

## SEC Adopts Large Trader Reporting Requirements

The U.S. Securities and Exchange Commission ("SEC") recently adopted a new rule, Rule 13h-1 ("Rule") under the Securities Exchange Act of 1934, as amended ("Exchange Act"),<sup>1</sup> that requires persons that fall within the definition of a "large trader" based on their volume of transactions in NMS securities<sup>2</sup> ("Large Trader") to: (i) periodically file new Form 13H with the SEC disclosing information regarding their organization and its use of broker-dealers; (ii) obtain a unique "Large Trader Identifier" (or "LTID") that the Large Trader must provide to registered broker-dealers through which transactions are executed; and (iii) respond to ad hoc information requests. Broker-dealers that carry accounts for, or effect transactions on behalf of, Large Traders will be required to maintain and, when requested by the SEC, be able to produce certain records of transactions by Large Traders on the next morning after the date the transactions were effected. The Rule is designed to allow the SEC both to conduct market surveillance and analyze potential securities law violations more efficiently.

### Overview

A Large Trader is defined as a person, whether or not based in the United States, that effects transactions on behalf of itself—or accounts over which it exercises "investment discretion"<sup>3</sup>—in an aggregate amount equal to or exceeding (i) two million shares or \$20 million during any calendar day, or (ii) 20 million shares or \$200 million during any calendar month ("Identifying Activity Levels"). Upon reaching the Identifying Activity Levels, Large Traders are required to "promptly" file with the SEC a new Form 13H, which requires disclosure of certain information about the Large Trader, including identifying its senior officers, each of its Securities Affiliates (as defined below) and each registered brokerage firm that effects transactions on its behalf.

To facilitate reporting by affiliated firms, an "ultimate parent company of an entity or entities that employ or otherwise control individuals that exercise investment discretion"<sup>4</sup> may file a Form 13H on behalf of all of

<sup>1</sup> *Large Trader Reporting*, Release No. 34-64976 (July 27, 2011) ("Adopting Release"), available at <http://www.sec.gov/rules/final/2011/34-64976.pdf>. Form 13H is included in the Adopting Release.

<sup>2</sup> An "NMS security" is defined in Rule 600(b)(46) of Regulation NMS and refers generally to U.S. exchange-listed securities, including exchange-traded equities and options. Shares of registered open-end investment companies ("mutual funds") would not be covered.

<sup>3</sup> For this purpose, "investment discretion" has the same meaning as in Section 3(a)(35) of the Exchange Act. Broadly, a person exercises "investment discretion" with respect to an account if, directly or indirectly, the person is authorized to determine or influence what securities or other property shall be purchased or sold by or for the account. For purposes of the Rule, a person's employees who exercise investment discretion within the scope of their employment are deemed to do so on behalf of the employer.

<sup>4</sup> Adopting Release, *supra* note 1, at 19.

its controlled subsidiaries.<sup>5</sup> However, each subsidiary that independently is a Large Trader also may elect to file a Form 13H on its own behalf under certain conditions. Each Large Trader (and its controlled subsidiaries that intend to file a joint Form 13H) will be assigned an LTID that must be provided to each registered broker-dealer holding accounts over which the Large Trader exercises investment discretion. Broker-dealers must code all accounts controlled by the Large Traders according to the applicable LTID and must be able to provide sorted trading information to the SEC by the morning following a request from the SEC (including weekends and holidays).

The Rule captures Large Traders both within and outside the United States if they purchase or sell NMS securities. The initial compliance date for Large Traders to file a Form 13H is December 1, 2011.<sup>6</sup> Broker-dealers must begin monitoring accounts and maintaining records of transactions by Large Traders on April 30, 2012.

## Requirements of the Rule

### Requirements for Traders

#### *Which Traders are Subject to the Rule?*

##### Generally

In general, a Large Trader is any person or entity that directly or indirectly exercises investment discretion over accounts, including proprietary accounts, that

<sup>5</sup> The Rule defines “control,” including 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. ... [A]ny 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.

<sup>6</sup> It is not clear how certain provisions of the Rule will be interpreted at this time. The SEC’s staff is expected to publish an FAQ regarding the Rule and its interpretation prior to the initial compliance deadlines.

(on an aggregate basis) engage in transactions in NMS securities in excess of the Identifying Activity Levels. Certain transactions (e.g., stock buybacks by an issuer, transactions to effect mergers, journal transactions, consolidations and tender offers) are not counted toward the Identifying Activity Levels thresholds. Special rules apply to options and ETF transactions.<sup>7</sup> Transactions prior to the effective date of the Rule are not counted towards the volume test.

Firms will need to determine whether or not they are subject to the filing requirement based on transactions in all accounts “directly or indirectly” controlled by them, including accounts advised by their controlled subsidiaries. Once transactions exceed either of the Identifying Activity Levels, the trader must “promptly” file a Form 13H with the SEC. The SEC stated in the Adopting Release that this could be within 10 days after reaching the Identifying Activity Level.

##### Voluntary Filers

An entity also may choose to voluntarily register as a Large Trader on Form 13H and, if so, will be treated as a Large Trader for all purposes of the Rule. This approach may be the preferred choice for entities that do not wish to monitor their aggregate activity levels on an ongoing basis. This group of voluntary filers may include: (i) larger financial institutions, (ii) traders that conduct trades near the Identifying Activity Levels threshold, or (iii) those traders that are likely to exceed the Identifying Activity Levels threshold at some point in the near future.

##### Non-U.S. Traders

Non-U.S. persons may qualify as Large Traders and become subject to the Rule and the Form 13H reporting requirements based on their transactions in NMS securities regardless of where the NMS securities are traded. For example, a trader that routes an order to buy or sell NMS securities to be executed on a non-U.S.

<sup>7</sup> For options, only the purchase and sale of options themselves are counted toward the Identifying Activity Levels threshold, while the exercise of an option is not counted. However, the volume and value of the options purchased or sold are generally determined by reference to the securities underlying the options. For ETF transactions, the creation and redemption of ETF shares between an ETF and an ETF’s authorized participant are not counted towards the Identifying Activity Levels threshold, but the secondary market transactions to assemble or dispose of baskets of securities in connection therewith are counted for such purpose.

exchange or market must nevertheless count those transactions in measuring whether it is subject to the Rule.

In addition, in response to comments that non-U.S. entities often effect trades through non-U.S. intermediaries, the Adopting Release noted that: (i) each Large Trader must report the U.S. registered broker-dealers<sup>8</sup> with which it maintains accounts, and (ii) a registered broker-dealer must treat non-U.S. intermediaries for which it executes trades as its customers for purposes of the Rule. If a non-U.S. intermediary effects transactions, through a U.S. registered broker-dealer, that exceed the Identifying Activity Levels, then that registered broker-dealer must inform the non-U.S. intermediary that it may be a Large Trader for purposes of the Rule. Nevertheless, a non-U.S. intermediary would not be required by the Rule to collect identifying information about its customers.

### ***Who Must File With the SEC?***

The definition of Large Trader is very broad, encompassing many different types of persons who exercise investment discretion over accounts. For reporting purposes, the Rule divides Large Traders into two general categories—controlling persons and controlled persons.

### **Holding Companies**

In the context of a holding company structure, a holding company or parent may file on behalf of its controlled subsidiaries if the group, in the aggregate, executes transactions in excess of the Identifying Activity Levels. In such circumstance, each subsidiary of the holding company, even if it would separately qualify as a Large Trader, is then not required to file a Form 13H separately from the holding company, but is required to use the holding company's LTID for purposes of the Rule.

<sup>8</sup> The Adopting Release states that Large Traders must report accounts held at "U.S. registered" broker-dealers. See, e.g., Adopting Release, *supra* note 1, at text accompanying notes 154 and 225. However, the Adopting Release also states that a Large Trader should be able to identify non-U.S. intermediaries with which it maintains accounts. *Id.* at 46981. As noted earlier, it is unclear how certain provisions of Rule, particularly those relating to non-U.S. entities, will be interpreted by the SEC. Further guidance is expected from the SEC's staff prior to the initial compliance deadlines.

The Rule also permits, and the SEC explicitly encourages, a Large Trader holding company to assign three digit suffixes to the LTID when completing the Form 13H to sub-identify persons, divisions, groups, or entities under the Large Trader's control that execute transactions in NMS securities. This approach could help limit the scope of inquiries during a regulatory examination of an entity that has its own LTID suffix and enhance the ability of a Large Trader to disaggregate trading data provided to the SEC, possibly reducing the scope and burden of a regulatory examination.

### **Affiliates**

A Large Trader parent is not required to separately comply with the identification and reporting requirements of the Rule if each of its controlled subsidiaries that exercise investment discretion over NMS securities ("Securities Affiliates") complies with the Rule's requirements with respect to all of the holding company's or parent's accounts. Accordingly, if a parent entity has one or more Securities Affiliates that each qualify as a Large Trader and all Securities Affiliates that are Large Traders elect to file a Form 13H, the parent entity does not need to separately file a Form 13H.

Complex organizations should carefully consider which constituent entities should register under the Rule. The Adopting Release explains that the Rule will require a parent company to compile high-level aggregated information but that the Rule will not require a parent company to compile detailed information about the day-to-day activities of its Securities Affiliates. In addition, the Adopting Release explains that the Rule does not require complex entities to communicate data internally that may breach their current internal information barriers.

### **Mutual Funds**

The Adopting Release states that in the context of a mutual fund organization it would be the trader (e.g., the Fund's adviser or sub-adviser), and not the funds themselves, that will be responsible for reporting under the Rule. While the Adopting Release does not specifically discuss sub-advisory relationships, in some cases both the adviser and sub-adviser may be viewed as exercising investment discretion over a particular mutual fund. In a case where multiple entities exercise discretion, multiple LTIDs may be associated with a single account.

## Reports on Form 13H

### Initial Filings

A Large Trader must promptly file a Form 13H with the SEC on EDGAR and obtain an LTID upon effecting transactions equal to or greater than either of the Identifying Activity Levels.<sup>9</sup> Form 13H requires basic information about the Large Trader and its Securities Affiliates, including the general type of business in which each entity engages, a brief written description of the nature of each entity's operations, and a general description of its trading strategies.<sup>10</sup>

The six broad items of disclosure are summarized below:

- A description of the Large Trader and the types of businesses that it and its Securities Affiliates engage in.
- A list of other forms submitted to the SEC by the Large Trader and its Securities Affiliates.
- Whether the Large Trader or any of its affiliates is registered with the Commodity Futures Trading Commission ("CFTC") and, if so, the relevant registration number(s). In addition, if the Large Trader or any of its Securities Affiliates is not a U.S. entity, it must disclose its primary foreign regulator.
- A description of the Large Trader's Securities Affiliates, the Large Trader's relationship to the Securities Affiliates, and an organizational chart that includes the Large Trader, its parent company, all of its Securities Affiliates and all of its affiliates that are registered with the CFTC. In addition, a Large Trader must provide its FINRA market participant identifier ("MPID"), if any.<sup>11</sup>

<sup>9</sup> In order to file Form 13H on EDGAR, each filer will need the necessary EDGAR access codes, including a Central Index Key (CIK) code. A first-time EDGAR filer must obtain EDGAR access codes by filing a one-time Form ID with the SEC.

<sup>10</sup> The Adopting Release provides the following example of a written description of operations and trading strategy: "Registered market-maker on [SRO], authorized participant for a number of ETFs based on foreign indices, and proprietary trading focusing on statistical arbitrage."

<sup>11</sup> MPIDs are assigned by NASDAQ members that are brokers-dealers, or that are the brokers' sponsored participants. Many Large Traders will not have MPIDs.

- Information regarding the governance of the Large Trader, including organizational form, the jurisdiction where it was formed, its partners, executives, and directors or trustees.
- A list of U.S.-registered brokers with which the Large Trader has accounts and the types of services provided by each broker-dealer.<sup>12</sup>

### Amendments

A Large Trader must update its Form 13H on an annual basis, within 45 days after the end of the calendar year. In addition, a Large Trader must amend its Form 13H by no later than the end of any calendar quarter in which "any of the information contained in the Form 13H filing becomes inaccurate for any reason." There is no materiality qualification on the requirement to file an amendment to the Form 13H. Therefore, a number of Large Traders will find that amendments are necessary on a quarterly basis to reflect changes in personnel as well as any additions to or deletions from the list of broker-dealers.<sup>13</sup>

### Ad Hoc Information Requests

Upon request from the SEC, a Large Trader must "promptly provide" the SEC with additional descriptive or clarifying information regarding accounts at broker-dealers through which the Large Trader effects transactions.

### Confidentiality

Trading and account information is regarded as highly confidential by many traders. Commenters on the proposed Rule expressed substantial concern about the scope of information required and the possibility that there could be an inappropriate release of sensitive information as a result of its inclusion on Form 13H, or provision of information (such as the LTID) associated with advisory accounts to persons other than the SEC or relevant broker-dealers, as was proposed to be required. As adopted, the Rule does not require a Large Trader to identify on Form 13H any of the individual

<sup>12</sup> See *supra* note 8.

<sup>13</sup> *Large Trader Reporting System*, Release No. 34-61908 (April 14, 2010) (proposing the Rule). For additional detail, please see the *DechertOnPoint* regarding the proposed rule, "SEC Proposes Large Trader Reporting System", available at [http://www.dechert.com/SEC\\_Proposes\\_Large\\_Trader\\_Reporting\\_System\\_05-19-2010](http://www.dechert.com/SEC_Proposes_Large_Trader_Reporting_System_05-19-2010).

accounts over which it exercises control, including the broker-dealer and account number, nor must Large Traders provide their LTIDs to other advisers for accounts over which they share investment discretion. Moreover, in the Adopting Release, the SEC stressed that the information filed on Form 13H, as well as transaction information provided to the SEC from broker-dealers, would remain confidential and would not be available to the public through FOIA requests.<sup>14</sup> These changes from the proposed Rule should reduce the likelihood of confidential client information becoming accessible by the public.

### **Requirements for Broker-Dealers**

The Rule imposes separate requirements on broker-dealers that are or deal with Large Traders. U.S.-registered broker-dealers that: (i) carry accounts for Large Traders; (ii) are themselves Large Traders based on activity in their proprietary accounts; or (iii) effect transactions on behalf of Large Traders that have accounts “carried” by non-broker dealers, are subject to new recordkeeping and reporting requirements under the Rule.

### ***Systems Development, Data Capture, and Recordkeeping***

Broker-dealers have a new data capture and systems development requirement. At the time of an account opening, or at the time that a trader becomes a Large Trader and provides the broker-dealer with its LTID, the broker-dealer will need to code the account according to the LTID, including any applicable suffixes. At that point, information concerning trades associated with that account must be captured, including the symbol, time of transaction, and whether the transaction was effected on an agency or proprietary basis.<sup>15</sup> As noted above, the information captured would need to be capable of being sorted and made available to the SEC on the morning following any transactions, including weekends and holidays. The SEC may, in unusual

<sup>14</sup> The Rule, however, does not prevent information from being disclosed to Congress, to other federal departments or agencies within the scope of their jurisdiction, or pursuant to a court order in certain actions. In a high-profile situation, Congress could obtain and then provide the information to the public.

<sup>15</sup> The SEC states that the data requested would be the same as that currently required of brokers by the SEC’s EBS system prior to the adoption of the Rule, with the new additions of time of transaction and LTID.

circumstances, require a response by a broker-dealer to a request for data on the same day the request was made. Separately, the Rule specifies that, upon request, all of the information captured must be reported to the SEC electronically in the format specified in Exchange Act Rule 17a-25.

### ***Ongoing Monitoring***

Broker-dealers are also required to adopt policies and procedures to detect “unidentified large traders”<sup>16</sup> and inform them of the Rule and their potential obligation to file with the SEC. A broker-dealer must treat as an unidentified large trader any person that the broker-dealer “knows or has reason to know” is a Large Trader that has not complied with the requirements to file Form 13H and to provide its LTID to the broker-dealer. A broker-dealer only needs to monitor transactions through the broker-dealer and does not need to determine the amount of transactions conducted by a “unidentified large trader” through other broker-dealers. While a broker-dealer is not required to refrain from dealing with an unidentified large trader, upon determining that it is dealing with an unidentified large trader, the broker-dealer must capture the same information as for Large Traders, with a broker-created identification number in place of the LTID, and the trader’s name, address, date the account was opened, and tax identification number(s).

The Rule contains a safe harbor that provides that a broker-dealer would be deemed not to know or have reason to know that a person is an “unidentified large trader” if: (i) the broker-dealer does not have actual knowledge that the person is a Large Trader, and (ii) the broker-dealer adopts policies and procedures reasonably designed to identify persons that conduct transactions through the broker-dealer in an amount equal to or exceeding the Identifying Activity Levels.

### ***Transactions on Behalf of Foreign Entities***

A U.S.-registered broker-dealer that deals directly with non-U.S. entities can generally treat the non-U.S. entity, including an intermediary, as it would any other customer. For example, a broker-dealer may treat a non-U.S. intermediary as the customer. In this case, the broker-dealer does not need to seek new or additional information about the intermediary’s underlying

<sup>16</sup> An “unidentified large trader” is a person that: (i) has not filed a Form 13H with the SEC and (ii) a registered broker-dealer knows or has reason to know is a Large Trader.

customers. However, the broker-dealer may be able to identify an intermediary's underlying customers as separate unidentified large traders through its monitoring procedures utilizing data it already collects, such as account names, tax identification numbers or other information.

With respect to intermediaries for which the broker-dealer does not have sufficient information about underlying its customers, the broker-dealer is required to either (i) collect the required information about the intermediary itself if the intermediary provides its LTID or (ii) monitor the activity of the intermediary, determine if it exceeds the Identifying Activity Levels threshold, inform the intermediary of its potential obligations to register as a Large Trader, and collect the appropriate information about the intermediary's transactions by treating the intermediary as an unidentified large trader.

### How Will the Information be Used?

The Rule permits the SEC to more quickly collect and analyze data that is already regularly requested from broker-dealers and advisers. Prior to the Rule, the primary information that the SEC and other regulators relied upon to monitor market developments and detect any potential manipulations was obtained from broker-dealers subject to individual exchange rules, FINRA's OATS™ reporting requirements,<sup>17</sup> and the SEC's own Electronic Blue Sheet ("EBS") system.<sup>18</sup> Another source of periodic information for the SEC concerning large trader holdings is the reports required under Sections 13(d) and 13(g) of the Exchange Act.

While information concerning trading activity is already available to the SEC, it generally is not easy to produce during an examination or in response to a sweep request of registered advisers or broker-dealers, which must maintain appropriate records of their trading. Gathering and reporting the requested information is frequently an expensive and time-consuming effort for both advisers and broker-dealers and, as a result, the information often cannot be produced quickly. In addition, the SEC may not be able to easily detect control relationships or obtain information concerning accounts managed by unregistered and non-U.S. entities.

<sup>17</sup> FINRA Rules 7410-7470.

<sup>18</sup> See Rule 17a-25 under the Exchange Act.

Under the Rule, the information collected will "facilitate the [SEC's] ability to monitor the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value, as well as to assist in the [SEC's] enforcement of the federal securities laws."<sup>19</sup> The SEC will be able to investigate situations, such as the May 6, 2010 "flash crash," more rapidly, as the data will be easier to obtain and will include the identity of the entity (through its LTID) and time of execution – information that previously was difficult or impossible to reconstruct after the fact. The Rule also furthers the SEC's attempt to obtain additional information regarding the current U.S. market structure in light of the rapid advancement of technology, growth in automated trading and adoption of sophisticated trading strategies.

### Conclusion

Large Traders shortly will be required to file Form 13H and provide their LTID to their broker-dealers. Advance planning as to which entity or entities within a complex organization should file separate Forms 13H may help streamline the ongoing compliance process for such organizations and help preserve internal information barriers. Broker-dealers will need to begin crafting appropriate policies and procedures to assure compliance with the Rule, and also undertake the more complex task of developing and testing the technology to assure that required data is captured in an appropriate format so that it can be easily produced for the SEC.

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This update was authored by Julien Bourgeois (+1 202 261 3451; julien.bourgeois@dechert.com), Jane A. Kanter (+1 202 261 3302; jane.kanter@dechert.com), Edward L. Pittman (+1 202 261 3387; edward.pittman@dechert.com), Michael L. Sherman (+1 202 261 3449; michael.sherman@dechert.com), Jennifer Wood (+44 20 7184 7403; jennifer.wood@dechert.com) and Daniel L. Clausen (+1 212 649 8747; daniel.clausen@dechert.com).

<sup>19</sup> Adopting Release, *supra* note 1, at 123.

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## Practice group contacts

For more information, please contact the authors, one of the attorneys listed or any Dechert attorney with whom you regularly work. Visit us at [www.dechert.com/financial\\_services](http://www.dechert.com/financial_services).

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**Karen L. Anderberg**

London  
+44 20 7184 7313  
karen.anderberg@dechert.com

**Elliott R. Curzon**

Washington, D.C.  
+1 202 261 3341  
elliott.curzon@dechert.com

**Robert W. Helm**

Washington, D.C.  
+1 202 261 3356  
robert.helm@dechert.com

**David L. Ansell**

Washington, D.C.  
+1 202 261 3433  
david.ansell@dechert.com

**Douglas P. Dick**

Washington, D.C.  
+1 202 261 3305  
douglas.dick@dechert.com

**Richard M. Hervey**

New York  
+1 212 698 3568  
richard.hervey@dechert.com

**Margaret A. Bancroft**

New York  
+1 212 698 3590  
margaret.bancroft@dechert.com

**Ruth S. Epstein**

Washington, D.C.  
+1 202 261 3322  
ruth.epstein@dechert.com

**Richard Horowitz**

New York  
+1 212 698 3525  
richard.horowitz@dechert.com

**Sander M. Bieber**

Washington, D.C.  
+1 202 261 3308  
sander.bieber@dechert.com

**Joseph R. Fleming**

Boston  
+1 617 728 7161  
joseph.fleming@dechert.com

**Jane A. Kanter**

Washington, D.C.  
+1 202 261 3302  
jane.kanter@dechert.com

**Stephen H. Bier**

New York  
+1 212 698 3889  
stephen.bier@dechert.com

**Brendan C. Fox**

Washington, D.C.  
+1 202 261 3381  
brendan.fox@dechert.com

**Geoffrey R.T. Kenyon**

Boston  
+1 617 728 7126  
geoffrey.kenyon@dechert.com

**Thomas C. Bogle**

Washington, D.C.  
+1 202 261 3360  
thomas.bogle@dechert.com

**Robert M. Friedman**

New York  
+1 212 649 8735  
robert.friedman@dechert.com

**Matthew Kerfoot**

New York  
+1 212 641 5694  
matthew.kerfoot@dechert.com

**Julien Bourgeois**

Washington, D.C.  
+1 202 261 3451  
julien.bourgeois@dechert.com

**David M. Geffen**

Boston  
+1 617 728 7112  
david.geffen@dechert.com

**Robert H. Ledig**

Washington, D.C.  
+1 202 261 3454  
robert.ledig@dechert.com

**Kevin F. Cahill**

Orange County  
+1 949 442 6051  
kevin.cahill@dechert.com

**David J. Harris**

Washington, D.C.  
+1 202 261 3385  
david.harris@dechert.com

**Angelyn Lim**

Hong Kong  
+852 3518 4718  
angelyn.lim@dechert.com

**Christopher D. Christian**

Boston  
+1 617 728 7173  
christopher.christian@dechert.com

**Christopher P. Harvey**

Boston  
+1 617 728 7167  
christopher.harvey@dechert.com

**George J. Mazin**

New York  
+1 212 698 3570  
george.mazin@dechert.com

**Gordon L. Miller**

Washington, D.C.  
+1 202 261 3467  
gordon.miller@dechert.com

**Jack W. Murphy**

Washington, D.C.  
+1 202 261 3303  
jack.murphy@dechert.com

**John V. O'Hanlon**

Boston  
+1 617 728 7111  
john.ohanlon@dechert.com

**Reza Pishva**

Washington, D.C.  
+1 202 261 3459  
reza.pishva@dechert.com

**Edward L. Pittman**

Washington, D.C.  
+1 202 261 3387  
edward.pittman@dechert.com

**Jeffrey S. Poretz**

Washington, D.C.  
+1 202 261 3358  
jeffrey.poretz@dechert.com

**Jon S. Rand**

New York  
+1 212 698 3634  
jon.rand@dechert.com

**Robert A. Robertson**

Orange County  
+1 949 442 6037  
robert.robertson@dechert.com

**Keith T. Robinson**

Washington, D.C.  
+1 202 261 3438  
keith.robinson@dechert.com

**Kevin P. Scanlan**

New York  
+1 212 649 8716  
kevin.scanlan@dechert.com

**Jeremy I. Senderowicz**

New York  
+1 212 641 5669  
jeremy.senderowicz@dechert.com

**Frederick H. Sherley**

Charlotte  
+1 704 339 3100  
frederick.sherley@dechert.com

**Michael L. Sherman**

Washington, D.C.  
+1 202 261 3449  
michael.sherman@dechert.com

**Stuart Strauss**

New York  
+1 212 698 3529  
stuart.strauss@dechert.com

**Patrick W. D. Turley**

Washington, D.C.  
+1 202 261 3364  
patrick.turley@dechert.com

**Brian S. Vargo**

Philadelphia  
+1 215 994 2880  
brian.vargo@dechert.com

**Thomas P. Vartanian**

Washington, D.C.  
+1 202 261 3439  
thomas.vartanian@dechert.com

**M. Holland West**

New York  
+1 212 698 3527  
holland.west@dechert.com

**Jennifer Wood**

London  
+44 20 7184 7403  
jennifer.wood@dechert.com

**Anthony H. Zacharski**

Hartford  
+1 860 524 3937  
anthony.zacharski@dechert.com