17 CFR Part 249

[Release No. 34-22038]

Requests for Confidential Treatment Filed by Institutional Investment Managers

AGENCY: Securities and Exchange Commission.

ACTION: Adoption of amendments to instructions to form.

SUMMARY: The Commission is adopting amendments to the instructions to the form that prescribes the reporting requirements for institutional investment managers exercising investment discretion over accounts having, in the aggregate, more than $100,000,000 in exchange-traded or NASDAQ-quoted securities. The amendments simplify the procedures for requesting confidential treatment of certain risk arbitrage positions reported on the form and limit the time for which confidential treatment of commercial information may be requested.

DATE: The amendments will be effective June 24, 1985.

FOR FURTHER INFORMATION CONTACT: For questions relating specifically to the subject of this release, contact Susan P. Hart, Esq., Office of Disclosure Policy and Adviser Regulation, (202) 272-2098; for questions relating generally to reporting requirements for institutional investment managers under Section 13(f) of the Securities Exchange Act of 1934 and rules thereunder, contact Alice R. Latimer, Technical Information Specialist, Office of Chief Counsel, (202) 272-2038, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is announcing the adoption of amendments to General Instruction D to Form 13F [17 CFR 249.325] under Section 13(f) of the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.* as amended by Pub. L. No. 94-29 (June 4, 1975)] ("the Exchange Act"), that simplify procedures for requesting confidential treatment of certain arbitrage information filed on the form and place time limitations on requests for confidential treatment of all commercial information. Under the revised procedures, the Commission will grant confidential treatment for a period not exceeding one year to information about security holdings which are open risk arbitrage positions if the reporting manager represents in writing at the time report is filed that: (1) The security holding represents a risk arbitrage position that is open on the last day of the calendar quarter for which a report is filed; and (2) the reporting manager has a reasonable belief as of the calendar quarter end that it may not close the entire position on or before the date on which the report is required to be filed with the Commission. In addition, the amendments require managers requesting confidential treatment for any commercial information, including open risk arbitrage positions, to limit their requests to a period of one year or less. The amendments balance the public disclosure concerns of Section 13(f) with the needs of institutional investment managers to protect certain investment strategies and holdings from public disclosure under the standards established by the statute and will improve the Commission's overall administration of the Section 13(f) institutional disclosure program.

Discussion

In December, 1984, the Commission proposed amendments to General Instruction D to Form 13F under the Exchange Act that were published in Securities Exchange Act Release No. 21539 (December 5, 1984).[1] The purpose of the proposal was to simplify the procedures for requesting confidential treatment of information about open risk arbitrage positions and to limit the amount of time for which confidential treatment of commercial information required by Form 13F could be requested. Eight commentators, including the Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance, broker-dealers and a trade association, commented on the proposal. Six commentators generally supported the proposal while two questioned the basis for granting confidential treatment to risk arbitrage information. After considering the comments received, the Commission has decided to adopt the proposed amendments to General Instruction D incorporating certain changes suggested by commentators. These changes are discussed briefly below.

I. Requests for Confidential Treatment of Open Risk Arbitrage Positions

As proposed, the amendment to paragraph 2(f) of General Instruction D required managers that request confidential treatment for information about open risk arbitrage positions to provide two good faith representations. As set forth in the proposal, these representations were, first, that the security holding represents a risk abritrage position that is open on the last day of the calendar quarter for which Form 13F is being filed; and, second, that the reporting manager has no present intention to close the position on or before the date the report is required to be filed with the Commission. The proposal provided that, if these representations were made, confidential treatment would be granted automatically for a period of one year.

The Commission requested specific comment on two aspects of the proposed amendment to paragraph 2(f). Since section 13(f) of the Exchange Act provides that commercial information can be granted confidential treatment only in accordance with the Freedom of Information Act ("FOIA"),[2] the release requested specific comment on the Commission's authority to grant confidential treatment to a class of holdings, in this case, open risk arbitrage positions. Comment was also requested on the appropriateness of one year as the initial period for which confidential treatment would be granted. Only one commentator responded to both of these requests and generally supported both aspects of the proposal. However, this commentator also suggested changes to one of the required representations and to the procedures for requesting an extension of the initial grant of confidential treatment.

With respect to the second good faith representation (*i.e.*, that the reporting manager has no present intention to close the open risk arbitrage position on or before the date Form 13F is required to be filed with the Commission), the commentator stated that the representation should be changed to specify that the manager does not intend to close the position in its entirety by the reporting date. Otherwise, the commentator argued, managers might be precluded from using the new procedures to request confidential treatment for positions that would be partially liquidated by the filing date. The commentator asserted that disclosure of a partially liquidated position could have a detrimental impact on the manager's ability to close out the remaining portion of that position.

The Commission has considered this suggestion and modified the second representation in two ways. This

[1] 49 FR 48318 (December 12, 1984).

[2] 5 U.S.C. 552.

representation now provides that: "the reporting manager has a reasonable belief as of calendar quarter end that it may not close the entire position on or before the date the report is required to be filed with the Commission." The word "entire" has been added to make it clear that only positions that are to be completely liquidated are excluded. In addition, the Commission has changed the requirement that the manager has no "present intention" to close the risk abritrage position to a requirement that the manager has "a reasonable belief that it [the manager] may not close the entire position." This change is intended to cover the situation where a manager has a present intention to close the position before the filing date, but believes, due to unfavorable market conditions or other adverse circumstances, that it may not be practicable to accomplish this objective.[3] This representation should reflect the manager's belief as of the end of the calendar quarter for which the report is submitted.

The commentator suggested that the procedures for requesting an extension of the initial period for which confidential treatment had been granted to risk arbitrage positions should be modified to require managers making such requests to provide only a statement reaffirming the original representations required in General Instruction D 2(f). The commentator argued that requiring managers to supply full factual support when requesting an extension serves no legitimate regulatory objective if, at the time of the extension request, the risk arbitrage event has not been consummated or terminated.

The Commission continues to believe, however, that requests for an extension of the initial grant of confidential treatment should be accompanied by full factual support and, accordingly, has adopted this portion of the amendment in the form proposed. As amended, the procedures in General Instruction D accord confidential treatment to risk arbitrage positions that are open at the calendar quarter end for a period of up to one year from the date Form 13F is required to be filed with the Commission. This is in effect a 58 week period of time, and it is the Commission's opinion that most open risk arbitrage positions would be closed within this period, or if not closed, may no longer be time-sensitive. In those limited circumstances where a position may remain open and sensitive after the 58-week period of time, additional factual information will assist the Commission in determining whether the standards of the FOIA have been met.

Another commentator suggested that in order to obtain confidential treatment, managers should only be required to mark positions in the portfolio as "risk arbitrage" and should not be required to make any other representations. The representations required by paragraph 2(f) of Instruction D limit the application of the new procedures to only those risk arbitrage positions which are open at the calendar quarter end and on the date on which Form 13F is required to be filed (*i.e.*, 45 days later). The required representations are designed to ensure that the new procedures will not be used more broadly and, accordingly, the Commission has not incorporated the suggestion into the amendments as adopted.

The Commission has made a minor modification regarding the time period for which confidential treatment will be granted to open risk arbitrage positions. As proposed, confidential treatment was to be granted automatically for a period of one year to those positions for which the required representations had been made. However, the Commission would like to make it possible for managers to request a shorter period of time where appropriate. Therefore, the language of General Instruction D 2(f) has been changed to indicate that the grant of confidential treatment will be accorded such positions up to one year. Thus, managers will be required to designate a specific period of time for which confidential treatment is requested. This modification also makes uniform the requirements regarding time limitations on any request for confidential treatment of commercial information. Risk arbitrage managers should therefore refer to the following section for more details regarding this aspect of the proposal.

II. Limitation on Confidential Treatment for Other Commercial Information

As proposed, the amendment to paragraph 2(e) of General Instruction D required managers to limit any request for confidential treatment of commercial information, other than open risk arbitrage positions, to a period of not more than one year. The release asked for comment on whether requests for confidential treatment for other commercial information (in addition to risk arbitrage) should be limited to a specific time period, and, if so, whether a one-year period was reasonable. The Commission received only one comment on this part of the proposal. While generally supporting the one-year limitation, the commentator suggested that the one-year period should be determined by the filing date of the Form 13F for the calendar quarter ending one year from the calendar quarter for which the initial report was filed. As proposed, the one year period would run from the filing date of the initial report for which confidential treatment was requested. Although the commentator did not explain the reason for the suggested change, presumably, it was so that an extension request could be filed at the same time as the new 13F report. Such a procedure would be impractical, however, because it would not allow time for staff review and processing of the extension request. As proposed, General Instruction D 2(g) required managers that requested an extension of the period of confidential treatment to submit a *de novo* request at least fourteen (14) days in advance of the date on which confidential treatment was due to expire. In the Commission's view, fourteen days gives the staff a reasonable amount of time to review and rule upon the extension request. Accordingly, both paragraphs 2 (e) and (g) of General Instruction D have been adopted as proposed.

III. Other Matters

Two broker-dealers commented that the proposed amendment regarding open risk arbitrage positions would improve present procedures, but argued that the Commission should expand the applicability of the new procedure to include block positions. These commentators disagreed with the statement in the proposing release that block positions "involve transactions which are completed during a very short period of time." Rather, they asserted that block positioning can involve holding positions for more than 45 days, and that the assumption set forth in the proposing release that block positions held for that length of time would then be held for investment purposes was inaccurate. These commentators contended that broker-dealers make a significant contribution to market liquidity by acting as block positioners, in the same way that risk arbitrageurs contribute to market efficiency; and therefore, block positions should be accorded the same protection as risk arbitrage positions. They also argued that premature disclosure of a block

[3] In the Commission's view, use of this representation would be inappropriate where the consummation of the risk arbitrage event was expected to occur before the filing date and the manager anticipated that all of its shares would be tendered at that time. The representation also would be inappropriate where the manager had an absolute goal to dispose of the entire position before the filing date despite any unfavorable circumstances.

position could cause harm (*e.g.*, competitors could trade against the position and impede the block positioner's ability to liquidate unobtrustively and without loss), and that this likelihood of competitive harm is no less substantial than the likelihood of harm to a risk arbitrageur.

The Commission agrees that some of these arguments may have merit. However, the Commission believes, particularly given the limited number of block positions maintained for 45 days, that it can adequately address requests for confidential treatment of block position data on a case-by-case basis. Therefore, such requests must continue to be made in accordance with General Instruction D 2(a)–(e).

Lists of Subjects in 17 CFR Part 249

Reporting and recordkeeping requirements, Securities.

Text of Amendment to General Instructions to Form 13F

Chapter II of Title 17 of the Code of Federal Regulations is amended as follows:

PART 249—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citations for Part 249 continues to read as follows:

Authority: The Securities Exchange Act of 1934, 15 U.S.C. 78a. *et seq.*

2. By revising paragraph 2 of General Instruction D of the form prescribed in § 249.325 of Title 17 of the Code of Federal Regulations to read as follows:

§ 249.325 Form 13F, report of institutional investment manager pursuant to section 13(f) of the Securities Exchange Act of 1934.

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General Instructions.

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D. * * *

2. If a request for confidential treatment is based upon a claim that the subject information is confidential commercial or financial information, provide information required by paragraphs (a)–(e) except that if the subject information concerns security holdings which represent open risk arbitrage positions and no previous requests for confidential treatment of those holdings have been made, only the information required in paragraph (f) need be provided.

a. Describe the investment strategy being followed with respect to the relevant securities holdings, including the extent of any program of acquisition and disposition (note that the term "investment strategy," as used in this instruction, also includes activities such as block positioning);

b. Explain why public disclosure of the securities holdings would, in fact, be likely to reveal the investment strategy; consider this matter in light of the specific reporting requirements of Form 13F (*e.g.*, securities holdings are reported only quarterly and may be aggregated in many cases);

c. Demonstrate that such revelation of an investment strategy would be premature; indicate whether the manager was engaged in a program of acquisition or disposition of the security both at the end of the quarter and at the time of the filing; address whether the existence of such a program may otherwise be known to the public;

d. Demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the manager's competitive position; show what use competitors could make of the information and how harm to the manager could ensue.

e. State the period of time for which confidential treatment of the securities holdings is requested. The time period specified may not exceed one year from the date the report is required to be filed with the Commission.

f. For security holdings which represent open risk arbitrage positions, the request must include good faith representations that:

(1) the security holding represents a risk arbitrage position open on the last day of calendar quarter for which the report is filed; and

(2) the reporting manager has a reasonable belief as of the calendar quarter end that it may not close the entire position on or before the date the report is required to be filed with the Commission.

If the representations stated above are made in writing at the time Form 13F is filed, the subject security holdings will automatically be accorded confidential treatment for a period of up to one year from the date the report is required to be filed with the Commission.

g. At the expiration of the period for which confidential treatment has been granted pursuant to item (e) or item (f) of this paragraph ("expiration date"), the Commission, without additional notice to the reporting manager, will make such security holdings public unless a *de novo* request for confidential treatment of the information that meets the requirements of items (a)–(e) of the paragraph, is filed with the Commission at least fourteen (14) days in advance of the expiration date.

Regulatory Flexibility Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act [15 U.S.C. 605(b)], the Chairman of the Commission previously certified that adoption of the amendments to General Instruction D of Form 13F will not have a significant impact on a substantial number of small entities. No comments were received on that certification.

Statutory Basis

The Commission hereby adopts these amendments to Form 13F pursuant to the authority set forth in sections 3(b), 13(f) and 23 of the Securities Exchange Act of 1934 [15 U.S.C. 78c(b), 78m(f), and 78(78w)].

By the Commission.

John Wheeler,

Secretary.

May 14, 1985.

[FR Doc. 85–12589 Filed 5–23–85; 8:45 am]

BILLING CODE 8010–01–M