commission is adopting a revised second sentence of paragraph (a)(9) of the Rule to provide: ''For purposes of determining under this rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.'' In other words, when considering whether a customer's trading activity has exceeded the ''identifying activity level,'' the broker-dealer need only consider the customer's activity effected through an account or a group of accounts at that broker-dealer. If that activity rose to the ''identifying activity level'', the broker-dealer would be required to treat the customer as an Unidentified Large Trader. Beyond considering the transactions effected through an account or a group of accounts at the broker-dealer, however, the broker-dealer is not required to proactively make further inquiries for the purpose of determining its customer's status (*e.g.,* by seeking to determine the customer's trading activity at other broker-dealers). However, if a registered broker-dealer

[200] *See id.* at 10 and Financial Information Forum Letter at 5.

[201] *See* SIFMA Letter at 10.

[202] For example, the broker-dealer may know, or learn from its customer, that the transactions over the identifying activity level were effected in connection with a tender offer, which are excluded under the Rule for purposes of determining whether a person is a Large Trader. Alternatively, the broker-dealer may know, or learn from its customer, that the account in question is an omnibus account and that the individual subaccounts do not exceed the identifying activity level.

[203] The Commission reiterates that the monitoring requirements are intended to be a ''limited'' duty that serves as ''a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act.'' Proposing Release, *supra* note 3, 75 FR at 21470. The Commission believes that requiring limited monitoring by broker-dealers will help assure that the objectives of the Rule are met and is consistent with the statutory intent of Section 13(h) of the Exchange Act.

[204] 15 U.S.C. 78w(a).

[205] 15 U.S.C. 78m(h)(2).

nevertheless has actual knowledge that a person is a large trader and the person has not provided the broker-dealer with a LTID, then the broker-dealer must treat the person as an Unidentified Large Trader under the recordkeeping and reporting requirements of the Rule.

Further, in response to questions regarding the scope of a broker-dealer's obligations with respect to an Unidentified Large Trader, the Commission notes that the Rule does not require a broker-dealer to stop doing business with Unidentified Large Traders. Rather, paragraph (d)(3) of the Rule requires broker-dealers to maintain information on Unidentified Large Traders, and paragraph (e) requires broker-dealers to report that information to the Commission on request.[206] Moreover, the Rule does not require a broker-dealer to proactively or affirmatively determine who is in fact a large trader. A potential large trader is required to assess for itself whether it meets the identifying activity threshold and thus qualifies as a large trader. The Commission notes that in some cases only the potential large trader would know whether it in fact is a large trader because certain types of transactions are excluded from the identifying activity level calculation. For example, a broker-dealer may have a customer that effected $22,000,000 worth of transactions through that broker-dealer in a given day, in excess of the identifying activity threshold. If that customer did not previously identify itself as a large trader to the broker-dealer by providing an LTID and identifying the accounts to which it applies, then the broker-dealer would treat the customer as an Unidentified Large Trader. However, the customer may not, in fact, be required to register as a large trader because the customer may not have exercised investment discretion over those transactions.

The Commission also is making several modifications to paragraph (f) from the proposal to clarify the requirements of the safe harbor provision contained in that paragraph. As noted above, this safe harbor would provide a broker-dealer with assurance as to whether it has ''reason to know'' that a person is a large trader, and therefore whether the broker-dealer must treat such person as an Unidentified Large Trader. As a practical matter, the Commission expects that broker-dealers with customers whose trading activities could exceed the identifying activity level will likely elect to avail themselves of the safe harbor. To qualify under the safe harbor, the broker-dealer must (i) implement policies and procedures reasonably designed to identify customers whose trading activity exceeds the identifying activity level, (ii) treat such customers as Unidentified Large Traders for purposes of the Rule, and (iii) notify such customers of their potential obligation to comply with the rule as a large trader.

Certain technical changes to paragraph (f) have been made to clarify these requirements. For example, paragraphs (f)(1) and (2) now make clear that if a customer's trading activity exceeds the identifying activity level, and the customer has not self-identified as a large trader, the broker-dealer must treat that customer as an Unidentified Large Trader for purposes of the Rule. In addition, paragraph (f)(1) has been revised to clarify that—consistent with the definition of Unidentified Large Trader—the broker-dealer's policies and procedures for measuring a customer's trading activity need only consider transactions effected in accounts carried by the broker-dealer or through which the broker-dealer executes transactions.[207]

ATSs. One commenter,[208] a broker-dealer that operates an ATS, argued that an ATS should not have a duty to monitor its subscribers' compliance with the large trader identification requirements. The commenter argued that, just as an exchange would not have an obligation to monitor its broker-dealer members' compliance with proposed Rule 13h–1, a broker-dealer that operates an ATS should not be required to monitor whether its subscribers are complying with the requirements of the rule. The Commission notes that the monitoring requirements are only applicable to registered broker-dealers that are large traders, carry accounts for large traders or Unidentified Large Traders, or effect transactions on behalf of large trader customers whose accounts are carried by non-broker-dealers. If an ATS is not operating in those capacities, then it is not subject to the monitoring requirements.

C. Foreign Entities

In the Proposing Release, the Commission requested comment about whether the proposed treatment of foreign entities is appropriate and the extent to which foreign statutes might complicate compliance with the proposed rule by foreign large traders.[209] In addition, the Commission solicited comment concerning whether the proposed rule would have any unintended negative consequences for the U.S. markets.[210] The Commission received a number of comments, both general and specific, on these topics.[211] One commenter expressed concern with the broad definition of ''large trader'' applying to non-U.S. entities, and suggested that the Commission modify the proposed rule to impose recordkeeping and reporting requirements solely on registered broker-dealers.[212] The Commission believes that limiting the definition of ''large trader'' in the suggested manner would be inconsistent with the legislative intent behind Section 13(h), as evidenced by the plain language of the statute.[213] The statute contemplates that the Commission would be able to identify all persons who are large traders, not just large traders who are U.S. entities. Accordingly, the Rule requires a foreign entity that is a large trader to comply with the identification requirements of paragraph (b) of the Rule. With respect to the recordkeeping and reporting requirements, however, the Commission notes that paragraphs (d) and (e) of the Rule, concerning

[206] The Rule does not address any other obligation or potential liability of the broker-dealer under any other provisions of the federal securities laws.

[207] In addition, as proposed, paragraph (f) applied to broker-dealers that are large traders, exercise investment discretion over an account together with a large trader or Unidentified Large Trader, carry an account for a large trader or Unidentified Large Trader, or effect transactions directly or indirectly for a large trader where a non-broker-dealer carries the account. Because the Commission is not adopting the proposed requirement to disclose account numbers or the corresponding requirements on large traders to disclose their LTIDs to other large traders, the Commission believes it is appropriate to streamline the introduction to paragraph (f) to refer to broker-dealers generally, and to modify sub-paragraph (1) to refer to transactions effected through an account or a group of accounts carried by such broker-dealer or through which such broker-dealer executes transactions, as applicable.

[208] *See* GETCO Letter at 3.

[209] *See* Proposing Release, *supra* note 3, 75 FR at 21473.

[210] *See id.* at 21482.

[211] *See, e.g.,* European Banking Federation and Swiss Bankers Association Letter at 2–5 and SIFMA Letter at 12–13.

[212] *See* European Banking Federation and Swiss Bankers Association Letter at 3.

[213] Section 13(h)(1) in pertinent part provides that each large trader shall: (A) Provide such information to the Commission as the Commission may by rule or regulation prescribe as necessary or appropriate, identifying such large trader and all accounts in or through which such large trader effects such transactions; and (B) identify, in accordance with such rules or regulations as the Commission may prescribe as necessary or appropriate, to any registered broker or dealer by or through whom such large trader directly or indirectly effects securities transactions, such large trader and all accounts directly or indirectly maintained with such broker or dealer by such large trader in or through which such transactions are effected.

recordkeeping and reporting, respectively, explicitly apply only to U.S.-registered broker-dealers.

One commenter suggested that it would be impractical for a registered broker-dealer to collect identifying information required by proposed Rule 13h–1(d)(3) when such collections may be prohibited under foreign laws.[214] The commenter further suggested that, because registered broker-dealers may not be able to comply with this provision, they ''may effectively be forced to cease providing services to non-U.S. intermediaries acting on behalf of unidentified non-U.S. Traders. * * *'' [215] Another commenter suggested that it would be impractical for a registered broker-dealer to monitor for foreign Unidentified Large Traders who trade through intermediaries.[216] The commenter asked for clarification in this context regarding a registered broker-dealer's duty to inform its customers about the self-identification requirements of the Rule.[217] Specifically, the commenter asked whether it would be sufficient for the broker-dealer to notify the foreign intermediary of its customer's possible obligation to comply with the self-identification requirements of the Rule. As discussed further below, when a U.S. registered broker-dealer deals directly with a foreign entity that is an intermediary, it would treat that foreign intermediary like any other customer: it must collect the information specified by Rule 13h–1(d)(2) about the foreign intermediary's transactions if it is a large trader and, if it is an Unidentified Large Trader,[218] the broker-dealer must also collect the information specified by Rule 13h–1(d)(3).[219] The Rule does not require a registered broker-dealer to collect the identifying information about the foreign intermediary's customers.[220]

As discussed above, Rule 13h–1(f) provides that a registered broker-dealer shall be deemed not to know or have reason to know that a person is a large trader if it establishes policies and procedures reasonably designed to assure compliance with the identification requirements of the Rule and does not have actual knowledge to the contrary. Those policies and procedures would need to be reasonably designed to identify potential large traders based upon transactions effected through an account or a group of accounts considering account name, tax identification number, or other identifying information available on the books and records of the broker-dealer. The Rule does not require broker-dealers to definitively determine who is, in fact, a large trader.

Further, in the case of foreign intermediaries, the Commission recognizes that the U.S. registered broker-dealer may only know as its customer the foreign intermediary, not the persons trading through the account of the foreign intermediary. In such case, the registered broker-dealer's policies and procedures would apply to its contact with the foreign intermediary. If the intermediary effects transactions through the U.S. broker-dealer that exceed the identifying activity level, then the safe harbor contemplates, as discussed above, that the broker-dealer inform the intermediary that the intermediary may be a large trader under Rule 13h–1. The foreign intermediary, then, bears the principal burden of compliance in determining whether it is a large trader.

With respect to the requirement on large traders to file Form 13H with the Commission, the Commission is aware that the laws of certain foreign jurisdictions may hinder a foreign large trader's ability to disclose certain personal identifying information. In the event, which the Commission believes to be unlikely, that the laws of a large trader's foreign jurisdiction preclude or prohibit the large trader from waiving such restrictions or otherwise voluntarily filing Form 13H with the Commission, then such foreign large traders or representatives of foreign large traders may request an exemption from the Commission pursuant to Section 36 of the Exchange Act [221] and paragraph (g) of the Rule.[222]

Commenters also discussed the practical difficulties associated with requiring large traders (such as investment advisers) to disclose account numbers. A few commenters stated that the proposal was unclear as to whether it would have required collection of brokerage account information or the account numbers assigned by investment advisers that sometimes contain client-identifying information.[223] The Commission has addressed this concern by not adopting the proposed requirement to report brokerage account numbers, as discussed above.[224] Instead, the Commission is requiring that a large trader provide information about the registered broker-dealers through which Securities Affiliates have an account. One commenter asserted that many foreign large traders do not have a direct relationship with any registered broker-dealer because they utilize intermediaries.[225] The commenter stated that the large trader's ability to provide information about the ''ultimate broker may be incomplete at best and may result in inadvertently misleading the Commission.'' [226] The Commission does not believe that it is unduly burdensome to expect a large trader to be able to identify the foreign intermediary with which it maintains accounts. The Commission expects all large traders, regardless of their place of domicile, to identify each broker-dealer at which it or any Securities Affiliate has an account and disclose the type(s) of services provided.

D. Three Specific Factors Considered by the Commission Pursuant to Section 13(h) of the Exchange Act

When engaging in rulemaking pursuant to its authority under Section 13(h), the Commission is required to take into account the following factors: (A) Existing reporting systems; (B) the costs associated with maintaining information with respect to transactions effected by large traders and reporting

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[214] *See* European Banking Federation and Swiss Bankers Association Letter at 3.

[215] *See id.*

[216] *See* SIFMA Letter at 12.

[217] *See id.*

[218] *See* discussion *supra* at Section III.B.3 (concerning monitoring for Unidentified Large Traders).

[219] Rule 13h–1(d)(3) requires a broker-dealer to maintain the following additional information for an Unidentified Large Trader: name, address, date the account was opened, and tax identification number(s). If an Unidentified Large Trader is a non-U.S. entity and does not have a U.S.-issued tax identification number, then the broker-dealer would only need to maintain the entity's name, address, and date the account was opened.

[220] The legislative history indicates Congress's expectation that the Commission, in implementing a large trader reporting system, ''would not impose requirements on broker-dealers to report beneficial ownership information that is not recorded in the normal course of business.'' Senate Report, *supra* note 14, at 42. The Committee specifically noted that many broker-dealers did not maintain beneficial ownership records of transactions of foreign persons that are carried out through banks, particularly foreign banks, which serve as the record holder of such securities. *See id.* The Committee expected that such beneficial owners would not be assigned LTIDs. *See id.* As discussed above, for all persons (both foreign and domestic), large trader status is triggered by the exercise of investment discretion, not mere beneficial ownership of NMS securities.

[221] 15 U.S.C. 78mm.

[222] A registered broker-dealer, however, would remain subject to the recordkeeping, reporting, and monitoring provisions of the Rule with respect to any Unidentified Large Traders independent of whether any such entity had received an exemption from the requirements to file Form 13H with the Commission.

[223] *See* European Banking Federation and Swiss Bankers Association Letter at 3; T. Rowe Price Letter at 2; and Financial Engines Letter at 4.

[224] *See supra* at Section III.A.3.0.

[225] *See* European Banking Federation and Swiss Bankers Association Letter at 2.

[226] *See id.* at 4 (discussing the challenges associated with foreign large traders providing account information).

such information to the Commission or self-regulatory organizations; and (C) the relationship between the United States and international securities markets.[227] These considerations have informed this final rule, as discussed below.

1. Existing Reporting Systems

Currently, the Commission collects transaction data from registered broker-dealers through the EBS system.[228] At present, neither the EBS system nor any other source of data available to the Commission allows it to definitively identify traders that conduct a substantial amount of trading activity or assess the impact of their activities on the securities markets.

Rule 13h–1 is focused on collecting information about large traders through modifications to existing EBS systems. Specifically, the Rule will provide the Commission with background information about all large traders through Form 13H submissions,[229] and will allow the Commission to obtain information on their transactions through the requirement on registered broker-dealers to track large trader trades according to the trader's LTID. Moreover, by requiring registered broker-dealers to collect and report (upon request) the execution time of all large trader transactions, the Commission is significantly enhancing its ability to investigate trading. Accordingly, the Commission believes that this new rule, which will be implemented through modifications to existing EBS systems, is narrowly tailored to address specific regulatory interests by requiring the disclosure of information that is not otherwise collected.[230]

2. Costs Associated With Maintaining and Reporting Large Trader Transaction Data

As discussed in detail below,[231] the Commission considered the costs associated with maintaining and reporting the large trader transaction data required under the Rule by registered broker-dealers. In particular, as discussed below, the Commission has designed the proposed rule to minimize the burdens of the large trader reporting requirements on both large traders and registered broker-dealers.

3. Relationship Between U.S. and International Securities Markets

In adopting Rule 13h–1 and Form 13H, the Commission is mindful of the danger of disadvantaging U.S. securities markets vis-á-vis foreign securities markets. In the Proposing Release, the Commission expressed concern that excluding foreign large traders from the proposed rule's requirements could create a competitive disparity between domestic markets and persons and foreign markets and persons.[232] Commenters raised issues about the application of the Rule to foreign entities, which are addressed above.[233]

The Commission solicited comment specifically about: whether the proposed rule might incentivize trading through certain market centers; whether large traders would effect their trades through entities other than registered broker-dealers (*e.g.,* foreign brokers); whether large traders might trade increasingly in foreign jurisdictions to evade the proposed reporting requirements; whether the proposed treatment of foreign entities is appropriate; the extent to which foreign statutes complicate foreign large traders' ability to comply with the proposed rule; and whether the proposal would have any unintended negative consequences for the U.S. markets.[234] The Commission received few comments that specifically addressed these topics.

One commenter warned that, to the extent that registered broker-dealers incur higher costs as a result of the complying with the Rule, the Rule may result in some brokerage business being driven offshore to foreign brokers who will not bear the same compliance burden.[235] As discussed above, the Commission clarified the extent and nature of the monitoring responsibilities applicable to registered broker-dealers and does not believe that the limited, high-level monitoring requirements would impose a cost so high as to drive business offshore. Further, as discussed in the Proposing Release and further below, the Commission believes that the Rule has been narrowly tailored to produce a core set of information necessary for the Commission to effectuate its authority under Section 13(h) of the Exchange Act in a manner that only results in minimal increased costs and burdens.

Another commenter suggested that the Rule may shift business away from trading in NMS securities and to other financial products that are not subject to the large trader reporting requirements but that allow market participants to undertake economically equivalent positions.[236] Specifically, the commenter asserted that market participants may gain the equivalent exposure through European Depositary Receipts, Global Depositary Receipts, European exchange-traded funds, futures, and swaps and that, if the Rule is adopted, it may cost less to use these alternatives than to invest directly in NMS securities.[237] The commenter provided no data to support its position and did not take into account the liquidity profiles or transaction cost differences among those alternatives. The Rule is designed to be minimally burdensome both to large traders and the registered broker-dealers who must record and report trading information. The Commission also notes that the costs associated with some of the alternatives identified by the commenter may soon change. For example, Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act[238] directs the Commission and the CFTC to regulate over-the-counter derivatives. Thus, these investments will be subject to regulation and oversight that have not applied in the past. In addition, the CFTC has a large trader reporting regime that currently applies to traders and transactions that are subject to the CFTC's regulatory authority. The Senate Report that accompanied the Market Reform Act observed that the U.S. futures markets, where reporting of large futures positions is required, have not been competitively disadvantaged by the CFTC's large trader reporting system, and that participants in those U.S. markets have generally not left for foreign markets.[239] On balance, as discussed further below, the Commission believes that the costs associated with Rule 13h–1 will not negatively impact the attractiveness of U.S. securities markets, capital formation in the U.S.,[240] or the

[227] *See* Section 13(h)(5) of the Exchange Act, 15 U.S.C. 78m(h)(5).

[228] *See* 17 CFR 240.17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers). *See also* Rule 17a–25 Release, *supra* note 19.

[229] *See supra* Section 0.

[230] The Commission notes that Form 13H requires a large trader to identify other forms it and its Securities Affiliates file with the Commission. As discussed above, this disclosure is designed to facilitate and expedite investigations connected to large traders.

[231] *See infra* Section 0.

[232] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[233] *See supra* Section III.0.

[234] *See* Proposing Release, *supra* note 3, 75 FR at 21473, 21482.

[235] *See* Prudential Letter at 2, n.4.

[236] *See* European Banking Federation and Swiss Bankers Association Letter at 4–5.

[237] *See id.*

[238] Public Law No. 111–203 (July 21, 2010).

[239] *See* Senate Report, *supra* note 14, at 42.

[240] The Senate Committee on Banking, Housing and Urban Affairs expected the Commission, in adopting any direct reporting rules, to consider carefully the total impact of such rules on capital formation in the U.S. *See id.*

competitive position of U.S. market participants.

E. Implementation and Compliance Dates, Exemptive Authority

The Commission proposed that the broker-dealer recordkeeping requirements contained in Rule 13h–1(d) and the reporting requirements contained in Rule 13h–1(e) would become effective six months after adoption of a final rule.[241] In the Proposing Release, the Commission solicited comment regarding the proposed implementation period.[242] The few commenters who specifically responded to this inquiry expected that it would take longer than six months to implement the necessary system changes.[243] One commenter suggested that 18 months would be a more appropriate implementation period to accommodate the system changes and testing required to implement the proposed T+1 reporting requirement.[244]

After considering the comments, the Commission continues to believe that, because the Rule utilizes the existing EBS system infrastructure, broker-dealers should be able to enhance their existing recordkeeping and reporting systems to meet the requirements of the proposed large trader rule within a relatively short time period. Nevertheless, to accommodate commenters' requests for more time to test and implement their systems, the Commission is adopting an implementation date for the requirements applicable to registered broker-dealers three months later than proposed. The Commission believes that this additional time should allow registered broker-dealers to plan, design, implement, and test the small number of enhancements to their existing transaction reporting systems required by the Rule. Accordingly, the deadline for implementing the recordkeeping and reporting requirements applicable to registered broker-dealers is seven months after the Effective Date of the Rule.[245]

The Commission also proposed that the self-identification requirements for large traders under Rule 13h–1(b) would become effective three months after adoption of a final rule.[246] In the Proposing Release, the Commission requested comments about whether that implementation period was sufficient.[247] A number of commenters suggested lengthening the three-month implementation period, recommending either 12 months [248] or 18 months.[249] Two commenters [250] suggested that the self-identification requirements should be delayed until the Commission is prepared to receive electronic Forms 13H.[251]

As discussed above, the Commission has streamlined the Form 13H from the proposed version to minimize the reporting burdens. For example, the Commission did not adopt the most detailed question in the proposed Form that would have required large traders to identify all of the brokerage account numbers through which they trade. With these changes from the proposal, the Commission believes that the three-month time frame provides large traders adequate time to gather together the information required by the Form. Further, the Commission expects that its electronic filing system will be operational and capable of receiving fully-electronic Form 13H filings by the proposed compliance date. Nevertheless, to accommodate commenters' requests for more time, the Commission is adopting a longer compliance date for large traders. Accordingly, the self-identification requirement for large traders will commence two months after the Effective Date of the Rule.[252]

Section 13(h)(6) of the Exchange Act [253] authorizes the Commission ''by rule, regulation, or order, consistent with the purposes of this title, [to] exempt any person or class of persons or any transaction or class of transactions, either conditionally or upon specified terms and conditions or for stated periods, from the operation of [Section 13(h)], and the rules and regulations thereunder.'' Rule 13h–1(g) implements this authority, providing that: ''[u]pon written application or upon its own motion, the Commission may by order exempt, 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 this rule to the extent that such exemption is consistent with the purposes of the Securities Exchange Act.''

The Commission requested comment about whether certain categories of persons (such as floor brokers, specialists, and market makers) should be exempted from the proposed rule.[254] One commenter suggested exempting persons whose trading activities are an ancillary activity in support of a core charitable purpose.[255] The commenter asserted that such non-profit entities generally are infrequent traders, and that the Rule is designed to capture the activities of frequent traders.[256]

As discussed above, frequency of trading alone does not affect whether a person is a large trader.[257] Non-profit organizations may engage in arm's-length purchases and sales of NMS securities in the secondary market, and their transactions may involve the exercise of investment discretion. Therefore, at this time, the Commission does not believe that a blanket exemption for such entities is appropriate.

The Commission notes, as discussed above, that any entity that merely beneficially owns NMS securities would not qualify as a large trader; only an entity that exercises investment discretion, directly or indirectly, on behalf of itself or others (*e.g.,* a registered investment adviser or a pension fund manager), and effects transactions equal to or greater than the identifying activity level, can qualify as a large trader.

IV. Paperwork Reduction Act

The Rule contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[258] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted the provisions to the Office of Management and Budget (''OMB'') for review. The title for the proposed collection of information requirement, including proposed Rule 13h–1 and proposed Form 13H, is ''Information Required Regarding Large Traders Pursuant to Section 13(h) of the Securities Exchange Act of 1934 and Rules Thereunder.'' An agency may not conduct or sponsor, and

[241] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[242] *See id.* at 21473.

[243] *See* Financial Information Forum Letter at 7 and SIFMA Letter at 6.

[244] *See* SIFMA Letter at 19.

[245] The Effective Date of the Rule, as noted above, is 60 days after publication in the Federal Register.

[246] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[247] *See id.* at 21473.

[248] *See* Prudential Letter at 5; Investment Adviser Association Letter at 9; and Investment Company Institute Letter at 12.

[249] *See* SIFMA Letter at 19.

[250] *See* T. Rowe Price Letter at 3 and Investment Adviser Association Letter at 9–10.

[251] In the Proposing Release, the Commission mentioned the possibility that large traders might be required to file Forms 13H in paper form in the event that the agency's electronic filing system is not operational as of the implementation deadline. *See* Proposing Release, *supra* note 3, 75 FR at 21465.

[252] The Effective Date of the Rule, as noted above, is 60 days after publication in the Federal Register.

[253] 15 U.S.C. 78m(h)(6).

[254] *See* Proposing Release, *supra* note 3, 75 FR at 21473.

[255] *See* Howard Hughes Medical Institute Letter at 2.

[256] *See id.* at 1.

[257] *See supra* text following note 60.

[258] 44 U.S.C. 3501 *et seq.*

a person is not required to respond to, a collection of information unless it displays a currently valid control number.

In the Proposing Release, the Commission solicited comment on the collection of information requirements. The Commission noted that the estimates of the effect that the Rule would have on the collection of information were based on the Commission's experience with similar reporting requirements. As discussed above, the Commission received 87 comment letters on the proposed rulemaking. Various commenters addressed the collection of information aspects of the proposal.[259]

A. Summary of Collection of Information

Under Rule 13h–1, a ''large trader'' is any person that 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 security for or on behalf of such accounts, with or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level.

All large traders will be required to identify themselves to the Commission by filing Form 13H and will be required to update their Form 13H from time to time.[260] Upon receiving an initial Form 13H, the Commission will assign to the large trader a unique LTID. Each large trader will be required to disclose to registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies.[261] In addition, upon request by the Commission, a large trader will be required promptly to provide additional information to the Commission that will allow the Commission to further identify the large trader and all accounts through which the large trader effects transactions.[262]

As discussed above, in response to comments, the Commission has adopted Form 13H without the proposed requirement that large traders report their broker-dealer account numbers on Form 13H. Instead, large traders will be required to report a list of broker-dealers with whom they have an account. As a consequence, as discussed above, large traders will not have to report on Form 13H the LTID of any unaffiliated large trader with whom they share investment discretion, as that proposed requirement was connected to the identification of accounts.

Rule 13h–1 also imposes recordkeeping, reporting, and monitoring requirements on registered broker-dealers. Paragraph (d)(1) of the Rule requires every registered broker-dealer to maintain records of all information required under paragraphs (d)(2) and (d)(3) 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 or (ii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion.[263] Additionally, where a non-broker-dealer (such as a bank) carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such person must maintain records of all of the information required under paragraphs (d)(2) and (d)(3) for those transactions. The term ''Unidentified Large Trader'' is defined to mean each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of the Rule that a registered broker-dealer knows or has reason to know is a large trader. For purposes of determining under the Rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.[264] Further, a registered broker-dealer will be deemed not to know or have reason to know that a person is a large trader if it establishes policies and procedures reasonably designed to assure compliance with the identification requirements and does not have actual knowledge that a person is a large trader.[265] In response to comments, the Commission clarified that a broker-dealer need only look to aggregate transactions it effected for its customer in assessing whether a person may be an Unidentified Large Trader. The Commission also clarified that even if a person's transactions at a broker-dealer meet the applicable identifying activity threshold, the customer might or might not be a large trader under Rule 13h–1, and the person itself is responsible for determining whether it is a large trader.[266]

Complementing the recordkeeping requirements on broker-dealers, Rule 13h–1(e) requires registered broker-dealers that are required to keep records pursuant to paragraph (d)(1) to report that information to the Commission upon request.[267] Specifically, upon the request of the Commission, a registered broker-dealer must report electronically, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and other persons for whom records must be maintained, equal to or greater than the reporting activity level.[268]

Broker-dealers will need to report a particular day's trading activity only if it equals or exceeds the ''reporting activity level.'' While a registered broker-dealer is required to report data for a given day only if it is equal to or greater than the reporting activity level, the Rule specifically allows a broker-dealer to voluntarily report a day's trading activity that falls short of the applicable threshold. Registered broker-dealers may wish to take this approach if they prefer to avoid implementing systems to filter the transaction activity and would rather utilize a ''data dump'' approach to reporting large trader transaction information to the Commission. Further, as discussed above, the Commission clarified in response to comments that while a person need not count trading activity that falls within one of the listed categories of excluded transactions when it determines whether it meets the

[259] *See, e.g.,* Managed Funds Association Letter, Prudential Letter, Investment Adviser Association Letter, Wellington Management Letter, Investment Company Institute Letter.

[260] *See* new Rule 13h–1(b).

[261] *See* new Rule 13h–1(b)(2).

[262] *See* new Rule 13h–1(b)(4).

[263] A broker-dealer that exercises discretion over an account with someone else would know that that person is an Unidentified Large Trader based on the transactions effected through that jointly managed account.

[264] *See* new Rule 13h–1(a)(9) (defining ''Unidentified Large Trader'').

[265] *See* new Rule 13h–1(f) (the monitoring safe harbor). The policies and procedures contemplated by the safe harbor contemplate systems that are reasonably designed to detect and identify a large trader based upon transactions effected through an account or groups of accounts considering the identity of the trader by using information readily available to the broker-dealer, such as name or tax identification number.

[266] For example, the customer might have effected transactions that, for purposes of determining whether a person is a large trader, are excluded from consideration under new Rule 13h–1(a)(6), in which case the customer would not qualify as a ''large trader'' based solely on those transactions.

[267] *See* new Rule 13h–1(e).

[268] In addition to reporting transaction data on large traders, the Rule requires broker-dealers to report transaction data for Unidentified Large Traders, along with additional information to help the Commission identify the Unidentified Large Trader. Specifically, paragraph (e) of the Rule requires broker-dealers to maintain and report for Unidentified Large Traders such person's name, address, date the account was opened, and tax identification number(s). *See also* new Rule 13h–1(d)(3).

applicable identifying activity threshold, a broker-dealer must report all transactions that it effected through the accounts of a large trader without reference to or exclusion of any transactions listed in Rule 13h–1(a)(6).

In recognition of the value of utilizing existing reporting systems,[269] the Rule requires broker-dealers to transmit the transaction records to the Commission utilizing the infrastructure of the existing EBS system. With respect to timing, Section 13(h)(2) of the Exchange Act provides that records of a large trader's transactions must be made available on the morning after the day the transactions were effected.[270] Rule 13h–1 incorporates this requirement in paragraph (d)(5). Therefore, transaction reports, including data on transactions up to and including the day immediately preceding the request, will need to be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested. Paragraph (d)(4) of the Rule requires that such records be kept for a period of three years, the first two in an accessible place, in accordance with Rule 17a–4 under the Exchange Act.[271]

B. Use of Information

The Commission will use the information collected pursuant to Rule 13h–1 to identify significant market participants and collect data on their trading activity. The large trader reporting requirements will provide the Commission with access to a new data source that will contribute to its ability to conduct investigations and enforcement matters, as well as analyze market activity, and should enhance its ability to assess the impact of large traders on the securities markets. It also will facilitate the Commission's trading reconstruction efforts, as transaction data that will be reported to the Commission pursuant to Rule 13h–1 will include the time of execution of the order as well as the identity of the large trader that effected the trade.

Registered broker-dealers will use the information they collect pursuant to Rule 13h–1, including LTID numbers, to comply with the requirement of the Rule to report to the Commission upon request all transactions they effect for large traders. In addition, registered broker-dealers that take advantage of the monitoring safe harbor will use the information they collect pursuant to Rule 13h–1 in connection with their policies and procedures under the Rule to monitor for Unidentified Large Traders and inform them of their potential obligations under Rule 13h–1. Registered broker-dealers also will be required to disclose the additional information they collect on Unidentified Large Traders pursuant to Rule 13h–1(d)(3) to the Commission upon request.

C. Respondents

In the Proposing Release, the Commission estimated that the ''collection of information'' associated with the Rule would apply to approximately 400 large traders and 300 registered broker-dealers. In the Proposing Release, the Commission solicited comment on the estimated number of respondents. Several commenters believed that the Commission's estimated number of respondents appeared to be too low, though few provided data or analysis to support their conclusions.[272] For the reasons discussed below, the Commission continues to believe that the Rule will affect approximately 400 large traders and 300 registered broker-dealers.

1. Number of Large Traders

The estimated number of large traders was based on Commission experience in reviewing EBS data and overseeing market participants. Notably, the estimate reflects Rule 13h–1(b)(3) filing requirement provisions, which focus, in more complex organizations, on the parent company of the entities that employ or otherwise control the individuals that exercise investment discretion. One commenter believed that the estimate of 400 large traders was underestimated and that the proposed thresholds may capture more than 400 large traders, including especially infrequent large traders, based on the proposed identifying activity level.[273] In particular, the commenter argued that the rule should not impose a self-identification requirement on traders that only infrequently trade in substantial volume.[274] The Commission agrees with this view, which reflects some of the considerations that informed the Commission's proposed provision for inactive status, which it is adopting. As discussed above, inactive status is designed to reduce the burden on infrequent traders who may trip the large trader threshold on a particular occasion but who do not regularly trade at sufficient levels to otherwise warrant the regulatory requirements under the Rule. Inactive status relieves the large trader from the requirement to file amended Forms 13H. However, as discussed above, even where a market participant trades in an amount that reaches the identifying activity threshold only infrequently—which at those times nonetheless would represent a substantial amount of trading activity relative to overall market volume—the Commission seeks to identify that participant as a large trader at those times so as to be able to obtain information about the participant. In light of the proposed provision for inactive status, which the Commission is adopting as proposed, the Commission's original estimate of 400 large traders accounted for traders that only infrequently trade in excess of the proposed identifying activity threshold, which the Commission also is adopting as proposed.

The Commission continues to believe that the estimate of 400 large traders is appropriate for other reasons. The estimate reflects the Rule's focus on identification and registration of large traders at the parent company level. As noted in the Proposing Release, the purpose of this focus is to narrow the number of persons that will need to self-identify and register on Form 13H as ''large traders,'' thereby allowing the Commission to identify the primary institutions that conduct a large trading business. One commenter believed that the number was underestimated and that 400 option traders alone would qualify as large traders.[275] However, this concern does not reflect the fact that the Rule contemplates registration as a large trader at the parent company level. Most, if not all, large trader control groups, as a natural consequence of their substantial trading and hedging activities, would involve persons that are active across a broad array of financial products trading in multiple venues, including cash equities and derivatives. The Commission's estimate, which was based on its experience with EBS data, takes into account this fact. Accordingly, the estimate does not separately count the number of subsidiary traders that conduct an options business (or any other securities

[269] As noted above, in connection with exercising rulemaking authority under Exchange Act Section 13(h), the Commission must consider existing reporting systems. *See supra* Section III.0.

[270] *See* 15 U.S.C. 78m(h)(2). *See also* discussion *supra* at Section III.B.2 (concerning reporting requirements).

[271] 17 CFR 240.17a–4.

[272] *See, e.g.,* Investment Adviser Association Letter at 10; Managed Funds Association Letter at 2; SIFMA Letter at 7; and Financial Information Forum Letter at 5–6.

[273] *See* Managed Funds Association Letter at 2.

[274] *See id.*

[275] *See* SIFMA Letter at 7.

business) as separate from the number of large trader complexes since the estimated number of large traders considers that large traders will identify at the parent company level, which is generally less burdensome than registering at the subsidiary level, as discussed above.

In addition, as discussed above, in response to comments the Rule as adopted allows a large trader to voluntarily register with the Commission, even before it meets the applicable trading activity threshold, in order to eliminate its need to actively monitor its trading levels.[276] The Commission is not adjusting its estimate of the number of large traders to account for such voluntary registrations because it expects that only persons whose trading activity would eventually equal or exceed the identifying activity level will take advantage of this new provision. In other words, the Commission expects that the only persons who would take advantage of the voluntary registration provision are persons that wish to avoid the burdens of monitoring their trading activity where such trading generally meets or exceeds the identifying activity threshold—that is, who in fact will be large traders. Accordingly, the Commission's original estimate of 400 large traders already includes persons who might consider voluntary registration because such persons were effectively deemed to be large traders for purposes of that estimate.

2. Number of Broker-Dealers Affected

In the Proposing Release, the Commission estimated that 300 registered broker-dealers would be subject to the recordkeeping, reporting, and monitoring requirements of the rule. This estimate was based on broker-dealer responses to FOCUS report filings with the Commission made in 2009. This estimate reflected the number of broker-dealer carrying firms that the Commission believes would carry accounts for large traders or that would effect transactions directly or indirectly for a large trader or an Unidentified Large Trader where a non-broker-dealer carries the account.

One commenter thought that the Commission's broker-dealer estimate of 300 broker-dealers was underestimated and believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500.[277] This commenter, whose analysis was based on the monitoring safe harbor provisions of the proposed rule, expressed concern with the reference to ''other readily available information'' contained in the proposed safe harbor. The commenter explained that ''other readily available information might only be available at the introducing broker-dealer, and therefore clearing firms might reasonably require the broker-dealers that introduce customer accounts to them to implement their own policies and procedures * * *''.[278] Thus, the commenter's assertion was based on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect information on Unidentified Large Traders required by the Rule to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[279] The commenter's estimate of 1,500 entities was based on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010.[280]

The Commission is mindful of this commenter's concern and has clarified in the adopted monitoring safe harbor provision of Rule 13h–1(f) the more limited scope intended of ''other identifying information'' that a broker-dealer would need to consider. Specifically, as adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based only on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information ''available on the books and records of such broker-dealer.'' The broker-dealer's safe harbor policies and procedures would not need to take into account identifying information on the books and records of another broker-dealer. The Commission believes it has addressed the commenter's concerns by clarifying in the adopted Rule that the approximately 300 brokers affected by this Rule would not be required to consider information that would otherwise have required, as estimated by the commenter, as many as 1,500 broker-dealers that introduce customer accounts to implement their own policies and procedures.

In addition, the Commission believes that large traders, whose aggregate NMS securities transactions equal or exceed the identifying activity level, require sophisticated trade-processing capacities. Accordingly, it is unlikely that 1,500 broker-dealers that have been assigned an MPID either carry accounts for or will effect a transaction on behalf of a large trader because not all such entities will have, or will be in the business of, effecting trades for large traders. For example, one commenter, a large investment management firm and likely large trader, reported that it currently has ''approximately 250 broker-dealers on our approved list for executing equity transactions''.[281] This number is lower than the Commission's estimate of 300 affected broker-dealers.

Further, as discussed above, in considering whether a broker-dealer has ''reason to know'' that a person is a large trader, the broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.[282] Moreover, a broker-dealer may determine that it has no ''reason to know'' that a person is a large trader through two methods. First, the broker-dealer may rely on the safe harbor of Rule 13h–1(f). Alternatively, however, a broker-dealer may simply conclude, based on its knowledge of the nature of its customers and their trading activity with the broker-dealer, that it has no reason to expect that any of these customers' transactions approach the identifying activity level. Accordingly, an introducing broker-dealer whose customers do not effect transactions in NMS securities by or through it at levels close to the identifying activity level could simply draw such conclusion and would not need to implement any new policies and procedures.

Therefore, for the reasons described above, all 1,500 entities are not expected to be impacted by the monitoring provisions of Rule 13h–1(f) and the Commission continues to believe that its initial estimate of 300 affected broker-dealers is appropriate consistent with the additional guidance provided in Rule 13h–1(f), as adopted.[283] As discussed above, the Commission's estimate of 300 broker-dealers was based on broker-dealer responses to FOCUS report filings with the

[276] *See supra* text accompanying note 115 (for a discussion of voluntary filing).

[277] *See* Financial Information Forum Letter at 6. The commenter focused its comment on the proposed monitoring requirement.

[278] *See id.*

[279] *See id.*

[280] *See id.*

[281] *See* Wellington Management Letter at 3.

[282] Section III.B.3 (discussing the monitoring requirements).

[283] To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

Commission, and reflected the number of broker-dealers that the Commission believes would be reasonably likely to carry accounts for large traders or that would be reasonably likely to effect transactions directly or indirectly for a large trader where a non-broker-dealer carries the account.

Further, as discussed above, the Commission received a comment letter from a broker-dealer that operates an ATS inquiring whether the requirement to monitor for Unidentified Large Traders would extend to other registered broker-dealers, including a broker-dealer that operates an ATS.[284] The monitoring requirements are applicable to registered broker-dealers that are large traders, carry accounts for large traders or Unidentified Large Traders, or effect transactions on behalf of large trader customers whose accounts are carried by non-broker-dealers. If an ATS is not operating in those capacities, then it is not subject to the monitoring requirements. The Commission does not expect ATSs to act in these capacities, and so the Commission is not amending its estimate of the number of affected registered broker-dealers to include ATSs.

D. Total Initial and Annual Burdens

1. Burden on Large Traders

a. Duties of Large Traders

Rule 13h–1 will present new burdens to persons that meet the definition of large trader. In particular, persons, including those that might not presently be registered with the Commission in some capacity, that meet the definition of ''large trader'' will become subject to a new reporting duty, as the Rule will require each large trader to identify itself to the Commission by filing a Form 13H and submitting annual updates, as well as updates on as frequently as a quarterly basis when necessary to correct information previously disclosed that has become inaccurate. Additionally, each large trader will be required to identify itself to each registered broker-dealer through which it effects transactions. As discussed above, however, the Commission did not adopt the proposed requirement that large traders disclose their LTIDs to others with whom they collectively exercise investment discretion.[285]

Paragraph (b)(1) of the Rule requires large traders to file Form 13H with the Commission promptly after first effecting transactions that reach the identifying activity level.[286] Thereafter, large traders are required to file an amended Form 13H promptly following the end of a calendar quarter in the event that any of the information contained therein becomes inaccurate for any reason (*e.g.,* change of contact information, type of organization, trading strategy, regulatory status, list of broker-dealers at which the large trader has an account, or description of affiliates).[287] Regardless of whether any amended Forms 13H are filed, large traders also are required to file Form 13H annually, within 45 days after the calendar year-end, in order to ensure the accuracy of all of the information reported to the Commission.[288] Additionally, Rule 13h–1(b)(4) provides that the Commission may require large traders to provide, upon request, additional information to identify the large trader and all accounts through which the large trader effects transactions. Such requests for additional information may include, for example, a disaggregation request to assist the Commission in identifying accounts through which a large trader effects specific transactions.

b. Initial and Annual Burdens

In the Proposing Release, the Commission estimated that it would take a large trader approximately 20 hours to calculate whether its trading activity qualifies it as a large trader, complete the initial Form 13H with all required information, obtain a LTID from the Commission, and inform its registered broker-dealers and other entities of its LTID and the accounts to which it applies. The Commission based this estimate on its understanding that large traders currently maintain systems that capture their trading activity and that these existing systems would be sufficient without further modification to enable a large trader to determine whether it effects transactions for the purchase or sale of any NMS security for or on behalf of accounts over which it exercises investment discretion in an aggregate amount equal to or greater than the identifying activity level. Accordingly, the Commission estimated that the one-time burden for large traders would be approximately 8,000 burden hours.[289]

The Commission also estimated that the ongoing annualized burden for complying with proposed Rule 13h–1 would be approximately 6,800 burden hours for all large trader respondents.[290] This figure was based on the estimated number of hours it would take to file any amendments as well as the required annual update to Form 13H. The Commission estimated that the average large trader would be required to file one annual update and three amended updates annually.[291]

Several commenters believed that the Commission underestimated the burden hour estimates for large traders.[292] Some commenters suggested that large trader organizations may need to develop integrated systems in order to accomplish parent company-level reporting, and correspondingly asserted that the estimate should account for this.[293] As described below, however, a parent company need only add together the aggregate gross trading activity of its subsidiaries when it calculates whether it has reached the identifying activity level and need not integrate trading or other systems. In addition, importantly, with respect to the information that must be assembled and reported on the Form that would require the development of an integrated system, as discussed directly below, the Commission has not adopted what commenters identified as the single most burdensome item—the reporting of

[284] *See* GETCO Letter at 3.

[285] *See supra* text following note 106 (for a discussion of the change).

[286] *See* new Rule 13h–1(b)(1)(i).

[287] *See* new Rule 13h–1(b)(1)(iii).

[288] *See* new Rule 13h–1(b)(1)(ii).

[289] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including those required by Rule 13f–1: (Compliance Manager at 3 hours) + (Compliance Attorney at 7 hours) + (Compliance Clerk at 10 hours) × (400 potential respondents) = 8,000 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information.

[290] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Compliance Manager at 2 hours) + (Compliance Attorney at 5 hours) + (Compliance Clerk at 10 hours) × (400 potential respondents) = 6,800 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information. As discussed above, Rule 17a–25 requires broker-dealers to disclose information that is very similar in scope and character to the information required under new Rule 13h–1. The Commission believed that determining whether a firm reaches the identifying activity level was a compliance function and that no software reprogramming would be required.

[291] This estimate was based on the varied characteristics of large traders and the nature and scope of the items that would be disclosed on proposed Form 13H that would require updating and considered that large traders would file one required annual update and three quarterly updates when information contained in the Form 13H became inaccurate.

[292] *See, e.g.,* Prudential Letter; Investment Adviser Association Letter; and Investment Company Institute Letter.

[293] *See* Prudential Letter at 5; Investment Adviser Association Letter at 7–8; and Investment Company Institute Letter at 4–5, 9.

brokerage account numbers. Instead, the Form, as adopted, requires large traders to disclose only basic identifying information, such as a list of affiliates and a list of broker-dealers at which it has accounts, and would not require the development of integrated systems to track brokerage account numbers across subsidiaries.

Several commenters indicated that the proposed requirement to report account numbers and names could be unduly burdensome.[294] These commenters, notably the investment advisers, expressed concern over potential burden on large traders associated with reporting brokerage account numbers. One commenter noted that it has more than 400,000 separate broker-dealer account numbers associated with its clients that reside on the systems of the broker-dealers with whom it transacts.[295] This commenter stated that it does not track or maintain a list of these internal broker-dealer account numbers and does not utilize these account numbers when communicating with broker-dealers about trades.[296]

Another commenter suggested that account information may not be on the premises of the large trader and that, even if it were, this data would not be in automated form that is amenable to reporting on Form 13H.[297] One commenter explained that many investment advisers do not know the account numbers assigned to them by their broker-dealers because that information is not required by the software they use to communicate order allocation and settlement instructions to broker-dealers.[298] Another commenter stated that many investment advisers have a large number of discretionary advisory clients and effect transactions on behalf of such clients through a substantial number of different broker-dealers, through multiple prime brokers, and, in the case of multi-managed accounts, in concert with other advisers.[299] This commenter stated that the proposal assumes that for each advisory client, the investment adviser can easily identify brokerage accounts by name and number.[300] This commenter stated that in practice, however, each transaction can be executed on behalf of many clients and that with respect to each such transaction, although a particular broker-dealer may have assigned an account number for its own internal recordkeeping purposes, the adviser does not have this information.[301]

Based on these comments, the Commission agrees that its proposal underestimated the burden hour estimates for large traders to report account numbers on Form 13H. In particular, the Commission based its initial burden estimate for reporting account numbers on its understanding that large traders have systems in place to readily track and manage their brokerage account numbers. According to certain commenters, particularly investment advisers, this may not be the case for some large traders, as some advisers rely on software to intermediate the process of communicating with their broker.[302] For these entities, the information may not be in a form that is amenable to reporting on the Form without the use of third-party software.[303]

As discussed above, the Commission is addressing these comments by not adopting the proposed requirement to report account numbers.[304] Instead, the Commission is requiring the large trader to disclose: (1) The names of broker-dealers with whom it has an account and (2) the types of brokerage services provided by those brokers. One commenter noted that many traders already maintain a list of approved broker-dealers in a readily accessible format, as they maintain approved broker-dealer lists in the ordinary course of business and have processes for adding and deleting broker-dealers as well as reviewing trades with a broker-dealer not on the approved list.[305] Requiring the reporting on the Form of a list of broker-dealers used, rather than all accounts held by each broker-dealer, will bring the compliance burden for many large traders that are investment advisers in line with the Commission's original estimate of burdens on large traders generally. Consequently, the estimated burdens on large traders under the Form are now in line with the requirements of the adopted Rule and Form.

With respect to the Commission's assumption that large traders will be able to utilize existing systems when considering their trading levels, one commenter stated that, in cases where a large trader is a parent company, the parent may not itself be carrying on any trading activity and, thus, will neither have the detailed knowledge about its subsidiaries' trading activities or the systems to capture the information required on Form 13H.[306] Another commenter stated that the burden of potentially needing to develop new systems would be increased for firms with complicated corporate structures.[307] This commenter noted that ''[m]any corporate groups maintain operational independence from their subsidiaries and that each affiliate may employ its own individual system, which may not communicate with other affiliates.'' [308] This commenter asserted that, as a result, the process for gathering information would have to be done on a manual basis until a system could be developed and that gathering information across multiple affiliates (both U.S. and non-U.S. entities) manually will place a tremendous burden on investment managers.[309] In addition, this commenter noted that compliance with the Rule would be more difficult for investment advisers in that they are required to maintain information barriers between different affiliates in their organizations.[310]

As discussed above, with respect to determining whether the identifying activity level is met, the Commission notes that parent companies need only collect and aggregate the *total* trading activity of those entities they control when determining whether they meet the applicable identifying activity level. To accomplish this, only summary statistics need to be produced to the parent company, which would be added together at the parent company level to determine whether the parent company complex meets the applicable identifying activity level threshold. In other words, each subsidiary will use existing systems to calculate its trading, and then will provide that information directly to the parent company. The

[294] *See, e.g.,* Wellington Management Letter and American Bankers Association Letter.

[295] *See* Wellington Management Letter at 3. *See also* American Bankers Association Letter at 2 (stating that it believes reporting account numbers and names is unduly burdensome because it may require the reporting of potentially thousands of brokerage accounts).

[296] *See* Wellington Management Letter at 3. *See also* Financial Engines Letter at 4–5 (stating that although investment advisers may execute trades with broker-dealers indirectly, the adviser does not technically maintain brokerage accounts with those broker-dealers and is therefore not privy to information about brokerage accounts).

[297] *See* Investment Company Institute Letter at 11.

[298] *See* Wellington Management Letter at 3–4. As an alternative to reporting the account number, the commenter suggested that an investment adviser report the codes utilized by its software solution to communicate with its broker-dealers.

[299] *See* Investment Company Institute Letter at 7–8.

[300] *See id.*

[301] *See id.*

[302] *See id.* at 8.

[303] *See, e.g.,* Investment Company Institute Letter and Wellington Management Letter.

[304] *See supra* Section III.A.3.0 (discussing account numbers).

[305] *See* Investment Company Institute Letter at 9.

[306] *See* Prudential Letter at 5.

[307] *See* Investment Adviser Association Letter at 2, 7–8.

[308] *See id.* at 8.

[309] *See id.*

[310] *See id.*

trading systems themselves need not be integrated to accomplish this task. This limited activity should not undermine existing firewalls, because information would not be shared among entities under common control but would only be shared with the parent company. In addition, general information such as ''Subsidiary XYZ executed $10,000,000 worth of transactions on Monday representing 750,000 shares'' that is communicated directly from the subsidiary to the parent company would be highly unlikely to undermine firewalls. Further, the calculation of trading volume only needs to be done until the entity meets the applicable identification activity level. Once the entity meets this level, it becomes a large trader and no longer needs to calculate its trading in this manner. To the extent a parent company complex wishes to avoid this process altogether, it may elect to register voluntarily as a large trader.

A few commenters believed that the proposed requirement to list affiliates that beneficially own, as well as exercise investment discretion over, NMS securities would be overly burdensome.[311] One commenter recommended that the requirement should apply to a smaller set of affiliates, namely only those affiliates that actually conduct trading in NMS securities.[312] Another commenter stated that large traders should only be obligated to identify other unaffiliated large traders if investment discretion is exercised collectively.[313] Two commenters asked the Commission to not require large traders to list bank and insurance regulators.[314] One commenter stated that listing all applicable regulators is likely to lead to the creation of an extensive list in the case of a diversified financial services company.[315] This commenter stated that it would be required to list approximately fifty insurance regulators for one subsidiary and more than 25 foreign regulators for its non-U.S. affiliates.[316] Another commenter stated that bank regulator information is unnecessary to meet the Rule's underlying purpose and that the Commission could seek this information from the federal banking regulators.[317] As discussed above, in adopting the Rule, the Commission limited the scope of affiliates about which it will collect information pursuant to Form 13H.[318] Specifically, the Commission did not adopt the requirement to disclose affiliates that merely beneficially own NMS securities and it did not adopt proposed Items 3(b) and (c) of the Form, which would have required the large trader to disclose whether it or any of its affiliates is a bank or an insurance company and identify each such entity and its respective regulators. The Commission anticipates that focusing the Rule's scope in this regard will reduce burdens on large traders to be in line with the Commission's original understanding, while enabling the Commission to focus on gathering the most relevant and useful information about large traders.

The Commission does not expect that the revisions to the Form, including eliminating the requirement to disclose certain affiliates and applicable bank and insurance regulators, discussed above, will materially affect the Commission's initial burden estimates. In particular, a full analysis of which affiliates need to be reported and disclosed would still need to be conducted, even though the scope of information that needs to be disclosed on Form 13H has been reduced from the proposal. The disclosure on the Form of bank and insurance regulators as proposed would have represented only a minimal additional burden, and such information would likely have been static and infrequently changed. Similarly, the Commission's decision to not adopt the requirement to disclose affiliates that merely beneficially own NMS securities likewise should not materially affect the estimated reporting burden because the Form, as adopted, now includes additional items such as the requirement to provide an organizational chart and to identify any affiliates that file separately and any affiliates that have been assigned an LTID suffix. The Commission carefully considered the changes to the Form in light of the comments received on the Form and the initial cost estimates, and believes that the removal of certain required information balances the addition of new required information of a similar scope so as to not affect the overall reporting burdens.

2. Burden on Registered Broker-Dealers

a. Recordkeeping

As part of the Commission's existing EBS system, pursuant to Rule 17a–25 under the Exchange Act, the Commission currently requires registered broker-dealers to keep records of most of the information for their customers that will be captured by Rule 13h–1.[319] The additional items of information that the Rule will capture are: (1) LTID(s) and (2) transaction execution time. Some registered broker-dealers will need to re-program their systems to capture execution time to the extent their systems do not already capture that information in a manner that is reportable pursuant to an EBS request for data. The Commission believes that the burdens of the Rule on registered broker-dealers will likely vary due to differences in their recordkeeping systems.

In the Proposing Release, the Commission estimated that all registered broker-dealers that either are large traders or have a customer base that includes large traders and Unidentified Large Traders would be required to make modifications to their existing systems to capture the additional data elements that were not currently captured by systems that comply with Rule 17a–25, including, for example, LTID numbers. The Commission estimated that the one-time, initial burden for registered broker-dealers for system development, including re-programming and testing of the systems to comply with the proposed rule, would be approximately 133,500 burden hours.[320] This figure

[311] *See* SIFMA Letter at 17; Wellington Management Letter at 5; Financial Information Forum Letter at 4; and Prudential Letter at 4.

[312] *See* SIFMA Letter at 17.

[313] *See* Wellington Management Letter at 5–6.

[314] *See* Prudential Letter at 4 and American Bankers Association Letter at 2.

[315] *See* Prudential Letter at 4.

[316] *See id.*

[317] *See* American Bankers Association Letter at 2.

[318] *See supra* Section III.A.3.0 (discussing Item 4 of the Form).

[319] *See* 17 CFR 240.17a–25. Pursuant to Rule 17a–25, broker-dealers are required to maintain the following information that will be captured by new Rule 13h–1: Date on which the transaction was executed; account number; identifying symbol assigned to the security; transaction price; the number of shares or option contracts traded and whether such transaction was a purchase, sale, or short sale, and if an option transaction, whether such was a call or put option, an opening purchase or sale, a closing purchase or sale, or an exercise or assignment; the clearing house number of such broker or dealer and the clearing house numbers of the brokers or dealers on the opposite side of the transaction; a designation of whether the transaction was effected or caused to be effected for the account of a customer of such broker or dealer, or was a proprietary transaction effected or caused to be effected for the account of such broker or dealer; market center where the transaction was executed; prime broker identifier; average price account identifier; and the identifier assigned to the account by a depository institution. For customer transactions, the broker-dealer is required to also include the customer's name, customer's address, the customer's tax identification number, and other related account information.

[320] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Computer Ops Dept. Mgr. at 30 hours) + (Sr. Database Administrator at 25 hours) + (Sr. Programmer at 150 hours) + (Programmer Analyst at 100 hours) + (Compliance Manager at 20 hours)

Continued

was based on the estimated number of hours for initial internal development and implementation, including software development, taking into account the fact that new data elements were required to be captured and would need to be available for reporting to the Commission as of the morning following the day on which the transactions were effected. The Commission noted that because broker-dealers already capture, pursuant to Rule 17a–25, most of the data that proposed Rule 13h–1 would capture, it did not expect broker-dealers to incur any hardware costs as existing hardware should be able to accommodate the additional two fields of information that would need to be captured.

In the Proposing Release, the Commission stated that the ongoing annualized expense for the recordkeeping requirement for registered broker-dealers would not result in a separate burden for purposes of the PRA, as registered broker-dealers already were required to provide to the Commission almost all of the proposed information for all of their customers pursuant to Rule 17a–25 under the Exchange Act. Moreover, the Commission stated that once a registered broker-dealer's system was updated to capture the additional two fields of information required by Rule 13h–1, the Commission did not believe that the additional fields would result in any ongoing annualized expense beyond what broker-dealers currently incur to maintain the existing EBS data that is required to be kept pursuant to Rule 17a–25.

In response to the Commission's recordkeeping burden estimates, one commenter believed that the Commission significantly underestimated the time and resources for broker-dealers to comply with the Rule.[321] In particular, the commenter stated that the build-out costs to update the EBS system to accommodate the two new items (LTID and execution time) would exceed the Commission's estimate of 133,500 burden hours.[322] Though the commenter did not provide a methodology for its estimate or provide a specific estimate of burden hours, it noted the following: ''Assuming that just the generation process alone would require three months of effort for each firm with an electronic blue sheets reporting responsibility and that conforming related systems would require additional time, and then multiplied across the approximately 300 broker-dealers that the SEC estimates would be subject to the proposed rule, the total build-out for the industry would require 75 years of effort on a cumulative basis.'' [323] The commenter noted that one potential major cost of implementing the recordkeeping requirement is that some broker-dealers do not have access to execution times in a manner that is readily reportable under the EBS infrastructure.[324] These broker-dealers, the commenter stated, would need to devote considerable resources to updating EBS to gather, process, and transmit such information.[325] The Commenter recommended using the OATS system maintained by FINRA instead of the EBS system for the large trader reporting rule and argued that using the OATS infrastructure would not be as ''onerous'' as modifying the existing EBS system.[326] However, the same commenter mentioned one firm it talked to that estimated that it would cost less and take 50 percent less time to build out the EBS system compared to expanding OATS.[327] The Commission believes the firm cited by the commenter supports the Commission's position that an expansion of the EBS system is a more cost effective option to leverage an existing reporting system for purposes of the large trader rule.

A separate commenter that represents a group that focuses on technological aspects of securities regulation expressed concern with the proposed monitoring requirements but did not address the costs associated with modifications to the EBS system. Rather, the commenter believed that broker-dealers could reasonably modify their systems to capture execution time within the proposed six-month implementation period.[328] However, this same commenter noted that EBS requests using LTID as a query mechanism would take longer to implement than the proposed six month compliance date.[329] As discussed above, the Commission expects that it would, on occasion, request EBS data according to LTID.[330] In addition, the Commission notes that it is adopting a longer compliance date than it proposed—seven months after the Effective Date of the Rule. Because the Rule will be effective 60 days after publication in the **Federal Register**, this effectively results in a compliance date nine months after publication in the **Federal Register**.

The Commission understands that many broker-dealers will face different challenges in capturing and reporting execution time information, depending on the sophistication of and resources they have previously devoted to their recordkeeping systems. The Commission's estimate, however, is an average calculation that accommodates a broad spectrum of broker-dealer EBS systems, including the possibility that some firms might face larger burdens than the average since different firms would be affected to different degrees. Not all broker-dealers will face complexities involved with modifying non-integrated legacy systems to capture execution time, and some broker-dealers will not need to devote as many resources to those efforts as will others. The Commission's estimate is based on an aggregated figure that recognizes that different broker-dealers will need to invest different levels of resources based on the needs of their particular technology. Accordingly, the Commission believes that its initial 133,500 hour burden/year estimate for the one-time burden on registered broker-dealers to modify their existing EBS systems is reasonable and appropriate.[331] This figure assumes that, on average, each broker-dealer would have to devote 445 burden hours in order to develop, program, and test the

+ (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 50 hours) + (Director of Compliance at 5 hours) + (Sr. Computer Operator at 35 hours) × (300 potential respondents) = 133,500 burden hours. As noted above, the Commission acknowledged that, in some instances, multiple LTIDs may be disclosed to a registered broker-dealer for a single account. Therefore, the hourly burden estimate factored in the cost that registered broker-dealers would need to develop systems capable of tracking multiple LTIDs. Rule 13f–1, like the Rule, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information. As discussed *supra,* Rule 17a–25 requires broker-dealers to disclose information that is very similar in scope and character to the information required under the Rule.

[321] *See* SIFMA Letter at 14.

[322] *See id.*

[323] *See id.* at 5.

[324] *See id.* at 13.

[325] *See id.*

[326] *See id.* at 5.

[327] *See id.* at 6. The commenter states that one firm has estimated it would costs $4 to $5 million and take 18 to 24 months to expand OATS, whereas it would cost an estimated $3 to $4 million and take 12 to 18 months to build out the EBS system as proposed. The commenter did not provide any basis for these estimates nor what assumptions this firm made with regards to collection, reporting, and monitoring requirements, or other any other aspects of the Rule. The Commission's response to this comment in light of its estimate of the costs applicable to broker-dealers under the recordkeeping requirements of the Rule is discussed below in detail. *See supra* Section V.B.2.a (costs applicable to broker-dealers under the recordkeeping requirements of the Rule).

[328] *See* Financial Information Forum Letter at 7.

[329] *See id.*

[330] *See supra* Section III.B.2 (discussing reporting requirements).

[331] The Commission notes that its estimate is in line with the burden estimates from Rule 17a–25. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35840–41.

enhancements to their existing systems to capture and report the additional fields of information (LTIDs and execution time).[332]

b. Reporting

In addition to requiring registered broker-dealers to maintain records of account transactions, the Rule also requires registered broker-dealers to report transaction data to the Commission upon request. In the Proposing Release, the Commission stated that this collection of information would not involve any substantive or material change in the burden that already exists as part of registered broker-dealers providing transaction information to the Commission in the normal course of business under the existing EBS system.[333] However, the Commission noted that the information would need to be available for reporting to the Commission on a next-day basis, versus the 10 business day period that typically is associated with an EBS request for data.[334] Nevertheless, the Commission believes that once the electronic recordkeeping system is in place to capture the information, and the system is designed and built to furnish the information within the time period specified in the Rule, the collection of information would result in minimal additional burden.

Although it is difficult to predict with certainty the Commission's future needs to obtain large trader data, the Commission estimated in the Proposing Release that, taking into account the Commission's likely need for data to be used for market reconstruction purposes and investigative matters, it would send 100 requests for large trader data per year to each affected registered broker-dealer.[335] The Commission estimated that it will take a registered broker-dealer 2 hours to comply with each request, considering that a broker-dealer would need to run the database query of its records, download the data file, and transmit it to the Commission.[336] The Commission received no comments on its reporting burden estimate and continues to believe that its initial estimate was reasonable. Accordingly, the Commission estimates the ongoing annual aggregate hour burden for broker-dealers to be 60,000 burden hours.[337]

c. Monitoring

In the Proposing Release, the Commission estimated that the one-time, initial burden for registered broker-dealers to comply with the monitoring requirements would be approximately 21,000 burden hours to establish a compliance system to detect and identify Unidentified Large Traders.[338] This figure was based on the estimated number of hours to establish policies and procedures reasonably designed to assure compliance with the identification requirements of the Rule. The Commission estimated that the ongoing annualized burden to broker-dealers for the monitoring requirements of the Rule, including the requirement on broker-dealers to inform Unidentified Large Traders of their potential obligations under Rule 13h–1, would be approximately 4,500 burden hours.[339]

As discussed above, one commenter believed that the Commission's estimate of 300 broker-dealers was underestimated and believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500 because of steps the commenter believed clearing brokers would likely impose on others in order for them to comply with the monitoring safe harbor provision of Rule 13h–1(f), as proposed.[340] This commenter based its estimate on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect ''other reasonably available information'' on Unidentified Large Traders required by the proposed safe harbor to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[341] The commenter based its estimate on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010. As such, this commenter believes that the Commission's ongoing burden estimate of 4,500 burden hours/year[342] (equivalent to $1,215,000/year[343]) should instead be something between 111,000 burden hours/year and 3,000,000 burden hours/year[344] (equivalent to $30,000,000–$750,000,000/year).[345] The commenter noted that its estimate included a full-time compliance professional.[346]

As discussed above, the safe harbor provision of Rule 13h–1(f), as adopted, makes clear the intended scope of ''other identifying information'' that a

[332] The Commission derived the total estimated burdens from the following estimates, which are based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Computer Ops Dept. Mgr. at 30 hours) + (Sr. Database Administrator at 25 hours) + (Sr. Programmer at 150 hours) + (Programmer Analyst at 100 hours) + (Compliance Manager at 20 hours) + (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 50 hours) + (Director of Compliance at 5 hours) + (Sr. Computer Operator at 35 hours) × (300 potential respondents) = 133,500 burden hours.

[333] *See* 17 CFR 240.17a–25.

[334] *See* Rule 17a–25 Release, *supra* note 19.

[335] Compared to the EBS system, where the Commission sent 5,168 electronic blue sheets requests between January 2007 and June 2009, the Commission expects to send fewer requests for large trader data, in particular because the Commission expects that a request for large trader data will be broader and encompass a larger universe of securities and a longer time period than would be the case for the typically more targeted EBS requests it currently sends.

[336] The Commission notes that the adopting release for Rule 17a–25 estimated that electronic response firms spend approximately 8 minutes and manual response firms spend 1.5 hours responding to an average blue sheet request. *See* Rule 17a–25 Release, *supra* note 19, at 35841. The Commission's 2-hour estimate for new Rule 13h–1 is intended to account for the collection and reporting of additional information on Unidentified Large Traders. This estimate also accommodates broker-dealers that might want to perform quality checks over the information before it is reported to the Commission.

[337] 100 × 300 × 2 = 60,000 burden hours. The Commission derived the total estimated burdens based on the Commission's experience with, and burden estimates for, other existing reporting systems, including Rule 17a–25. The Commission estimated that each broker-dealer who electronically responds to a request for data in connection with Rule 17a–25 and the EBS system spends 8 minutes per request. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35841. Unlike EBS, under new Rule 13h–1, a broker-dealer will also be required to report data on Unidentified Large Traders. The Commission therefore believes that the time to comply with a request for data under the Rule could take longer than would a similar request for data under the EBS system, as a broker-dealer likely would take additional time to review and report information on any Unidentified Large Traders, including the additional fields of information specified in paragraph (d)(3) of the Rule, that they would be required to report to the Commission under the Rule.

[338] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1: (Sr. Programmer at 10 hours) + (Compliance Manager at 10 hours) + (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 10 hours) + (Director of Compliance at 2 hours) + (Sr. Computer Operator at 8 hours) × (300 potential respondents) = 21,000 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain trading threshold.

[339] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Compliance Attorney at 15 hours) × (300 potential respondents) = 4,500 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information.

[340] *See* Financial Information Forum Letter at 6.

[341] *See id.*

[342] Compliance Attorney at 15 hours × 300 potential respondents = 4,500 burden hours

[343] Compliance Attorney at 15 hours × $270 per hour × 300 potential respondents = $1,215,000

[344] Compliance Attorney at 370 hours × 300 potential respondents = 111,000 burden hours; Compliance Attorney at 2,000 hours × 1,500 potential respondents = 3,000,000 burden hours.

[345] *See* Financial Information Forum Letter at 7.

[346] *See id.*

broker-dealer would need to consider, which is narrower in scope than what the commenter assumed. As adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information ''available on the books and records of such broker-dealer.'' The policies and procedures would not need to consider information on the books and records of another broker-dealer. Accordingly, the Rule has been clarified to exclude a possible expansive interpretation of ''other readily available information'' that formed the basis for the commenter's concern.

Further, the Commission believes that large traders, whose aggregate NMS securities transactions by definition equal or exceed the identifying activity level, require sophisticated trade-processing capacities on the part of broker-dealers that service them. Consequently, the Commission believes it is unlikely that nearly all broker-dealers that have been assigned an MPID either carry accounts for or will effect a transaction on behalf of a large trader. Therefore, it does not expect all such entities to be impacted by the monitoring provisions of Rule 13h–1(f).[347] By providing additional guidance in the Rule, as adopted, the Commission believes it has clarified the intended monitoring responsibilities of broker-dealers and has shown that the burden estimates for these more limited requirements are in line with the Commission's original estimates.

d. Total Burden

Under the Rule, the total burden on these respondents will be 214,500 hours for the first year[348] and 64,500 hours for each subsequent year.[349]

E. Collection of Information is Mandatory

All collections of information pursuant to Rule 13h–1 will be mandatory.

F. Confidentiality

Section 13(h)(7) of the Exchange Act provides that Section 13(h) ''shall be considered a statute described in subsection (b)(3)(B) of [5 U.S.C. 552]'', which is part of the Freedom of Information Act (''FOIA'').[350] As such, ''the Commission shall not be compelled to disclose any information required to be kept or reported under [Section 13(h)].''[351] Accordingly, the information that a large trader will be required to disclose on Form 13H or provide in response to a Commission request will be exempt from disclosure under FOIA. In addition, any transaction information that a registered broker-dealer reports to the Commission under the Rule also will be exempt from disclosure under FOIA. The circumstances under which the Commission will provide information collected pursuant to Rule 13h–1 and Form 13H are discussed above.[352]

G. Record Retention Period

Registered broker-dealers will be required to retain records and information under Rule 13h–1 for a period of three years, the first two in an accessible place, in accordance with Rule 17a–4 under the Exchange Act.[353]

V. Consideration of Costs and Benefits

The Commission is sensitive to the costs and benefits that result from its rules. In the Proposing Release, the Commission identified certain costs and benefits of the Rule as proposed and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission received several comments relating to the cost-benefit analysis, which are discussed below. For the reasons discussed below, the Commission continues to believe that its estimates of the benefits and costs of Rule 13h–1, as set forth in the Proposing Release, are appropriate.

A. Benefits

U.S. securities markets have experienced a dynamic transformation in recent years. In large part, the changes reflect the culmination of a decades-long trend from a market structure with primarily manual trading to a market structure with primarily automated trading. Rapid technological advances have produced fundamental changes in the structure of the securities markets, the types of market participants, the trading strategies employed, and the array of products traded. The markets also have become even more competitive, with exchanges and other trading centers offering innovative order types, data products and other services, and aggressively competing for order flow by reducing transaction fees and increasing rebates. These changes have facilitated the ability of large institutional and other professional market participants to employ sophisticated trading methods to trade electronically in huge volumes with great speed. In addition, large traders have become increasingly prominent at a time when the markets are experiencing an increase in overall volume.[354]

Currently, to support its regulatory, investigative, and enforcement activities, the Commission collects transaction data through the EBS system.[355] The Commission uses the EBS system to obtain securities transaction information for two primary purposes: (1) To assist in the investigation of possible federal securities law violations, primarily involving insider trading or market manipulation; and (2) to conduct market reconstructions.

The EBS system has performed effectively as an enforcement tool for analyzing trading in a small sample of securities over a limited period of time. However, because the EBS system is designed for use in narrowly-focused enforcement investigations that generally involve trading in particular securities, it has proven to be insufficient for large-scale market reconstructions and analyses involving numerous stocks during peak trading volume periods. Importantly, EBS does not address the Commission's need to identify market participants in a uniform manner that would allow the Commission to readily aggregate their trading activity across broker-dealers, nor does it include time of execution information necessary to properly sequence and reconstruct trading activity.

[347] To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

[348] This figure was derived from the estimated one-time burdens from the recordkeeping requirement (133,500 burden hours) + the reporting requirement (60,000 burden hours) + the monitoring requirement (21,000 burden hours) = 214,500 total burden hours.

[349] This figure was derived from the estimated ongoing burdens from the reporting requirement (60,000 burden hours) + the monitoring requirement (4,500 burden hours) = 64,500 total burden hours.

[350] 5 U.S.C. 552(b)(3)(B) is now 5 U.S.C. 552(b)(3)(A)(ii).

[351] *See* Section 13(h)(7) of the Exchange Act, 15 U.S.C. 78m(h)(7).

[352] *See supra* Section III.A.3.g.

[353] 17 CFR 240.17a–4.

[354] *See supra* note 8 (discussing analyst estimates of high frequency trader activity).

[355] *See* 17 CFR 240.17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers).

Following declines in the U.S. securities markets in October 1987 and October 1989, Congress noted that the Commission's ability to analyze the causes of a market crisis was impeded by its lack of authority to gather trading information.[356] To address this concern, Congress passed the Market Reform Act, which, among other things, amended Section 13 of the Exchange Act to add new subsection (h), authorizing the Commission to establish a large trader reporting system under such rules and regulations as the Commission may prescribe.[357]

The large trader reporting authority in Section 13(h) of the Exchange Act was intended to facilitate the Commission's ability to monitor the impact on the securities markets of securities transactions involving a substantial volume or large fair market value, as well as to assist the Commission's enforcement of the federal securities laws.[358] In particular, the Market Reform Act provided the Commission with the authority to collect broad-based information on large traders, including their trading activity, reconstructed in time sequence, in order to provide empirical data necessary for the Commission to perform investigations and conduct analysis of data.[359]

The large trader reporting system envisioned by the Market Reform Act authorizes the Commission to require large traders [360] to self-identify to the Commission and provide information to the Commission that identifies the trader.[361] The Market Reform Act also authorized the Commission to require large traders to identify their status as large traders to any registered broker-dealer through whom they directly or indirectly effect securities transactions.[362]

In addition to facilitating the ability of the Commission to identify large traders, the Market Reform Act also authorizes the Commission to collect information on the trading activity of large traders from broker-dealers. In particular, the Commission is authorized to require every registered broker-dealer to make and keep records with respect to securities transactions of large traders that equal or exceed a certain ''reporting activity level'' and report such transactions upon request of the Commission.[363]

To implement its authority under Section 13(h) of the Exchange Act, the Commission is adopting new Rule 13h–1 and Form 13H to establish large trader reporting requirements. The Rule is intended to assist the Commission in identifying traders that conduct a substantial volume or large fair market value of trading activity in the U.S. securities markets and obtain certain baseline information on their trading activity. Specifically, a ''large trader'' is defined as a person who effects transactions in NMS securities of at least, during any calendar day, two million shares or shares with a fair market value of $20 million or, during any calendar month, either 20 million shares or shares with a fair market value of $200 million.[364] The large trader reporting rule is designed to facilitate the Commission's ability to assess the impact on the securities markets of large trader activity and allow it to conduct trading reconstructions following periods of unusual market volatility and analyze significant market events for regulatory purposes.

The identification, recordkeeping, and reporting requirements will provide the Commission with a mechanism to identify large traders, as well as their affiliates, the broker-dealers they use, and their transactions. Specifically, Rule 13h–1 will require large traders to identify themselves to the Commission and make certain disclosures to the Commission on Form 13H. Upon receipt of Form 13H, the Commission will issue a unique identification number to the large trader, which the large trader will then provide to its registered broker-dealers. Registered broker-dealers will be required to maintain transaction records for each large trader customer and will be required to report that information to the Commission upon request. In addition, certain registered broker-dealers will need to adopt procedures to monitor their customers' activity for volume that triggers the identification requirements of the Rule.

In light of recent turbulent markets and the increasing sophistication and trading capacity of large traders, the Commission believes it needs to implement a large trader reporting rule to further enhance its ability to collect and analyze trading information, especially with respect to the most active market participants. In particular, the Commission believes it needs to implement a large trader reporting rule to reliably and efficiently identify large traders and promptly obtain information on their trading on a market-wide basis.

The Commission believes that the large trader reporting rule is necessary because, as noted above, large traders appear to be playing an increasingly prominent role in the securities markets.[365] Market observers have offered a wide range of estimates for the percent of overall volume attributable to one potential subcategory of large trader—high frequency traders—which is typically estimated at 50% of total volume or higher.[366] The large trader reporting rule is intended to provide a basic set of tools for the Commission to monitor more readily and efficiently the impact on the securities markets of large traders.

Among other things, the Commission believes that the large trader reporting rule will enhance its ability to: (1) Reliably identify large traders and their affiliates, (2) obtain more promptly trading data on the activity of large traders, including execution time, and (3) aggregate and analyze trading data among affiliated large traders. In addition to those benefits that the Commission believes will result from the large trader reporting rule, the Commission also expects that investors

[356] The legislative history accompanying the Market Reform Act also noted the Commission's limited ability to analyze the causes of the market declines of October 1987 and 1989. *See generally* Senate Report, *supra* note 14 and House Report, *supra* note 14.

[357] PL 101–432 (HR 3657), October 16, 1990.

[358] *See* 15 U.S.C. 78m(h)(1). *See also* Senate Report, *supra* note 14, at 42.

[359] *See* Senate Report, *supra* note 14 at 4, 44, and 71. In this respect, though SRO audit trails provide a time-sequenced report of broker-dealer transactions, those audit trails generally do not identify the broker-dealer's customers. Accordingly, the Commission is not presently able to utilize existing SRO audit trail data to accomplish the objectives of the Market Reform Act.

[360] Section 13(h) of the Exchange Act defines a ''large trader'' as ''every person who, for his own or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level.'' *See* 15 U.S.C. 78m(h)(8)(A).

[361] *See* 15 U.S.C. 78m(h)(1)(A).

[362] *See* 15 U.S.C. 78m(h)(1)(B).

[363] *See* 15 U.S.C. 78m(h)(2). Section 13(h) also provides the Commission with authority to determine the manner in which transactions and accounts should be aggregated, including aggregation on the basis of common ownership or control. *See* 15 U.S.C. 78m(h)(3). The term ''reporting activity level'' is defined in Section 13(h)(8)(D) of the Exchange Act to mean ''transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated.'' *See* 15 U.S.C. 78m(h)(8)(D).

[364] This test is defined in the Rule as the ''identifying activity level.'' *See* new Rule 13h–1(a)(7). Section 13(h)(8)(c) of the Exchange Act, 15 U.S.C. 78m(h)(8)(c), authorizes the Commission to determine, by rule or regulation, the applicable identifying activity level.

[365] *See* 15 U.S.C. 78m(h)(1) and (h)(2) (reflecting the purpose of Section 13(h) of the Exchange Act to allow the Commission to monitor the impact of large traders).

[366] *See supra* note 8 (discussing analyst estimates of high frequency trader activity).

should likewise benefit as a consequence of the Commission's enhanced access to information to identify large traders and obtain prompt data on their activity that the Commission would be able to employ in carrying out its regulatory mission.

The Commission sought comment on the benefits associated with the proposed Rule. Many of the 87 comment letters, including those from retail investors, expressed support for the Rule's stated intent to obtain certain baseline trading information about traders that conduct a substantial volume or large fair market value of trading activity in the U.S. securities markets.[367]

One commenter, a large pension fund, stated that it believes that its beneficiaries will benefit from a greater understanding of today's hyper-electronic trading, which encompasses speed and volumes that were previously unknown to most participants.[368] Another commenter, a large mutual fund adviser, stated that the large trader reporting requirements are a pragmatic approach to obtain relevant data on trading activity in the U.S. securities markets and that recent volatility in the marketplace, as exemplified by the unprecedented events of May 6, 2010, has emphasized the need to provide improved regulatory access to trade data in order to detect manipulative trading activities and to analyze significant market events that negatively impact investor trust in the stock market.[369] In addition, a large broker-dealer commented that the EBS system is insufficient in today's trading environment for large scale investigations and market reconstructions across numerous securities during peak trading volume periods and agreed that regulators need additional levels of transparency into the trading practices of all firms with significant activity.[370]

B. Costs

1. Large Traders

In the Proposing Release, the Commission identified the primary costs to large traders from the proposal as the requirement to self-identify to the Commission, including using existing systems to detect when they meet the identifying activity level, filing Form 13H when large trader status is achieved, and informing its broker-dealers of its LTID and all accounts to which it applies. The Commission is adopting the identification requirements substantially as proposed. However, the Commission has not adopted Form 13H as proposed. Specifically, the Commission did not adopt the proposed requirement that large traders report brokerage account numbers. Instead, the Rule as adopted requires that large traders report a list of broker-dealers with whom they have an account. As a consequence, large traders will not have to report on Form 13H the LTID of any other large traders with whom they collectively exercise investment discretion, and so will not have to disclose their LTID to other traders or collect from other large traders the LTID of such traders.

The Rule will require large traders to file Form 13H with the Commission promptly after first effecting transactions that reach the identifying activity level.[371] Further, when determining who should register with the Commission as a ''large trader'' by filing Form 13H, the Rule is intended to focus, in more complex organizations, on the parent company of the entities that exercise investment discretion. The purpose of this focus is to narrow the number of persons that will self-identify as ''large traders'' and file Form 13H, while allowing the Commission to identify the primary institutions that conduct a large trading business. Focusing the identification requirements in this manner is intended to enable the Commission to easily identify and readily contact the principal groups that control large traders, while minimizing the costs associated with filing and self-identification that will be imposed on large traders. Large traders will, however, be able to assign and attach a suffix to the LTID that is assigned to them by the Commission.

To limit the impact of the Rule on entities whose trading is not characterized by the exercise of investment discretion that the Commission intends to capture under the definition of ''large trader,'' the Rule provides several exceptions from the definition of ''transaction'' that are considered when determining large trader status. These exceptions are intended to balance the Commission's desire to capture significant trading activity with the cost imposed on market participants to register and report as large traders. These exceptions include 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, and any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(c)(1) of the Internal Revenue Code.[372] As discussed above, in response to comments, the Commission is adopting as exceptions, in addition to those proposed, several types of transactions that focus on corporate actions that are not characteristic of an arm's-length purchase or sale of securities in the secondary market that would normally be characteristic of a ''trader'' in securities, such as business combinations, issuer tender offers, and buybacks, as well as stock loans and equity repurchases. The Commission believes that these additional categories of transactions are effected for materially different reasons than those commonly associated with the arm's-length trading of securities in the secondary market and the associated exercise of investment discretion. For example, transactions involving business combinations, as well as issuer stock buybacks and issuer tender offers, reflect fundamental corporate decision-making. They are not effected with an intent or expectation to profit from the trade itself, but are transactions conducted by or with issuers of securities in furtherance of corporate objectives involving publicly-traded securities. Further, stock loan and equity repos typically are entered into as part of a larger financing transaction or for purposes of generating corporate income and, as such, are effected with general corporate intent rather than for purposes of buying or selling positions in securities. Accordingly, the Commission believes it appropriate to not count these transactions for the purpose of determining whether a person meets the identifying activity threshold contained in the definition of large trader. The Commission believes that adding these additional exclusions will further reduce the potential cost of the Rule on affected entities, as well as registered broker-dealers, while at the same time allowing the Commission to focus the Rule on those entities and activities that the Commission seeks to identify under the Rule.

In addition, the Rule provides for an Inactive Status to further reduce the

[367] *See, e.g.* GETCO Letter; CalSTRS Letter; David L. Goret Letter; Prudential Letter; Investment Adviser Association Letter; American Benefits Council Letter; Howard Hughes Medical Institute Letter; T. Rowe Price Letter; Financial Engines Letter; Investment Company Institute Letter; Wellington Management Letter; SIFMA Letter; and Foothill Securities Letter.

[368] *See* CalSTRS Letter at 1. The commenter noted that it would be ''pleased to be subject to the rule.'' *Id.*

[369] *See* T. Rowe Price Letter at 1.

[370] *See* GETCO Letter at 2.

[371] *See* new Rule 13h–1(b)(1)(i).

[372] *See* new Rule 13h–1(a)(6).

potential costs of the Rule for infrequent traders who may trip the threshold on a particular occasion but do not otherwise trade at sufficient levels to merit continued status as a large trader or that warrant imposing the regulatory burdens of the Rule. In particular, large traders that have not effected aggregate transactions at any time during the previous full calendar year that are equal to or greater than the identifying activity level will be eligible for Inactive Status upon checking a box on the cover page of their next annual Form 13H filing.[373] Specifically, Inactive Status will relieve a person from the requirement to file amended Forms 13H.

Form 13H also allows a large trader to report the termination of its operations (*i.e.,* Inactive Status where the entity, because it has discontinued operations, has no potential to requalify for large trader status in the future). This designation is intended to allow large traders to inform the Commission of their status and to signal to the Commission not to expect future Form 13H filings from the large trader. For example, termination status will be relevant in the case of a merger or acquisition where the large trader does not survive the corporate transaction. In addition, with respect to registered broker-dealers, the Termination Filing is intended to reduce the potential costs to registered broker-dealers who will no longer have to track the entity's LTID.

In the Proposing Release, the Commission noted that from time to time, information provided by large traders through their Forms 13H may become inaccurate. Rather than requiring prompt updates whenever this occurs, the Rule instead will require ''Amended Filings'' on a quarterly basis (and only when the prior submission becomes inaccurate). Specifically, large traders will be required to amend their latest Form 13H by submitting an ''Amended Filing'' promptly following the end of a calendar quarter in the event that any of the information contained in a Form 13H filing becomes inaccurate for any reason (*e.g.,* change of name or address, type of organization, regulatory status, broker-dealers used, or affiliates).[374] Regardless of whether any quarterly amended Form 13Hs are filed, large traders are required to file Form 13H annually (an ''Annual Filing''), within 45 days after the calendar year-end, in order to ensure the accuracy of all of the information reported to the Commission.[375] The quarterly filing requirement for amendments is designed to mitigate the filing burden on large traders, as large traders will not be required to file a large number of amendments on a more prompt basis every time something in their latest Form 13H needs to be corrected or updated. A large trader could elect to file more promptly or frequently at its discretion, but would not be required to do so.

In the Proposing Release, the Commission estimated that the aggregate costs for the estimated 400 respondents that would register on Form 13H and obtain from the Commission an LTID and inform its broker-dealers of its LTID and the accounts to which it applies would be $1,317,600.[376] The Commission stated its belief that potential large trader respondents would not need to modify their existing systems to comply with proposed Rule 13h–1. Rather, the Commission believed that large traders already maintain systems that are capable of computing their level of trading, and the Commission expected that firms would be able to use their existing systems to assess whether they have reached the identifying activity level. Further, as discussed above, the Rule as adopted allows a large trader to voluntarily register with the Commission, even before it meets the applicable trading activity threshold, in order to eliminate the need for a person to actively monitor its trading levels for purposes of Rule 13h–1. To the extent a large trader does not want to track its trading levels for the identifying activity level thresholds, it can avail itself of the option to voluntarily register and forego the burden of such tracking. Any person that elects to voluntarily file would be treated as a large trader for purposes of the Rule, and would be subject to all of the obligations of a large trader under the Rule, notwithstanding the fact that the person had not effected the requisite level of transactions at the time it registered as a large trader.

In addition, the Commission estimated in the Proposing Release that the aggregate cost to file amendments as well as an annual updated Form 13H would be $998,400.[377] The Commission did not expect these costs per large trader of self-identification and reporting to the Commission to have any significant effect on how large traders conduct business because such costs would be marginal when compared to level of activity at which a large trader would be trading, and should not change how such traders conduct business, create a barrier to entry, or otherwise alter the competitive landscape among large traders. Further, the Commission is designing an electronic filing system for Form 13H that is intended to minimize the costs associated with filing Form 13H, for example, by allowing filers to access and amend their most recently filed Form 13H when filing an amended or annual update.

As noted in the PRA section above, several commenters believed that the Commission underestimated the costs of the proposed rule on large traders.[378] These commenters principally noted that the proposal's requirements to gather and report information related to account numbers and names, affiliates, and bank and insurance regulators would be burdensome.[379] Commenters noted that the Commission assumed that this information was readily available for all large traders.[380]

As discussed above, the Commission, in adopting the Rule, modified Form 13H from the proposed version to reduce the potential costs associated with filing Form 13H for affected entities. Most significantly, the Commission did not adopt the proposed requirement that large traders report their broker-dealer account numbers on Form 13H. Instead, large traders will be required to report a list of broker-dealers with whom they or their Securities

[373] *See* new Rule 13h–1(b)(3)(iii).

[374] *See* new Rule 13h–1(b)(1)(iii).

[375] *See* new Rule 13h–1(b)(1)(ii).

[376] The Commission derived the total estimated cost from the following estimates, which were based on the Commission's experience with, and cost estimates for, other existing reporting systems including Rule 13f–1: ((Compliance Manager (3 hours) at $258 per hour) + (Compliance Attorney (7 hours) at $270 per hour) + (Compliance Clerk (10 hours) at $63 per hour)) × (400 potential respondents) = $1,317,600. Rule 13f–1, like new Rule 13h–1, requires the filing of a form (Form 13F) upon exceeding a certain trading threshold. Hourly figures were from SIFMA's Management & Professional Earnings in the Securities Industry 2008 and SIFMA's Office Salaries in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 or 2.93, as appropriate, to account for bonuses, firm size, employee benefits, and overhead.

[377] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 6a–2: ((Compliance Manager (2 hours) at $258 per hour) + (Compliance Attorney (5 hours) at $270 per hour) + (Compliance Clerk (10 hours) at $63 per hour)) × (400 potential respondents) = $998,400. Rule 6a–2, like new Rule 13h–1, requires: (1) Form amendments when there are any material changes to the information provided in the previous submission; and (2) submission of periodic updates of certain information provided in the initial Form 1, whether or not such information has changed.

[378] *See, e.g.,* Prudential Letter; Investment Adviser Association Letter; and Investment Company Institute Letter.

[379] *See, e.g.,* American Bankers Association Letter.

[380] *See, e.g.,* Investment Company Institute Letter.

Affiliates have an account. In light of these modifications from the proposal, the Commission continues to believe that its estimate of initial and ongoing costs is appropriate. The initial cost estimate was based on the understanding that large traders know and can readily identify their brokerage account numbers. As noted by commenters, particularly investment advisers, this may not be the case for all large traders, at least not in a form that would be conducive to reporting on Form 13H. One commenter recommended an alternative approach to requiring large traders to disclose a list of the broker-dealers that the large trader is authorized to use.[381] This commenter noted that many investment advisers maintain an approved list of broker-dealers and have processes for adding and deleting broker-dealers as well as reviewing trades with a broker-dealer not on the approved list.[382] The Commission has considered this alternative, and believes it is appropriate to focus the reporting burden on a list of broker-dealers at which the large trader maintains an account, rather than a list of accounts held at those broker-dealers. The Commission believes, based on the comments it received from investment advisers on this topic, that this new requirement will reduce the potential costs for certain large traders, particularly investment advisers.

The adopted Rule also limits the scope of information that must be reported on bank and insurance regulators and focuses the identification requirement on affiliates that trade, rather than merely beneficially own, NMS securities. However, the Commission does not anticipate that these changes from the proposal will materially affect the Commission's initial cost estimates. In particular, the prominence and scope of those items on the Form, relative to the other disclosure requirements, were minor and the fact that they were not adopted should not materially affect the cost estimates. Further, the Form, as adopted, now includes additional items such as the requirement to provide an organizational chart and to identify any affiliates that file separately and any affiliates that have been assigned an LTID suffix. The Commission carefully considered the changes to the Form in light of the comments received on the Form and the initial cost estimates, and believes that the removal of certain required information balances the addition of new requirement information of a similar scope so as to not affect the overall reporting burdens. Accordingly, the balanced modifications to the Rule and additional guidance on the intended scope of the Rule result in changes that are in line with the Commission's original estimates.

2. *Registered Broker-Dealers*

The Commission anticipated that the three primary costs to registered broker-dealers from the proposal were: (1) Recordkeeping requirements; (2) reporting requirements; and (3) monitoring requirements.

a. Recordkeeping

The Rule will require registered broker-dealers to keep records of transactions for large traders and Unidentified Large Traders.[383] The Rule also will require brokers and dealers to furnish transaction records of large traders and Unidentified Large Traders to the Commission upon request. While most of the data required to be kept pursuant to Rule 13h–1 is already required under Rule 17a–25 and reported via the EBS system, the large trader reporting rule will contain two additional fields of information, notably the LTID number(s) and execution time of the transaction. The Rule will require records to be kept for a period of three years, the first two in an accessible place, in accordance with Rule 17a–4(b) under the Exchange Act.[384]

In the Proposing Release, the Commission estimated that the one-time, initial costs for each registered broker-dealer for development of enhancements to its EBS infrastructure, including re-programming and testing of the systems, would be approximately $106,060.[385] The Commission also believed that there would be minimal additional costs associated with the operation and maintenance of the large trader reporting rule because it would utilize the existing EBS system. Accordingly, the Commission estimated the total start-up, operating, and maintenance cost burden for registered broker-dealers to be $31,818,000.[386] As previously noted, this figure was based on the estimated number of hours for development and implementation of enhancements to the firm's EBS systems, including software development, taking into account the fact that two new data elements were required to be captured and that data would be required to be available for reporting to the Commission on the morning following the day on which the transactions were effected. Because broker-dealers already capture most of the data required to be captured under Rule 13h–1 pursuant to Rule 17a–25, the Commission did not expect broker-dealers to have to incur any additional hardware costs.

In response to the Commission's recordkeeping burden estimates, as previously discussed in the PRA section above, one commenter stated that one of its member firms estimated it would cost $3,000,000–$4,000,000 to build out its EBS system in a manner required by the proposed rule, though the commenter did not provide any basis for the estimate or assumptions that were made with regards to the collection, reporting, and monitoring requirements of the Rule.[387] This figure, which is an estimate of one affected entity that represents a single data point, is significantly higher than the Commission's estimate of $106,060 for the initial one-time costs of implementing the system changes required by the Rule as adopted. The commenter noted that one potential major cost of implementing the recordkeeping requirement is that some broker-dealers do not have access to execution times in a manner that is readily reportable under the EBS infrastructure.[388] These broker-dealers, the commenter stated, would need to devote considerable resources to updating EBS to gather, process, and transmit such information.[389]

The Commission notes that commenters did not express particular concern with the proposed requirement to record and report LTIDs, but rather focused on the transmission of execution time from the execution-facing systems to the clearing-facing systems which traditionally are utilized in the EBS process. The Commission

[381] *See* Wellington Management Letter at 4 and Investment Company Institute Letter at 8–9.

[382] *See* Investment Company Institute Letter at 9.

[383] *See* new Rule 13h–1(a)(9) (defining ''Unidentified Large Trader'').

[384] 17 CFR 240.17a–4.

[385] The Commission derived the total estimated one-time cost from the following: (Computer Ops Dept. Mgr. (30 hours) at $335 per hour) + (Sr. Database Administrator (25 hours) at $281 per hour) + (Sr. Programmer (150 hours) at $292 per hour) + (Programmer Analyst (100 hours) at $193 per hour) + (Compliance Manager (20 hours) at $258 per hour) + (Compliance Attorney (10 hours) at $270 per hour) + (Compliance Clerk (20 hours) at $63 per hour) + (Sr. Systems Analyst (50 hours) at $244 per hour) + (Director of Compliance (5 hours) at $388 per hour) + (Sr. Computer Operator (35 hours) at $75 per hour) = $106,060. As noted above, the Commission acknowledged that, in some instances, multiple LTIDs may be disclosed to a registered broker-dealer for a single account. Therefore, the cost estimate factored in the cost that registered broker-dealers would need to develop systems capable of tracking multiple LTIDs.

[386] 300 affected broker-dealers × $106,060 = $31,818,000.

[387] *See* SIFMA Letter at 6.

[388] *See id.* at 13.

[389] *See id.*

understands that broker-dealers will face different challenges in capturing and reporting execution time information, depending on the sophistication of and resources they have previously devoted to their recordkeeping systems. Relevant factors might include, for example, the size of the entity, the nature, flexibility, and extent of their existing systems, and the business and other regulatory drivers for their technological strategies. As such, the Commission's estimate involves an average calculation that accommodates a broad spectrum of broker-dealer EBS systems and considers that different firms would be affected to different degrees, including the possibility that some firms might spend more than the average. However, not all broker-dealers will face complexities involved with modifying non-integrated legacy systems to capture execution time, and some broker-dealers will not need to devote as many resources to those efforts as will others. For example, one commenter that represents a group that focuses on technological aspects of securities regulation expressed concern with the proposed monitoring requirements but did not address the costs associated with modifications to the EBS system. Rather, the commenter believed that broker-dealers could reasonably modify their systems to capture execution time within the proposed six-month implementation period.[390] The Commission's estimate is based on an aggregated figure that recognizes that different broker-dealers will need to invest different levels of resources based on the needs of their particular technology.

b. Reporting

The Rule will require registered broker-dealers to report transactions that equal or exceed the reporting activity level effected by or through such broker-dealer for both identified and Unidentified Large Traders. More specifically, upon the request of the Commission, registered broker-dealers will be required to report electronically, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of the Rule for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and other persons for whom records must be maintained, which equal or exceed the reporting activity level. These broker-dealers will need to report a particular day's trading activity only if it equals or exceeds the ''reporting activity level'' but will be permitted to report all data without regard to that threshold.

In the Proposing Release, the Commission estimated that the costs of the proposed reporting requirements would be $16,200,000.[391] The Commission's estimate took into account the design and intent of the proposed rule to utilize the recordkeeping and reporting infrastructure of the existing EBS system. The Commission received no comments on its reporting cost estimate and continues to believe that its initial estimate is appropriate.

c. Monitoring

As proposed, paragraph (f) of Rule 13h–1 would establish a ''safe harbor'' for the duty to monitor for Unidentified Large Traders.[392] Specifically, for purposes of determining under the Rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer generally need take into account only transactions in NMS securities effected by or through such broker-dealer.[393] A registered broker-dealer would be deemed not to know or to have reason to know that a person is a large trader if: (1) It does not have actual knowledge that a person is a large trader; [394] and (2) it established and maintained policies and procedures reasonably designed to assure compliance with the identification requirements. Proposed paragraphs (f)(1) and (2) of the rule provided the specific elements that will be required for the safe harbor, including policies and procedures reasonably designed to inform persons of their obligations to file Form 13H and disclose their large trader status.

As discussed above, a few commenters asked for clarification of the monitoring requirements and offered alternatives.[395] Of those commenters that addressed the issue, most were critical of the proposed monitoring requirements.[396] The Commission believes the concerns expressed by commenters are a result of confusion as to the nature of the contemplated monitoring requirements. As noted in the Proposing Release, the Rule places ''the principal burden of compliance with the identification requirements on large traders themselves.'' [397] Further, the Commission characterized broker-dealers' monitoring requirements as ''limited'' and ''a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act.'' [398] The safe harbor in Rule 13h–1(f) references reasonably designed systems to detect and identify persons that may be large traders—based upon transactions effected through an account or group of accounts or other information readily available to the broker-dealer. Further, the safe harbor references reasonably designed systems to inform such persons of their potential obligations under Rule 13h–1. The broker-dealer monitoring requirements are intended to promote awareness of and foster compliance with Rule 13h–1.

The Commission notes that a large trader is required to assess *for itself* whether it meets the identifying activity threshold and thus qualifies as a large trader. To this extent, the Commission notes that there are certain exclusions, for example from the types of transactions that are counted towards the identifying activity threshold, that may have excused a customer from having to register as a large trader even though its aggregate transactions exceed the applicable identifying activity threshold. Unless a broker-dealer has actual knowledge to the contrary that a customer is a large trader (*e.g.,* the customer voluntarily informs the broker-dealer that it is a large trader under Rule 13h–1), the monitoring requirements contemplate an inquiry by the broker-dealer into whether a customer meets the identifying activity threshold based upon transactions effected through an account or a group of accounts at that broker-dealer.

In the Proposing Release, the Commission estimated the initial, one-time cost to establish policies and

[390] *See* Financial Information Forum Letter at 7.

[391] The Commission derived the total estimated ongoing cost from the following: (Compliance Attorney (2 hours) at $270 per hour) × (100 requests per year) × (300 potential respondents) = $16,200,000.

[392] *See* new Rule 13h–1(a)(9) (defining an Unidentified Large Trader as ''each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader.'')

[393] *See* new Rule 13h–1(a)(9).

[394] As discussed above, if a registered broker-dealer has actual knowledge that a person is a large trader, then the broker-dealer would treat such person as an Unidentified Large Trader under the Rule.

[395] *See, e.g.,* Financial Information Forum Letter; SIFMA Letter; and GETCO Letter.

[396] One commenter described the proposed safe harbor as ''anything but safe'' and, as discussed above, asserted that the proposal exceeds the Commission's statutory authority because, among other reasons, the safe harbor provided that a registered broker-dealer would have reason to know that a customer is an Unidentified Large Trader based on other readily available information, as well as transactions effected through the broker-dealer. *See* SIFMA Letter at 11.

[397] Proposing Release, *supra* note 3, 75 FR at 21470.

[398] *Id.*

procedures pursuant to the proposed safe harbor provision would be $3,982,800.[399] The Commission estimated that the ongoing cost would be $1,215,000.[400] The Commission believed that the proposed safe harbor would reduce the costs associated with the monitoring requirements of the proposed rule on registered broker-dealers. Among other things, it would limit the broker-dealer's obligations to only those Unidentified Large Traders that should be readily identifiable and apparent to the broker-dealer and would require the broker-dealer to inform such persons of their obligations to file proposed Form 13H and disclose their large trader status to the Commission.

As noted above in the PRA section, one commenter stated that the Commission's broker-dealer estimate of 300 broker-dealers was underestimated. This commenter believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500 to the extent that carrying broker-dealers require their introducing broker correspondents to establish policies and procedures under the safe harbor to collect the information on Unidentified Large Traders required by the Rule to help the clearing firm comply with the requirements of the Rule that are applicable to them.[401] The commenter based its estimate on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010.[402] As such, this commenter argued that the Commission's ongoing burden estimate of 4,500 burden hours/year[403] (equivalent to $1,215,000/year[404]) should really be 111,000 burden hours/year–3,000,000 burden hours/year[405] (equivalent to about $30,000,000–$750,000,000/year).

As discussed above, the commenter based its analysis on the safe harbor provisions of the proposed rule and was concerned with the reference to ''other readily available information'' contained in the proposed safe harbor. The commenter's estimate was based on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect information on Unidentified Large Traders required by the Rule to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[406] As adopted, however, the safe harbor provision of the Rule makes clear the intended scope of ''other identifying information'' that a broker-dealer would need to consider, which is narrower than what the commenter assumed. As adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information ''available on the books and records of such broker-dealer.'' As discussed above, the safe harbor policies and procedures would not need to take into account information on the books and records of another broker-dealer. Accordingly, the scope of the provision cited by the commenter is not as extensive as the commenter thought might be intended, and the revised Rule text has now clarified the intended scope.

Further, also as described with respect to the PRA, the Commission believes that large traders, whose aggregate NMS securities transactions equal or exceed the identifying activity level, require sophisticated trade-processing capacities.[407] The Commission believes it is unlikely that all broker-dealers that have been assigned an MPID would likely either carry accounts for or effect transactions on behalf of a large trader. Accordingly, all such entities are not expected to be impacted by the monitoring provisions of Rule 13h–1(f), and the Commission continues to believe that its initial estimate of 300 affected broker-dealers is appropriate.[408]

VI. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[409] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[410] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission is adopting Rule 13h–1 pursuant to its authority under Sections 13(h) and 23(a) of the Exchange Act. Section 13(h)(2) requires the Commission, when engaging in rulemaking pursuant to that authority that would require every registered broker-dealer to make and keep for prescribed periods such records as the Commission by rule or regulation prescribes, to consider whether such rule is ''necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].''[411]

In the Proposing Release, the Commission requested comment on whether proposed Rule 13h–1 would place a burden on competition, as well as the effect of the proposal on efficiency, competition, and capital formation. While the Commission did receive comment letters that discussed the overall number of respondents that would be affected by the proposed rule,[412] as well as the Commission's cost and burden estimates,[413] the Commission only received one comment that specifically addressed whether Rule 13h–1 would burden

[399] The Commission derived the total estimated one-time cost from the following: ((Sr. Programmer (10 hours) at $292 per hour) + (Compliance Manager (10 hours) at $258 per hour) + (Compliance Attorney (10 hours) at $270 per hour) + (Compliance Clerk (20 hours) at $63 per hour) + (Sr. Systems Analyst (10 hours) at $244 per hour) + (Director of Compliance (2 hours) at $388 per hour) + (Sr. Computer Operator (8 hours) at $75 per hour)) × (300 potential respondents) = $3,982,800.

[400] The Commission derived the total estimated ongoing cost from the following: (Compliance Attorney at (15 hours) × $270 per hour) × (300 potential respondents) = $1,215,000.

[401] *See* Financial Information Forum Letter at 6.

[402] *See id.*

[403] Compliance Attorney at 15 hours × 300 potential respondents = 4,500 burden hours.

[404] Compliance Attorney at 15 hours at $270 per hour × 300 potential respondents = $1,215,000.

[405] Compliance Attorney at 370 hours × 300 potential respondents = 111,000 burden hours; Compliance Attorney at 2,000 hours × 1,500 potential respondents = 3,000,000 burden hours.

[406] *See* Financial Information Forum Letter at 6.

[407] *See supra* text accompanying note 281 (noting one commenter, a large investment management firm and likely large trader, that reported that it currently has approximately 250 broker-dealers on its approved list for executing equity transactions).

[408] To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

[409] 15 U.S.C. 78c(f).

[410] 15 U.S.C. 78w(a)(2).

[411] The Commission is adopting new Rule 13h–1(b) relating to identification requirements for large traders pursuant to Section 13(h)(1) of the Exchange Act, which does not require the Commission to consider the factors identified in Section 3(f), 15 U.S.C. 78c(f). Analysis of the effects, including the considerations under Section 23(a), of new Rule 13h–1(b) is discussed above in Sections IV and V.

[412] *See supra* Section IV.C.

[413] *See supra* Sections IV.D and V.B.

competition or impact efficiency, competition, and capital formation.[414] The comment is addressed as part of the discussion below.

A. Competition

In the Proposing Release, the Commission considered the impact of proposed new Rule 13h–1 on the securities markets and market participants. Information provided by market participants and broker-dealers in their registrations and filings with us informs our views on the structure of the markets in which they participate. We begin our consideration of potential competitive impacts with observations of the current structure of these markets.

The securities trading industry is a competitive one with reasonably low barriers to entry. The intensity of competition across trading platforms in this industry has increased in the past decade as a result of a number of factors, including market reforms and technological advances. This increase in competition has resulted in decreases in market concentration, more competition among trading centers, a proliferation of trading platforms competing for order flow, and decreases in trading fees.

The reasonably low barriers to entry for trading centers are evidenced, in part, by the fact that new entities, primarily ATSs, continue to enter the market.[415] For example, there are approximately 40 registered ATSs that trade NMS securities. In addition, the Commission within the past few years has approved applications by two entities—BATS Exchange, Inc. and NASDAQ Stock Market LLC—to become registered as national securities exchanges for trading equities, and approved proposed rule changes by two existing exchanges—International Securities Exchange, LLC (''ISE'') and Chicago Board Options Exchange, Incorporated—to add equity trading facilities to their existing options business.[416] Moreover, on March 12, 2010, Direct Edge received approval from the Commission for its trading platforms to operate as facilities of two newly created national securities exchanges.[417] We believe that competition among trading centers has been facilitated by Rule 611 of Regulation NMS,[418] which encourages quote-based competition between trading centers; Rule 605 of Regulation NMS,[419] which empowers investors and broker-dealers to compare execution quality statistics across trading centers; and Rule 606 of Regulation NMS,[420] which enables customers to monitor their broker-dealers' order routing practices.

Broker-dealers are required to register with the Commission and at least one SRO. The broker-dealer industry, including market makers, is a competitive industry with most trading activity concentrated among several larger participants and thousands of smaller participants competing for niche or regional segments of the market. There are approximately 5,035 registered broker-dealers, of which approximately 862 are small broker-dealers.[421]

Larger broker-dealers often enjoy economies of scale over smaller broker-dealers and compete with each other to service the smaller broker-dealers, who are both their competitors and their customers.

As discussed above, the Commission acknowledges that the Rule will entail costs. In particular, requiring registered broker-dealers to establish recordkeeping systems to capture the required information, in particular the new fields that are not currently captured under the existing EBS system, will require one-time initial expenses, as discussed above. In addition, registered broker-dealers will need to implement policies and procedures to monitor their customers' trading in order to determine whether customers' trades would trigger the threshold for large trader status. The Commission does not believe that these expenses would adversely affect competition.

In our judgment, the costs of complying with Rule 13h–1 would not be so large as to significantly raise barriers to entry, or otherwise alter the competitive landscape of the industries involved because the incremental costs of Rule 13h–1 that would be incurred by broker-dealers would be marginal relative to the costs of complying with the existing EBS system.[422] In industries characterized by reasonably low barriers to entry and competition, the viability of some of the less successful competitors may be sensitive to regulatory costs. Nonetheless, we believe that the broker-dealer industry would remain competitive, despite the costs associated with implementing new Rule 13h–1, even if those costs influence the entry or exit decisions of individual broker-dealer firms at the margin.

The Commission does not expect that the costs associated with new Rule 13h–1, which are marginal relative to the costs of complying with the existing EBS system, would be a determining factor in a broker-dealer's entry or exit decision or decision to accept large trader customers because the volume of trading associated with large traders and resultant revenue that could be gained by servicing a large trader would justify the costs associated with the Rule.

Further, the Commission would not be compelled to disclose publicly any information required to be kept or reported under Section 13(h) of the Exchange Act, including information kept or reported pursuant to Rule 13h–1.[423] Information and trading data that the Commission would obtain pursuant to the Rule would not be shared with others and would not be available to other large traders or broker-dealers. Accordingly, because the large trader transaction data will be reported only to the Commission, and not made publicly available for use by a large trader's customers or competitors, the Commission expects the Rule to have little to no impact on competition.

The approach of new Rule 13h–1 will advance the purposes of the Exchange Act in a number of significant ways. The Commission believes that the large trader reporting rule will enhance its ability to identify large traders and collect trading data on their activity at a time when, for example, many such traders employ rapid algorithmic systems that quote and trade in huge volumes. The large trader reporting rule will provide a useful source of data to facilitate the ability of the Commission to monitor and analyze more readily and efficiently the impact of large traders, including high-frequency traders, on the securities markets. Although, as noted above, several commenters stated that the Commission underestimated the costs of the proposed rule,[424] the Commission has made several modifications to the Rule to reduce reporting burdens. The Commission believes that establishing the large trader reporting rule would not

[414] *See* European Banking Federation and Swiss Bankers Association Letter.

[415] *See* Securities Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208, 61234 (Nov. 23, 2009) (discussing the reasonably low barriers to entry for ATSs and that these reasonably low barriers to entry have generally helped to promote competition and efficiency).

[416] The ISE discontinued its equities platform in 2010. *See* Press Release, Direct Edge, *available at http://www.directedge.com/DE_ISE_Partner.aspx*.

[417] *See* Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010).

[418] 17 CFR 242.611.

[419] 17 CFR 242.605.

[420] 17 CFR 242.606.

[421] These numbers are based on a review of 2009 FOCUS Report filings reflecting registered broker-dealers, and discussions with SRO staff. These numbers do not include broker-dealers that are delinquent on FOCUS Report filings.

[422] *See supra* Sections IV (Paperwork Reduction Act) and V (Consideration of Costs and Benefits) for a detailed description of the expected costs.

[423] *See supra* Section III.A.3.g.

[424] *See supra* Section V.B.

impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In particular, the Commission believes that the Rule will implement the Commission's authority under Section 13(h) of the Exchange Act at a crucial time when large traders play an increasingly prominent role in the securities markets.

While one commenter raised the possibility that a U.S. large trader reporting rule may incentivize non-U.S. traders to shift their trading in NMS securities to transactions that provide an economically equivalent long position but would not impose any reporting requirement,[425] the Commission believes that the Rule, as adopted, has minimized this possibility. In particular, this release addresses the concerns raised by the commenter by clarifying the obligations on U.S. broker-dealers to collect information on customers in light of applicable foreign laws. In summary, a registered broker-dealer must collect the information specified by Rule 13h–1(d)(2) about the foreign intermediary's transactions if it is a large trader or an Unidentified Large Trader.[426] The broker-dealer also must collect the information specified by Rule 13h–1(d)(3) relating to Unidentified Large Traders. The Rule does not require a registered broker-dealer to collect the identifying information about the foreign intermediary's client(s).[427] Further, the Commission clarified that the Rule does not require broker-dealers to definitively determine who is, in fact, a large trader.

Finally, the Commission believes that, because the reporting requirements applied to all large traders (both U.S. and foreign) will be minimal, they will not negatively impact the competitiveness of U.S. markets.

B. Capital Formation

New Rule 13h–1 is intended to facilitate the Commission's ability to monitor the impact on the securities markets of securities transactions involving a substantial volume of shares, a large fair market value or a large exercise value, as well as to assist the Commission's enforcement of the federal securities laws. The Rule focuses on the core of the large trader reporting requirements—the entities that control persons that exercise investment discretion and are responsible for trading large amounts of securities. As these entities can represent significant sources of liquidity and overall trading volume, their trading may have a direct impact on the cost of capital of securities issuers. As such, the Commission's ability to promptly obtain information from registered broker-dealers on large trader activity should better enable the Commission to understand the impact of large traders on the securities markets. As the Commission improves its understanding, it should be better positioned to administer and enforce the federal securities laws, thereby promoting the integrity and efficiency of the markets, as well as, ultimately, investor trust and capital formation. For example, the information collected from Rule 13h–1(d) would allow for a more timely reconstruction of trading activity during a market crisis and thus could better position the Commission to craft any regulatory responses.

However, one commenter expressed concern that a potential consequence of a large trader reporting rule might be to deprive U.S. markets of capital that will instead flow to alternative market centers that provide an economically equivalent long position but would not impose any reporting requirement to the extent that foreign traders seek to avoid trading in reportable NMS securities.[428] The consequence could be to deprive U.S. markets of capital, and to possibly create pricing disparities between economically equivalent non-reportable transactions and their analog reportable transactions.[429]

The commenter based its concerns on certain aspects of the Proposed Rule that it believed would impact non-U.S. traders. One concern was that potential non-U.S. traders would have little or no experience in dealing with Commission regulation and may not even realize they are subject to identifying and reporting requirements.[430] Another concern involved how a broker-dealer would be expected to collect information from non-U.S. intermediaries and the impact of privacy laws on the ability to collect information and for large traders to report such information.[431] A third concern involved the practicality of the proposed requirement for large traders to list account numbers on Form 13H.[432]

The Commission is mindful of these comments and believes that the modifications and clarifications in the adopted Rule and discussed in detail above should mitigate these concerns. For example, as adopted, the Rule does not require account numbers to be included on Form 13H, alleviating the commenters' concern about the practicality of non-U.S. traders providing this information. Also as discussed above, the scope of the monitoring requirements has been clarified in the adopted Rule such that the obligations of broker-dealers to collect information from non-U.S. parties is limited to only the non-U.S. entity with whom they transact. Furthermore, in the event, which the Commission believes to be unlikely, that the laws of a large trader's foreign jurisdiction preclude or prohibit the large trader from waiving such restrictions or otherwise voluntarily filing Form 13H with the Commission, then such foreign large traders or representatives of foreign large traders may request an exemption from the Commission pursuant to Section 36 of the Exchange Act [433] and paragraph (g) of the Rule.

Given these mitigating factors, the Commission does not believe that any remaining costs to a non-U.S. trader that trades in an amount sufficient to require identification with the Commission via Form 13H outweigh the considerable benefits of directly accessing U.S. markets for the trading of NMS securities. Moreover, armed with more current and accurate trading information on large traders, the Commission would be able to identify regulatory and potential enforcement issues more quickly. Thus, Rule 13h–1 could help maintain investor trust in the markets, and in turn could add depth and liquidity to the markets and promote capital formation. Further, the Commission believes that the requirements imposed on all large traders, whether U.S. or foreign, are necessary and appropriate, not unduly burdensome, and would be imposed

[425] *See* European Banking Federation and Swiss Bankers Association Letter at 4.

[426] *See* discussion *supra* at Section III.B.3 (explaining when a registered broker-dealer must treat its customer as an Unidentified Large Trader).

[427] The legislative history indicates that the Commission stated that it ''would not impose requirements on broker-dealers to report beneficial ownership information that is not recorded in the normal course of business.'' Senate Report, *supra* note 14, at 42. The Committee specifically noted that many broker-dealers currently maintain no beneficial ownership records of transactions of foreign persons that are carried out through banks, particularly foreign banks, which serve as the record holder of such securities. *See id.* The Committee expected that such beneficial owners would not be assigned LTIDs. *See id.* As discussed above, for all persons (both foreign and domestic), large trader status is triggered by the exercise of investment discretion, not mere beneficial ownership of NMS securities.

[428] *See* European Banking Federation and Swiss Bankers Association Letter at 4–5.

[429] *See id.*

[430] *See id.* at 2.

[431] *See id.* at 3.

[432] *See id.* at 3–4.

[433] 15 U.S.C. 78mm.

uniformly on all affected entities (whether U.S. or non-U.S.).

C. Efficiency

New Rule 13h–1 is designed to achieve the appropriate balance between the Commission's goals of monitoring the impact on the securities markets of securities transactions by large traders and assisting the Commission's enforcement of the federal securities laws, on the one hand, and the effort to minimize the burdens and costs associated with implementing a large trader reporting rule.

The Commission believes that the disclosure by registered broker-dealers to regulators that would be achieved by the large trader reporting rule would promote efficiency by enabling the Commission to go beyond the EBS system, which permits investigations of small samples of securities over a limited period of time, and to instead assist with large-scale investigations and market reconstructions involving numerous stocks during peak trading volume periods. The Rule also would enable the Commission to receive from registered broker-dealers contemporaneous information on large traders' trading activity much more promptly than is currently the case with the EBS system. With a system designed specifically to help the Commission reconstruct and analyze time-sequenced trading data, the Commission could more quickly investigate the nature and causes of unusual market movements and initiate investigations and regulatory actions where warranted.

The Commission acknowledges that the trading activity of certain large traders also promotes market liquidity in secondary securities markets. The Commission also acknowledges that participation in primary market offerings may be affected by changes in expectations about secondary market liquidity and price efficiency. As discussed above, however, the Commission believes that Rule 13h–1 will enhance the Commission's efforts to monitor the markets, in furtherance of promoting efficiency and capital formation and thereby bolstering investor trust.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'')[434] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[435] of the Administrative Procedure Act,[436] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.''[437] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment, which if adopted, would not ''have a significant economic impact on a substantial number of small entities.''[438]

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity when used with reference to a ''person' '' other than an investment company means a person that, on the last day of its most recent fiscal year, had total assets of $5 million or less.[439] In reference to a broker-dealer, small entity means total capital of less than $500,000 and not affiliated with any person that is not a small business or small organization. Pursuant to Section 605(b), the Commission believes that Rule 13h–1 and Form 13H will not have a significant economic impact on a substantial number of small entities.

In the Proposing Release, the Commission requested comment on whether proposed Rule 13h–1 and Form 13H would have a significant economic impact on a substantial number of small entities. While the Commission did receive comment letters that discussed the overall number of respondents that would be affected by the proposed new rule,[440] the Commission did not receive any comments that specifically addressed whether Rule 13h–1 and Form 13H would have a significant economic impact on small entities.

Rule 13h–1 and Form 13H will require self-identification by large traders, which is a term that, as discussed below, would implicate persons and entities with the resources and capital necessary to transact securities in substantial volumes relative to overall market volume in NMS securities.[441] Specifically, the Rule defines ''large trader'' as a person that effects transactions in an ''identifying activity level'' of: (1) 2 million shares, or shares with a fair market value of $20 million, effected during a calendar day; or (2) 20 million shares, or shares with a fair market value of $200 million, effected during a calendar month.

The Commission anticipates that the types of entities that would identify as large traders would include, for example, broker-dealers, financial holding companies, investment advisers, and firms that trade for their own account. The Commission does not believe that any small entities would be engaged in the business of trading, over the course of the applicable measuring period, in a volume that approaches the threshold levels. Because the Rule focuses on parent companies and is designed to identify the largest market participants by volume or fair market value of trading, the Commission believes that a large trader that trades in such substantial volumes would necessarily have considerable assets (beyond the level of a small entity) to be able to conduct such trading.

In addition, Rule 13h–1 will apply to registered broker-dealers that serve large trader customers. The Commission believes that, given the considerable volume in which a large trader as defined in the Rule would effect transactions, particularly in the case of high-frequency traders, registered broker-dealers servicing large trader customers or broker-dealers that are large traders themselves likely would be larger entities, with total capital greater than $500,000, and have systems and capacities capable of handling the trading associated with such accounts. Further, because the trading capacities of large traders will typically necessitate the services of sophisticated broker-dealers likely to be well capitalized entities or affiliated with well capitalized entities, the Commission does not believe that any broker-dealer that maintains large trader customers would be ''not affiliated with any person that is not a small business or small organization'' under Rule 0–10.

For the foregoing reasons, the Commission hereby certifies that, pursuant to 5 U.S.C. 605(b), Rule 13h–1 will not have a significant economic impact on a substantial number of small entities.

VIII. Statutory Authority

Pursuant to the Exchange Act and particularly, Sections 13(h) and 23(a)

[434] 5 U.S.C. 601 *et seq.*

[435] 5 U.S.C. 603(a).

[436] 5 U.S.C. 551 *et seq.*

[437] Although Section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small entity for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10. *See* Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS–305).

[438] *See* 5 U.S.C. 605(b).

[439] 17 CFR 240.0–10(a). Investment companies are small entities when the investment company, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less at the end of its most recent fiscal year. 17 CFR 270.0–10(a).

[440] *See supra* Section IV.C.

[441] *See supra* text accompanying note 61.

thereof, 15 U.S.C. 78m(h) and 78w(a), the Commission adopts new Rule 13h–1 under the Exchange Act that will implement a large trader reporting rule to provide the Commission with a mechanism to identify large traders, and the affiliates, accounts, and transactions of large traders.

IX. Text of the Amendments

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements; Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–ll, and 7201 *et seq.;* 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3); and 7 U.S.C. 2(c)(2)(E), unless otherwise noted.

* * * * *

■ 2. Add § 240.13h–1 to read as follows:

§ 240.13h–l Large trader reporting.

(a) *Definitions.* For purposes of this section:

(1) The term *large trader* means 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 security 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 Commission Form 13H (§ 249.327 of this chapter).

(2) The term *person* has the same meaning as in Section 13(h)(8)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(h)(8)(E)).

(3) The term *control* (including the terms *controlling, controlled by* and *under common control with*) means the possession, direct or indirect, of 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 purposes of this section only, any person that 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% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity.

(4) The term *investment discretion* has the same meaning as in Section 3(a)(35) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(3)(a)(35)). A person's employees who exercise investment discretion within the scope of their employment are deemed to do so on behalf of such person.

(5) The term *NMS security* has the meaning provided for in Section 242.600(b)(46) of this chapter.

(6) The term *transaction* or *transactions* means all transactions in NMS securities, excluding the purchase or sale of such securities pursuant to exercises or assignments of option contracts. For the sole purpose of determining whether a person is a large trader, the following transactions are excluded from this definition:

(i) Any journal or bookkeeping entry made to an account in order to record or memorialize the receipt or delivery of funds or securities pursuant to the settlement of a transaction;

(ii) 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 (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;

(iii) Any transaction that constitutes a gift;

(iv) Any transaction effected by a court appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate;

(v) Any transaction effected pursuant to a court order or judgment;

(vi) Any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(a)(5) of the Internal Revenue Code (26 U.S.C. 1 *et seq.*);

(vii) 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; or

(viii) Any transaction to effect a business combination, including a reclassification, merger, consolidation, or tender offer subject to Section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)); an issuer tender offer or other stock buyback by an issuer; or a stock loan or equity repurchase agreement.

(7) The term *identifying activity level* means: aggregate transactions in NMS securities that are equal to or greater than:

(i) During a calendar day, either two million shares or shares with a fair market value of $20 million; or

(ii) During a calendar month, either twenty million shares or shares with a fair market value of $200 million.

(8) The term *reporting activity level* means:

(i) Each transaction in NMS securities, effected in a single account during a calendar day, that is equal to or greater than 100 shares;

(ii) Any transaction in NMS securities for fewer than 100 shares, effected in a single account during a calendar day, that a registered broker-dealer may deem appropriate; or

(iii) Such other amount that may be established by order of the Commission from time to time.

(9) The term *Unidentified Large Trader* means each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this section that a registered broker-dealer knows or has reason to know is a large trader. For purposes of determining under this section 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.

(b) *Identification requirements for large traders.*

(1) *Form 13H.* Except as provided in paragraph (b)(3) of this section, each large trader shall file electronically Form 13H (17 CFR 249.327) with the Commission, in accordance with the instructions contained therein:

(i) Promptly after first effecting aggregate transactions, or after effecting aggregate transactions subsequent to becoming inactive pursuant to paragraph (b)(3) of this section, equal to or greater than the identifying activity level;

(ii) Within 45 days after the end of each full calendar year; and

(iii) Promptly following the end of a calendar quarter in the event that any of the information contained in a Form 13H filing becomes inaccurate for any reason.

(2) *Disclosure of large trader status.* Each large trader shall disclose to the registered broker-dealers effecting transactions on its behalf its large trader identification number and each account to which it applies. A large trader on Inactive Status pursuant to paragraph (b)(3) of this section must notify broker-dealers promptly after filing for reactivated status with the Commission.

(3) *Filing requirement.*

(i) *Compliance by controlling person.* A large trader shall not be required to separately comply with the requirements of this paragraph (b) if a person who controls the large trader complies with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) of this section applicable to such large trader with respect to all of its accounts.

(ii) *Compliance by controlled person.* A large trader shall not be required to separately comply with the requirements of this paragraph (b) if one or more persons controlled by such large trader collectively comply with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) of this section applicable to such large trader with respect to all of its accounts.

(iii) *Inactive status.* A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level shall become inactive upon filing a Form 13H (17 CFR 249.327) and thereafter shall not be required to file Form 13H or disclose its large trader status unless and until its transactions again are equal to or greater than the identifying activity level. A large trader that has ceased operations may elect to become inactive by filing an amended Form 13H to indicate its terminated status.

(4) *Other information.* Upon request, a large trader must promptly provide additional descriptive or clarifying information that would allow the Commission to further identify the large trader and all accounts through which the large trader effects transactions.

(c) *Aggregation.*

(1) *Transactions.* For the purpose of determining whether a person is a large trader, the following shall apply:

(i) The volume or fair market value of transactions in equity securities and the volume or fair market value of the equity securities underlying transactions in options on equity securities, purchased and sold, shall be aggregated;

(ii) The fair market value of transactions in options on a group or index of equity securities (or based on the value thereof), purchased and sold, shall be aggregated; and

(iii) Under no circumstances shall a person subtract, offset, or net purchase and sale transactions, in equity securities or option contracts, and among or within accounts, when aggregating the volume or fair market value of transactions for purposes of this section.

(2) *Accounts.* Under no circumstances shall a person disaggregate accounts to avoid the identification requirements of this section.

(d) *Recordkeeping requirements for broker and dealers.*

(1) *Generally.* Every registered broker-dealer shall maintain records of all information required under paragraphs (d)(2) and (d)(3) of this section 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, 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 paragraphs (d)(2) and (d)(3) of this section for those transactions.

(2) *Information.* The information required to be maintained for all transactions shall include:

(i) The clearing house number or alpha symbol of the broker or dealer submitting the information and the clearing house numbers or alpha symbols of the entities on the opposite side of the transaction;

(ii) Identifying symbol assigned to the security;

(iii) Date transaction was executed;

(iv) The number of shares or option contracts traded in each specific transaction; whether each transaction was a purchase, sale, or short sale; and, if an option contract, whether the transaction was a call or put option, an opening purchase or sale, a closing purchase or sale, or an exercise or assignment;

(v) Transaction price;

(vi) Account number;

(vii) Identity of the exchange or other market center where the transaction was executed.

(viii) A designation of whether the transaction was effected or caused to be effected for the account of a customer of such registered broker-dealer, or was a proprietary transaction effected or caused to be effected for the account of such broker-dealer;

(ix) If part or all of an account's transactions at the registered broker-dealer have been transferred or otherwise forwarded to one or more accounts at another registered broker-dealer, an identifier for this type of transaction; and if part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise received from one or more other registered broker-dealers, an identifier for this type of transaction;

(x) If part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise received from another account at the reporting broker-dealer, an identifier for this type of transaction; and if part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise forwarded to one or more other accounts at the reporting broker-dealer, an identifier for this type of transaction;

(xi) If a transaction was processed by a depository institution, the identifier assigned to the account by the depository institution;

(xii) The time that the transaction was executed; and

(xiii) The large trader identification number(s) associated with the account, unless the account is for an Unidentified Large Trader.

(3) *Information relating to Unidentified Large Traders.* With respect to transactions effected directly or indirectly by or through the account of an Unidentified Large Trader, the information required to be maintained for all transactions also shall include such Unidentified Large Trader's name, address, date the account was opened, and tax identification number(s).

(4) *Retention.* The records and information required to be made and kept pursuant to the provisions of this section shall be kept for such periods of time as provided in § 240.17a–4(b).

(5) *Availability of information.* The records and information required to be made and kept pursuant to the provisions of this rule shall be available on the morning after the day the transactions were effected (including Saturdays and holidays).

(e) *Reporting requirements for brokers and dealers.* Upon the request of the Commission, every registered broker-dealer who is itself a large trader or carries an account for a large trader or an Unidentified Large Trader shall electronically report to the Commission, using the infrastructure supporting § 240.17a–25, in machine-readable form

and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of this section for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and Unidentified Large Traders, equal to or greater than the reporting activity level. Additionally, 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 shall electronically report using the infrastructure supporting § 240.17a–25, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of this section for such transactions equal to or greater than the reporting activity level. Such reports shall be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.

(f) *Monitoring safe harbor.* For the purposes of this rule, a registered broker-dealer shall be deemed not to know or have reason to know that a person is a large trader if it does not have actual knowledge that a person is a large trader and it establishes policies and procedures reasonably designed to:

(1) Identify persons who have not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this section but whose transactions effected through an account or a group of accounts carried by such broker-dealer or through which such broker-dealer executes transactions, as applicable (and considering account name, tax identification number, or other identifying information available on the books and records of such broker-dealer) equal or exceed the identifying activity level;

(2) Treat any persons identified in paragraph (f)(1) of this section as an Unidentified Large Trader for purposes of this section; and

(3) Inform any person identified in paragraph (f)(1) of this section of its potential obligations under this section.

(g) *Exemptions.* Upon written application or upon its own motion, the Commission may by order exempt, 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 this section to the extent that such exemption is consistent with the purposes of the Securities Exchange Act of 1934 (15 U.S.C. 78a).

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 4. Add § 249.327 to read as follows:

§ 249.327 Form 13H, Information required on large traders pursuant to Section 13(h) of the Securities Exchange Act of 1934 and rules thereunder.

This form shall be used by persons that are large traders required to furnish identifying information to the Commission pursuant to Section 13(h)(1) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(h)(1)] and § 240.13h–1(b) of this chapter.

Note: The text of Form 13H does not, and this amendment will not, appear in the Code of Federal Regulations.

- OMB Number: 3235–0862
- Estimated average burden hours per response: 18

United States Securities and Exchange Commission

FORM 13H

Large Trader Registration

Information Required of Large Traders Pursuant to Section 13(h) of the Securities Exchange Act of 1934 and Rules Thereunder

[ ] INITIAL FILING: Date identifying transactions first effected (mm/dd/yyyy) _____

Voluntary filing? [ ] no [ ] yes
Date of voluntary filing _____

[ ] ANNUAL FILING: Calendar year ending _____

[ ] AMENDED FILING

[ ] INACTIVE STATUS: Date commencing Inactive Status (mm/dd/yyyy) _____

[ ] TERMINATION FILING: Effective date (mm/dd/yyyy) _____

[ ] REACTIVATED STATUS: Date identifying transactions first effected, post-Inactive Status (mm/dd/yyyy) _____

Name of Large Trader Filing This Form

LTID

Taxpayer Identification Number

Business Address of the Large Trader (Street, City, State, Zip, Country)

Mailing Address of the Large Trader (Street, City, State, Zip, Country)

Telephone No ( ) ____–_____
Facsimile No. ( ) ____–_____
Email _____

The Form and the schedules thereto must be submitted by a natural person who is authorized to make this submission on behalf of the large trader.

Name of Authorized Person (First, Middle Initial, Last)

Title of Authorized Person

Relationship to Large Trader

Business Address of Authorized Person (Street, City, State, Zip, Country)

Authorized Person's Telephone No. ( ) _____–_____
Facsimile No. ( ) _____–_____
Authorized Person's Email

ATTENTION

Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a). Intentional misstatements or omissions of facts may result in civil fines and other sanctions pursuant to the Securities Exchange Act of 1934.

The authorized person signing this form represents that all information contained in the form, schedules, and continuation sheets is true, correct, and complete. It is understood that all information whether contained in the form, schedules, or continuation sheets, is considered an integral part of this form and that any amendment represents that all unamended information remains true, correct, and complete.

Signature of Person Authorized to Submit this Form

FORM 13H

INFORMATION REQUIRED OF ALL LARGE TRADERS

ITEM 1. BUSINESSES OF THE LARGE TRADER (check as many as applicable)

(a) Businesses engaged in by the large trader and any of the large trader's affiliates (check as many as applicable)

[ ] Broker or Dealer
[ ] Government Securities Broker or Dealer
[ ] Municipal Securities Broker or Dealer

[ ] Investment Adviser
  [ ] to Registered Investment Companies
  [ ] to Hedge Funds or other Funds not registered under the Investment Company Act
[ ] Futures Commission Merchant
[ ] Commodity Pool Operator
[ ] Bank Holding Company
[ ] Non-Bank Holding Company
[ ] Bank
[ ] Pension Trustee
[ ] Non-Pension Trustee
[ ] Insurance Company
[ ] Other (specify) _____

(b) Describe the nature of the business of the large trader including a description for each Securities Affiliate:

_____
_____
_____
_____

ITEM 2. SECURITIES AND EXCHANGE COMMISSION FILINGS

Does the large trader or any of its Securities Affiliates file any other forms with the Commission?

[ ] Yes [ ] No

If yes, specify the entity and the forms filed:

Entity	Form(s) filed	CIK No.

ITEM 3. CFTC REGISTRATION AND FOREIGN REGULATORS

(a) Is the large trader or any of its affiliates registered with the Commodity Futures Trading Commission in any capacity, including as a ''registered trader'' pursuant to sections 4i and 9 of the Commodity Exchange Act?

[ ] Yes [ ] No

If yes, identify each entity and specify the registration number:

Entity	Registration No.

(b) Is the large trader or any of its Securities Affiliates regulated by a foreign regulator?

[ ] Yes [ ] No

If yes, identify each entity and its primary foreign regulator(s):

Entity	Primary foreign regulator

ITEM 4. ORGANIZATION INFORMATION

(a) Attach an Organizational Chart that identifies the large trader, its parent company (if applicable), all Securities Affiliates, and all entities identified in Item 3(a).

(b) Provide the following information on all Securities Affiliates and all entities identified in Item 3(a):

Entity	MPID(s)	Description of business	Relationship to the large trader

(c) If any affiliates file separately, identify each entity:

Entity	LTID	Suffix (if any)

(d) If any affiliates have been assigned an LTID suffix, identify such entities and their corresponding suffixes:

Entity	Suffix

ITEM 5. GOVERNANCE OF THE LARGE TRADER

(a) STATUS OF THE LARGE TRADER (check as many as apply)

[ ] Individual
[ ] Trustee
[ ] Limited Liability Company
[ ] Partnership
[ ] Limited Partnership
[ ] Corporation
[ ] Other (specify) _____

(b) Complete the following for each general partner, and in the case of limited partnerships, each limited partner that is the owner of more than a 10 percent financial interest in the accounts of the large trader:

Name	Status (check one for each)
_____	[ ] General Partner [ ] Limited Partner.
_____	[ ] General Partner [ ] Limited Partner.
_____	[ ] General Partner [ ] Limited Partner.
_____	[ ] General Partner [ ] Limited Partner.
_____	[ ] General Partner [ ] Limited Partner.
_____	[ ] General Partner [ ] Limited Partner.
_____	[ ] General Partner [ ] Limited Partner.

(c) Complete the following for each executive officer, director, or trustee of a large trader corporation or trustee:

Name	Status (check one for each)
_____	[ ] Executive Officer [ ] Director [ ] Trustee.
_____	[ ] Executive Officer [ ] Director [ ] Trustee.
_____	[ ] Executive Officer [ ] Director [ ] Trustee.
_____	[ ] Executive Officer [ ] Director [ ] Trustee.
_____	[ ] Executive Officer [ ] Director [ ] Trustee.
_____	[ ] Executive Officer [ ] Director [ ] Trustee.
_____	[ ] Executive Officer [ ] Director [ ] Trustee.

(d) Jurisdiction in which the large trader entity is incorporated or organized:

_____

(state and country)

ITEM 6. LIST OF BROKER-DEALERS AT WHICH THE LARGE TRADER OR ITS SECURITIES AFFILIATES HAS AN ACCOUNT

Identify each broker-dealer at which the large trader or any of its Securities Affiliates has an account and the types of services provided.

Name of Broker-Dealer	
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.
________	[ ] Prime Broker [ ] Executing Broker [ ] Clearing Broker.

INSTRUCTIONS FOR FORM 13H

Submission of the Form. All submissions on Form 13H must be filed electronically through the Commission's Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system. For more information on filing through EDGAR, including instructions on how to obtain access to and file electronically through EDGAR, see the EDGAR Filer Manual (available on the Commission's website at: *http://www.sec.gov/info/edgar.shtml*).

Definitions. The term ''*Securities Affiliate*'' means an affiliate of the large trader that exercises investment discretion over NMS securities.

The term ''*affiliate*'' means any person that directly or indirectly controls, is under common control with, or is controlled by the large trader.

The term ''*bank*'' means a national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank.

The term ''*executive officer*'' means ''policy-making officer'' and otherwise is interpreted in accordance with Rule 16a–1(f) under the Exchange Act.

Type of Filing. Indicate the type of Form 13H filing by checking the appropriate box at the top of the cover page to Form 13H. All filings must include a valid digital signature.

If the filing is an ''Initial Filing,'' indicate whether it is a voluntary filing. Voluntary filings are submitted regardless of whether the aggregate number of transactions effected reached the identifying activity level. For voluntary filings, the large trader must input the date on which it submits its voluntary filing. For non-voluntary filings, the large trader must input the first date on which the aggregate number of transactions effected reached the identifying activity level. A non-voluntary ''Initial Filing'' must be submitted promptly after first effecting an aggregate number of transactions equal to or greater than the identifying activity level.

If the filing is an ''Annual Filing,'' input the applicable calendar year.

An ''Amended Filing'' must be filed promptly following the end of the calendar quarter in which any of the information contained in a Form 13H filing becomes inaccurate for any reason. A large trader must file an ''Amended Filing'' when, for example, it changes its name, business address, organization type (*e.g.,* the large trader partnership reincorporates as a limited liability company), or regulatory status (*e.g.,* a hedge fund registers under the Investment Company Act), or when its organizational chart changes in a manner relevant under Item 4(a) (*e.g.,* it adds or removes a Securities Affiliate).

If the filing is for ''Inactive Status,'' input the date that the large trader qualified for Inactive Status. A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an aggregate amount equal to or greater than the identifying activity level may file for Inactive Status. A large trader shall become inactive, and exempt from the filing and self-identification requirements upon filing for Inactive Status until the identifying activity level is reached again.

If the filing is for ''Reactivated Status,'' indicate the date that the aggregate number of transactions again reached or exceeded the identifying activity level. A filing for ''Reactivated Status'' must be submitted promptly after effecting an aggregate number of transactions—subsequent to filing for ''Inactive Status''—equal to or greater than the identifying activity level. In addition, a person may voluntarily elect to file for Reactivated Status prior to effecting aggregate transactions that are equal to or greater than the identifying activity threshold. For such voluntarily filings for ''Reactivated Status,'' the date of the voluntarily filing should be entered rather than the date that the aggregate number of transactions again reached or exceeded the identifying activity level.

If the filing is a ''Termination Filing,'' indicate the date on which the large trader ceased operation. For example, when one large trader merges into another large trader, resulting in only one surviving entity, the non-surviving large trader should specify the effective date of the merger in its Termination Filing.

The Form also requires that a large trader input its Taxpayer Identification Number. The Form further requires a large trader to input its business and mailing addresses. If those addresses are the same, for the mailing address field, the large trader may either input its address again or input ''same.''

The Form must be filed by a natural person who is authorized to submit it on behalf of the large trader. The Commission may require the large trader to provide descriptive or clarifying information about the information disclosed in the Form 13H, and will contact the Authorized Person to provide such information.

To amend the name, phone number, and email address of the large trader, the large trader must modify its EDGAR profile. Thereafter, changes will automatically be reflected in the Form 13H.

Item 1. Businesses of the Large Trader. Item 1 of the Form requires the large trader to specify, from among the enumerated choices, the types of business engaged in by the large trader, by checking as many as are applicable. Select ''Other'' to indicate a financial entity not included in any of the enumerated categories and enter a short description for each such entity. In addition, select ''Other'' if the large trader is an individual and input his or her occupation.

A large trader also is required, for itself and each of its Securities Affiliates, to describe the nature of its operations, including a general description of its trading strategies. As an example, the following would be an appropriate description: ''Registered market-maker on [SRO], authorized participant for a number of ETFs based on foreign indices, and proprietary trading focusing on statistical arbitrage.''

Item 2. Securities and Exchange Commission Filings. The large trader must indicate whether it or any of its Securities Affiliates files forms with the Commission. If it checks ''Yes,'' the large trader must input the names of the filing entities and, for each of them, input the form(s) they file and the applicable CIK number.

Item 3. CFTC Registration and Foreign Regulators.

Item 3(a) requires the large trader to indicate whether it or any of its affiliates

is registered with the Commodity Futures Trading Commission in any capacity, including as a ''registered trader'' pursuant to Sections 4i and 9 of the Commodity Exchange Act. If it checks ''Yes,'' the large trader must input the name of each such entity and the registration number for each such entity.

Item 3(b) requires the large trader to indicate whether it or any of its Securities Affiliates is regulated by a foreign regulator. Unlike Item 3(a), Item 3(b) applies only to the large trader and its Securities Affiliates. If it checks ''Yes,'' the large trader must input the name of each such regulated entity and its primary foreign regulator.

Item 4. Organization Information.

To comply with Item 4(a), the large trader must attach an organizational chart that depicts the organization of the large trader. At a minimum, the chart must include the large trader, its parent company (if applicable), all Securities Affiliates, and all entities identified in Item 3(a) of the Form (if any) (collectively, ''Item 4 Affiliates'').

Item 4(b) requires that a large trader provide information about the Item 4 Affiliates. Specifically, the large trader must input the names of Item 4 Affiliates and, for each one of them, also input the following information: MPID(s); a brief description of its business, and its relationship to the large trader.

Item 4(c) requires that a large trader identify all affiliates that file a separate Form 13H. Those affiliates will have a different LTID.

Item 4(d) permits a large trader to assign LTID suffixes to one or more of its Securities Affiliates. A suffix should have no more than three characters, all of which must be numbers; no letters or special characters may be used. The same suffix may not be assigned to more than one affiliate using the same LTID.

Item 5. Governance of the Large Trader.

Item 5 captures basic information about the large trader organization. All terms have the meanings generally ascribed to them in the United States. If a foreign organization type has no comparable corporate form, check ''Other'' and input the organization type. A large trader who is a natural person must check ''Individual.''

Item 6. List of Broker-Dealers at Which the Large Trader or Its Securities Affiliates Has an Account.

Item 6 requires that a large trader identify each broker-dealer at which the large trader and any Securities Affiliate has an account. Additionally, for each such broker-dealer, the large trader must indicate the type(s) of services provided. The large trader must check as many of the following that apply: Prime Broker; Executing Broker; Clearing Broker.

Paperwork Reduction Act Disclosures. This collection of information has been reviewed by OMB in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Responses to this collection are mandatory, pursuant to Section 13(h) of the Exchange Act and Rule 13h–1 thereunder. The Commission will treat as confidential the information collected pursuant to this Form in a manner consistent with Section 13(h)(7) of the Exchange Act, which sets forth a few limited exceptions.

The Commission will use the information collected pursuant to this Form 13H to identify significant market participants, *i.e.,* large traders. Form 13H will allow the Commission to collect background information about large traders, which will contribute to the agency's ability to conduct investigations and enforcement matters. The Commission estimates that the average burden to respond to the Form 13H will be 18 hours. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

By the Commission.

Dated: July 27, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19419 Filed 8–2–11; 8:45 am]

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