



Mr. David S. Shillman
Associate Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

March 26, 2012

Re: Request for Relief from SEC Rule 13h-1 for Certain Capital Markets Offerings

Dear Mr. Shillman,

The Securities Industry and Financial Markets Association (“SIFMA”)¹ is submitting this letter to request that the Securities and Exchange Commission (the “Commission”) grant an exemption from the final rule on large trader reporting² (“Rule 13h-1”) for certain capital markets transactions that may trigger large trader registration, but do not capture the most active market participants and those that conduct a large trader business, as intended by the rule.

In adopting Rule 13h-1, the Commission Staff noted that the rule was designed to be an “efficient and effective mechanism for gathering data on the *most active market participants*” (emphasis added) and “to allow the Commission to gather information about the primary institutions that conduct a large trading business.” The Staff excluded certain transactions, such as offerings by an issuer, other than those effected through the facilities of

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

² Large Trader Reporting, Rel. No. 34-64976 (76 FR 46,960) (Aug 3, 2011), *available at* <http://www.sec.gov/rules/final/2011/34-64976fr.pdf>.

a national securities exchange,³ from the calculation of a trader's identifying activity level. These exclusions were designed to exclude certain small and otherwise infrequent traders from the definition of a large trader and were provided on the basis that they are "not effected with an intent that is commonly associated with the arm's length trading of securities in the secondary market."

SIFMA's concern is that the rule is not limited to "the most active market participants" or persons that conduct a "large trading business" or exercise any investment discretion at all. A single transaction can trigger a registration requirement, including:

- an offering by an issuer of at least 2 million shares or \$20 million "through the facilities of a national securities exchange," which would include not only "dribble out" programs but offerings "crossed" on a national securities exchange; and
- sales of at least 2 million shares or \$20 million by a selling shareholder, such as sales by management in connection with an initial public offering ("IPO") or in a registered secondary offering.

While Inactive Status is available for large traders whose trading activity reaches the identifying activity level infrequently, it only permits the suspension of filings after a year and does not address the requirement to file an initial Form 13H. The requisite filing requirement requires a significant amount of information and imposes an unnecessary burden on parties that appear to be outside the intent of the rule.

We believe that the Commission's stated goals of creating an efficient and effective mechanism for gathering data about the most active market participants and about the primary institutions that conduct a large trading business would still be met if clause (a)(6)(ii) of Rule 13h-1, which excludes certain transactions from the definition of "transaction" contemplated by the rule, were broadened to include:

- offerings of securities effected through the facilities of a national securities exchange; and
- sales by employees (whether current or former employees of the issuer), of securities acquired in connection with their employment, into initial public offerings and in registered secondary offerings.

³ Rule 13h-1(a)(6)(ii) excludes from the definition of "transaction" 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, other than an offering of securities effected through the facilities of a national securities exchange.

Offerings effected through the facilities of a national securities exchange

Although Rule 13h-1 excludes the vast majority of primary offerings, there are certain offerings that are effected through the facilities of a national securities exchange and therefore would not be excluded. Whether or not part of a *registered* offering is effected on or through the facilities of a national securities exchange should not alter the fact that registered offerings by issuers are distinguishable from ordinary secondary market trading activity that is the focus of Rule 13h-1.

“Dribble out” programs. A dribble out program enables an issuer to offer and sell its equity securities through one or more registered broker-dealers in incremental registered transactions that are effected over a period of time, which may last from a few weeks to several months, at the prevailing market prices. These programs facilitate capital formation for issuers, particularly during periods of high market volatility, by avoiding many of the risks of large underwritten offerings. Similar to a registered initial offering that is not effected through the facilities of a national securities exchange, dribble out programs involve prospectus supplements, comfort letters, opinions of counsel, due diligence, officers’ certificates, and filings with the SEC. These characteristics distinguish dribble out programs from arm’s length trades in the secondary market and liken dribble out programs to ordinary primary offerings. However, unlike ordinary primary offerings, dribble out transactions typically are effected pursuant to the facilities of a national securities exchange.

Dribble out programs occur with regularity and could potentially require many issuers that are not the most active market participants and are not conducting a large trading business to register with the Commission as large traders under Rule 13h-1.

Offerings “crossed” on a national securities exchange. Purely for ease of settlement, all or part of an offering may be “crossed” on a national securities exchange. The manner of settlement, however, does not change the character of the offering or make it any less distinguishable from ordinary secondary market trading activity.

Selling shareholder employees

Sales by employees of securities obtained in connection with their employment into an IPO or in a registered secondary offering are distinguishable from ordinary secondary market trading activity and occur only once or with minimal frequency. However, because clause (a)(6)(ii) extends only to sales by issuers and underwriters, selling shareholder employees may be required to register as large traders as a result of a single offering.

Sales by employees into an initial public offering. In an IPO, it is common for pre-IPO shareholder employees to offer shares obtained with respect to their employment in connection with the IPO. The selling shareholders’ shares are offered with the company’s shares as part of a single offering under the company’s prospectus, and the underwriting agreement for the transaction is among the issuer, the selling shareholders, and the

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underwriters. However, because clause (a)(6)(ii) is limited to sales by issuers and underwriters, and does not extend to selling shareholders, such selling shareholders could be required to register as large traders for their participation in the IPO. In any given IPO there could be tens or hundreds of such selling stockholders that may be required to register solely on the basis of the sale of their shares in the IPO.

Sales by employees in a registered secondary offering. A shareholder that is or was formerly an employee of an issuer may have accumulated a large amount of the issuer's stock in connection with such employment and may seek to sell large blocks of their shares through registered secondary offerings. These shares are sold by underwriters and utilize the issuer's registration statement pursuant to a registration rights agreement. Because selling shareholders cannot take advantage of the exclusion in clause (a)(6)(ii), they will be required to register as large traders, if the offering reaches the identifying activity level, as a result of this activity.

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We respectfully request that the Commission provide relief from the requirements of Rule 13h-1 for the capital markets transactions described above. We believe such an exemption would not impact the Commission's stated goals of creating an efficient and effective mechanism for gathering data about the most active market participants and about the primary institutions that conduct a large trading business.

If you have any comments or questions, please do not hesitate to contact me at SDavy@sifma.org or (212) 313-1000.

Respectfully submitted,



Sean Davy
Managing Director
SIFMA

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Robert W. Cook, Director, Division of Trading and Markets
Richard R. Holley, Assistant Director, Division of Trading and Markets
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