European Banking Federation

SwissBanking

Via Electronic Filing

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090

Basel, 21 October 2010

The Proposed Large Trader Reporting System
Exchange Act Release No. 61,908; File No. S7-10-10

Dear Secretary Murphy

The European Banking Federation ("EBF")[1] and the Swiss Bankers Association ("SBA")[2] welcome the opportunity to comment on the proposal by the Securities and Exchange Commission (the "Commission") to establish a large trader reporting system (the "Proposal").[3] This Proposal is the most recent proposal by the Commission based on authority granted by Congress in the Market Reform Act of 1990 to enhance the ability of the Commission to identify and collect information regarding large traders.

Given the recent volatility in securities markets around the world, notably including the U.S. "flash crash" of May 6, 2010, we appreciate the Commission's desire to obtain data regarding trading activities significantly affecting U.S. and non-U.S. securities markets. We write respectfully to raise concerns, however, regarding aspects of the Proposal that may raise issues for many securities market participants located outside of the United States.

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[1] Set up in 1960, the European Banking Federation is the voice of the European banking sector (European Union & European Free Trade Association countries). The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions. The EBF advocates free and fair competition in the EU and world markets and supports the banks' efforts to increase their efficiency and competitiveness. For more information, please visit http://www.ebf-fbe.eu/.

[2] The SBA was founded in 1912 as a trade association for banking organizations in Switzerland, and today has nearly 360 institutional members and approximately 16,340 individual members from the banking and securities sectors. The SBA, in collaboration with the Swiss Financial Market Supervisory Authority ("FINMA"), also performs certain self-regulatory functions. For more information, please visit http://www.swissbanking.org/en/home.htm.

[3] Large Trader Reporting System, Exchange Act Rel. No. 61,908, 75 Fed. Reg. 21,456 (April 23, 2010) (the "Proposing Release").

Non-U.S. Traders with no Prior Experience with the Commission

The Commission has proposed to broadly define "large trader" to include "any person that … exercises investment discretion … and effects transactions for the purchase or sale of any NMS security … by or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level."[4] This definition is intended to apply extraterritorially and will capture traders organized or domiciled outside the United States (each, a "Non-U.S. Trader") that have little or no experience in dealing with Commission regulation and may not even realize they are subject to identifying and reporting requirements.

The Non-U.S. Traders will include, among other types, high net worth individuals, financial institutions, and institutional traders such as retirement plans or advisers to non-U.S. pooled investment vehicles.[5] Many of these Non-U.S. Traders will access the U.S. securities markets only indirectly, by placing trades in NMS securities with financial institutions in their home (non-U.S.) jurisdiction. These non-U.S. financial institutions will likely not be registered in the United States as brokers or dealers but instead will route orders for execution to or through U.S.-registered broker-dealers. In an extreme example, a non-U.S. investment adviser with no U.S. personnel or U.S. operations, and that makes no use of the means or instrumentalities of interstate commerce in providing discretionary advice to a non-U.S. fund that itself has no U.S. person investors, may nonetheless be subject to the Proposal, even if it places all trades in NMS securities with a non-U.S. financial institution. The EBF and the SBA ask that the Commission consider how difficult it would be for U.S. large traders to comply with similar requirements imposed on them remotely by a non-U.S. regulator with whom they have no prior experience.

The Commission may be better served by reaching out to non-U.S. regulators with oversight responsibilities for local financial intermediaries and who may already collect similar types of information from those intermediaries. We note that Exchange Act Section 13(h)(5)(c) directs the Commission to "take into account … the relationship between the United States and international securities markets." We believe that this language provides a sufficient statutory basis for the Commission to seek, where applicable treaties permit, information from non-U.S. regulators rather than imposing a reporting requirement potentially duplicative of that used in a Non-U.S. Trader's home jurisdiction. In addition we think that internationally, the Commission would be well advised in using the international fora to which it is a member, most notably in this regard the International Organisation of Securities Commissions (IOSCO).

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4 Proposed Rule 13h-1(a)(1).

5 As a technical matter, the organizational structure of certain non-U.S. funds poses questions regarding the "investment discretion" element of the proposed definition of "large trader." For example, many European funds have both an "investment manager" and an "investment adviser" (or subadviser) with the investment manager often retaining ultimate discretion over the hiring and firing of the investment adviser, and thus likely retaining "investment discretion" for purposes of Section 3(a)(35) of the Securities Exchange Act of 1934 (the "Exchange Act"), which is incorporated by reference into proposed Rule 13h-1(a)(4). Such would almost certainly be the case with respect to "fonds commun de placement" (or FCPs), which have no separate legal existence from their investment managers. Moreover, some European funds might themselves be deemed to be exercising investment discretion over the assets held in the fund, depending upon the degree of involvement by the fund's board. In these cases, it is entirely possible that the investment manager, the investment adviser, and the fund itself would all be "large traders," potentially leading to needlessly duplicative regulatory burdens, particularly in situations where none of the entities "controls" any of the others, as that term is defined in proposed Rule 13h-1(a)(3).

Alternatively, we believe that large trade information can be more accurately and efficiently provided by market participants that have other regulatory contacts with the Commission (or the United States in general). In particular, the EBF and the SBA believe that registered broker-dealers are better positioned to monitor, maintain records of, and file reports regarding the activities of large traders executing trades with or through such broker-dealers. Indeed, in many respects, the Commission appears to share this view in light of the consolidated audit trail proposal, which was proposed by the Commission not long after the Proposal.[6] Thus, we believe that the Proposal should be modified to impose requirements solely on registered broker-dealers (with the further modifications and concerns noted below addressed).

The Proposal Does Not Adequately Address Non-U.S. Privacy Laws

Several provisions of the Proposal present significant issues under privacy laws and blocking statutes in place in Europe and elsewhere. Under proposed Rule 13h-1(d)(1), a registered broker-dealer is required to maintain information (including identification information such as name, address and tax identification number) for “Unidentified Large Traders” for which the broker-dealer effects transactions directly or indirectly. The EBF and the SBA understand this to require broker-dealers to obtain and maintain identifying information for Non-U.S. Traders that place orders only through non-U.S. intermediaries if those orders are eventually routed through or executed by the registered broker-dealer.

It is unclear from the Proposal how the broker-dealer would be expected to collect that information—the non-U.S. intermediary may be forbidden under local law from disclosing information regarding its Non-U.S. Trader customers let alone information about indirect Non-U.S. Traders (i.e., persons for whom the intermediary’s direct client acts with investment discretion). As such, registered broker-dealers may effectively be forced to cease providing services to non-U.S. intermediaries acting on behalf of unidentified Non-U.S. Traders in order to avoid violating their recordkeeping requirements under the proposed rule.

Similar issues arise under proposed Rule 13h-1(b)(4), which requires large traders to “promptly provide additional descriptive or clarifying information … to further identify the large trader and all accounts through which the large trader effects transactions.” The ability of Non-U.S. Traders to provide information regarding accounts over which they exercise investment discretion may be severely limited under local privacy laws. These laws should be acknowledged, and the Commission should specifically permit filers of Form 13H to omit blocked information without consequence to large traders or the broker-dealers through which such transactions are effected.

Practical Considerations Raised by Non-U.S. Intermediaries

Even if local law permits, Non-U.S. Traders that attempt to file Form 13H may be unable to complete the form completely and accurately for practical reasons. For example, Schedule 6 to Form 13H requires large traders to provide a variety of information regarding the accounts over which they exercise investment discretion. Among the information required, large traders must identify the broker-dealers with whom the

[6] Consolidated Audit Trail, Exchange Act Rel. No. 62,174; 75 Fed. Reg. 32,556 (June 8, 2010). The consolidated audit trail proposal would, among other things, place much of the reporting burden on registered broker-dealers for information substantially similar to that called for under the Proposal.

accounts are held, the broker-dealer's account number and the account name. As the EBF and the SBA interpret the schedule, the information must be provided with respect to the registered broker-dealer that ultimately effects the transactions, not with respect to any intermediary "broker." Because many Non-U.S. Traders do not have a direct relationship with a registered broker-dealer, their ability to provide this information regarding the ultimate broker may be incomplete at best and may result in inadvertently misleading information to the Commission.

For purposes of executing trades in NMS securities, non-U.S. intermediaries may maintain accounts with multiple registered broker-dealers. Customers of non-U.S. intermediaries may be bunched or may be broken into sub-orders for execution of block trades through various pricing mechanisms (such as VWAP), thus obscuring from the perspective of a Non-U.S. Trader the clear identity of the registered broker-dealer or broker-dealers that ultimately effect the resulting transaction or transactions. As such, a non-U.S. Trader could have to identify each of the non-U.S. intermediary's U.S. broker-dealer accounts.[7] This would result in a great deal of overlapping information of questionable usefulness to the Commission, with many Non-U.S. Traders identifying the same omnibus accounts of non-U.S. intermediaries held with registered broker-dealers.

Unintended Shift Away from U.S. Securities

In light of the legal and regulatory burden that the Proposal would impose, the Proposal may incentivize Non-U.S. Traders (and domestic market participants as well) to shift from trading in NMS securities to engaging in transactions that provide an economically equivalent long position but would not impose any reporting requirement. Indeed, the Commission specifically noted this as a concern.[8] For example, many NMS stocks are already available in the form of European Depositary Receipts or Global Depositary Receipts available on an over the counter basis or through listing on European stock exchanges, and many European exchange-traded funds also contain NMS security underliers. Alternatively, exposure could be obtained by using single-stock futures or single-stock total return swaps.[9] The EBF and the SBA believe that the potential "costs" associated with using these alternative investments (e.g., the payments due to a swap counterparty) will likely be lower than the costs associated with full compliance with the Proposal in the normal course (e.g., acquiring an NMS security in amount above the triggering threshold), creating a clear incentive for would-be large traders to change their conduct.

The EBF and the SBA do not believe that the Commission has an interest in spurring a shift to non-reportable non-NMS security transactions, which may have the

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[7] For example, if a Non-U.S. Trader uses ten non-U.S. intermediaries, each of which executes trades through ten registered broker-dealers, the Non-U.S. Trader would be required to report information for 100 accounts, notwithstanding that its transactions may make up only a minute fraction of the total activity in each such account.

[8] Proposing Release at 21,473 ("Would the large trader reporting requirements influence the day-to-day decisions made by large traders in any substantive way? … For example, might traders choose in some cases to avoid trading in equities or options in favor of alternative vehicles such as OTC derivatives to avoid reporting? … Might they trade in foreign jurisdictions?")

[9] With respect to total return swaps, increased usage may result in additional transaction reporting by swap counterparties such as broker-dealers, who may purchase the underlying NMS security in order to hedge their exposure to the swap participant. Such additional transaction reporting my further obfuscate the Commission's ability to effectively understand where the ultimate market actors lie—by taking cognizance of the counterparty's hedge in the open market, the Commission will only perceive the *reaction*, but not the action that precipitated it.

effect of not only diminishing the value of the data the Commission does receive but also depriving the U.S. markets of capital that will instead flow through London or other European market centers. We recognize that the Commission is constrained by Exchange Act Section 13(h) in defining the types of activity that would cause a person to be a "large trader," and may not be able to reach the types of economically equivalent positions noted above. Nevertheless, the Commission should carefully consider whether the Proposal will unintentionally shift investor behavior in an undesirable way and may also create pricing disparities between economically equivalent non-reportable transactions and their analog reportable transactions inviting unwarranted arbitrage activities.

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The EBF and the SBA commend the Commission for taking a proactive role in seeking the information that it believes to be needed to better understand the securities markets as they exist today. We continue to believe, however, that effective regulation must take into account the legal barriers and operational difficulties faced by regulated parties to allow for smooth functioning of these markets not only in the United States but throughout the world. We appreciate the opportunity to provide our views on these issues and would be pleased to discuss these issues further. If you have any questions or comments, please do not hesitate to contact us (heinrich.siegmann@sba.ch) with any questions regarding our comments.

Sincerely,

Guido Ravoet
Secretary General
European Banking Federation

Claude-Alain Margelisch
Chief Executive Officer
Swiss Bankers Association

cc: The Honorable Mary L. Shapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
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