

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Part 1**

**RIN 3038-XXXX**

**Records of Commodity Interest and Related Cash or Forward Transactions**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (the “Commission” or “CFTC”) is proposing to amend Commission Rule 1.35(a) (the “Proposal”) to: (i) provide that all records required to be maintained under this regulation must be searchable; (ii) clarify that all records be kept in a form and manner that allows for identification of a particular transaction, except that records of oral and written communications leading to the execution of a transaction in a commodity interest and related cash or forward transactions are not required to be kept in a form and manner that allows for identification of a particular transaction; (iii) exclude unregistered members of designated contract markets (“DCMs”) and swap execution facilities (“SEFs”) from the requirements to retain text messages and to maintain records in a particular form and manner; and (iv) exclude commodity trading advisors (“CTAs”) from the oral recordkeeping requirement.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by RIN 3038-XXXX, by any of the following methods:

- Agency web site, via its Comments Online process: <http://comments.cftc.gov>.

Follow the instructions for submitting comments through the web site.

- Mail: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- Hand Delivery/Courier: Same as Mail, above.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures set forth in § 145.9 of the Commission's regulations.<sup>1</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from [www.cftc.gov](http://www.cftc.gov) that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as

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<sup>1</sup> 17 CFR 145.9. The Commission's regulations are found at 17 CFR Ch. I (2013) and can be accessed through the Commission's web site at [www.cftc.gov](http://www.cftc.gov).

required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Gary Barnett, Director, (202) 418-6700, [gbarnett@cftc.gov](mailto:gbarnett@cftc.gov); Katherine Driscoll, Associate Director, (202) 418-5544, [kdriscoll@cftc.gov](mailto:kdriscoll@cftc.gov); August A. Imholtz III, Special Counsel, (202) 418-5140, [aimholtz@cftc.gov](mailto:aimholtz@cftc.gov); or Lauren Bennett, Attorney-Advisor, (202) 418-5290, [lbennett@cftc.gov](mailto:lbennett@cftc.gov), Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Commission Recordkeeping Requirements for Certain Market Participants*

On December 21, 2012, the Commission published a final rulemaking, which amended the recordkeeping provisions of Commission Regulation 1.35(a) to integrate the rule more fully with the framework created by the Dodd-Frank Wall Street Reform and Consumer Protection Act for swap dealers and major swap participants (the “Final Rule”).<sup>2</sup> The Final Rule requires each futures commission merchant (“FCM”), retail foreign exchange dealer (“RFED”), introducing broker (“IB”), and member of a DCM or SEF to keep full, complete, and systematic records of all transactions relating to its business of dealing in commodity interest and related cash or forward transactions.<sup>3</sup> The Commodity Exchange Act (“CEA”) defines “member” as an individual, association,

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<sup>2</sup> See Adaptation of Regulations to Incorporate Swaps—Records of Transactions, 77 FR 75523 (Dec. 21, 2012) (“Final Rule Adopting Release”).

<sup>3</sup> 17 CFR 1.35(a)(1).

partnership, corporation, or trust – (i) owning or holding membership in, or admitted to membership representation on, the registered entity or derivatives transaction execution facility; or (ii) having trading privileges on the registered entity or derivatives transaction execution facility.<sup>4</sup>

The Final Rule includes a requirement to keep records of all oral communications, which applies to each FCM, RFED, large IB (defined as an IB that has generated over \$5 million in aggregate gross revenues over the preceding three years from its activities as an IB), and member of a DCM or SEF that is registered or required to register with the Commission as a floor broker (“FB”) (only with regard to acting as an agent for a non-affiliated client) or as a CTA.<sup>5</sup> Unlike the written recordkeeping requirement that applies to transactions in a commodity interest and related cash or forward transactions, the oral recordkeeping requirement is limited to transactions in a commodity interest.<sup>6</sup> The scope of Regulation 1.35(a) under the Final Rule includes communications made via telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media.<sup>7</sup> These communications include text messages. The Final Rule also mandates that such records be kept in a form and manner identifiable and searchable by transaction.

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<sup>4</sup> 7 U.S.C. 1a(34). The CEA can be accessed through the Commission’s web site.

<sup>5</sup> As stated in the Final Rule, the oral recordkeeping requirement in Regulation 1.35(a) does not apply to: (i) oral communications that lead solely to the execution of a related cash or forward transaction; (ii) oral communications provided or received by a floor broker that do not lead to the purchase or sale for any person other than the floor broker of any commodity for future delivery, security futures product, swap, or commodity option authorized under section 4c of the Commodity Exchange Act; (iii) an introducing broker that has generated over the preceding three years \$5 million or less in aggregate gross revenues from its activities as an introducing broker; (iv) a floor trader; (v) a commodity pool operator; (vi) a swap dealer; (vii) a major swap participant; or (viii) a member of a DCM or SEF that is not registered or required to be registered with the Commission in any capacity. 17 CFR 1.35(a)(1).

<sup>6</sup> 17 CFR 1.35(a)(1).

<sup>7</sup> Id.

The Final Rule became effective on February 19, 2013, with a December 21, 2013 compliance date for the oral recordkeeping requirement.<sup>8</sup>

*B. Comments Received on the 2011 Proposed Amendments to Regulation 1.35(a)*

Prior to promulgating the Final Rule, on June 7, 2011, the Commission published proposed changes to Regulation 1.35(a) and sought public comment on those proposed changes (the “2011 Proposed Rule”).<sup>9</sup> In response, the Commission received 35 comment letters from a variety of institutions.<sup>10</sup> Many commenters opposed the Proposed Rule’s written and oral recordkeeping requirements for members of a DCM or SEF that are commercial end-users and non-intermediaries.<sup>11</sup> The commenters on the 2011 Proposed Rule generally argued that entities that do not trade for customers pose minimal risk to the market, and should therefore not be subject to what they believed to be the costly recordkeeping burdens outlined in the proposed changes to Regulation 1.35(a).<sup>12</sup> Some commenters also suggested that the proposed recordkeeping provisions could potentially deter some end-users from hedging commercial risk on a DCM or SEF, thereby “defeating the Dodd-Frank Act’s transparency objectives.”<sup>13</sup>

After carefully considering the comments to the 2011 Proposed Rule, the Commission excluded commercial end-users and non-intermediaries from the oral

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<sup>8</sup> Final Rule Adopting Release at 75524.

<sup>9</sup> Adoption of Regulations to Incorporate Swaps, 76 FR 33066 (July 7, 2011).

<sup>10</sup> See Final Rule Adopting Release at 75524. These comments can be found on the Commission’s web site at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1037>.

<sup>11</sup> Final Rule Adopting Release at 75527.

<sup>12</sup> Id.

<sup>13</sup> Id.

recordkeeping provisions.<sup>14</sup> The Commission did not exclude those same market participants from the written recordkeeping requirements of Regulation 1.35(a), concluding that the Final Rule would “significantly advance the Commission’s efforts to detect and deter abusive, disruptive, fraudulent and manipulative acts and practices that seriously harm market integrity and customers.”<sup>15</sup>

Since the Final Rule was promulgated on December 21, 2012, the Commission has received additional comments from a wide range of commercial end-users and CTAs that are members of a DCM or SEF that the Final Rule, and in some instances Regulation 1.35(a) as it existed before the Commission promulgated the Final Rule, is overly burdensome and inappropriate in its application to end-users and to CTAs. Subsequently, on April 3, 2014, the Commission staff held a Public Roundtable to Discuss Dodd-Frank End-User Issues<sup>16</sup> (the “End-User Roundtable”). In addition, Commission staff has provided certain market participants with relief from particular aspects of the Final Rule.<sup>17</sup> Both the End-User Roundtable and staff relief are described below.

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<sup>14</sup> Under the Final Rule, members of a DCM or SEF that are not registered or required to register with the Commission in any capacity are not required to record and keep oral communications. Because floor traders and commodity pool operators do not face customers, the Commission chose to exempt them as well from the oral recordkeeping requirement. 17 CFR 1.35(a)(1).

<sup>15</sup> Final Rule Adopting Release at 75528.

<sup>16</sup> Public Roundtable to Discuss Dodd-Frank End-User Issues, Commodity Futures Trading Commission (Apr. 3, 2014), available at: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/transcript040314.pdf> (“End-User Roundtable Transcript”).

<sup>17</sup> See CFTC Staff Letter No. 13-77, Time-Limited No-Action Relief for Certain Members of Swap Execution Facilities from the Requirement to Record Oral Communications Pursuant to Commission Regulation 1.35(a) (Dec. 20, 2013), available at: <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-77.pdf> (“CFTC Staff Letter No. 13-77”); CFTC Staff Letter No. 14-33, Time-Limited No-Action Relief for Certain Members of a Designated Contract Market from the Requirement to Record Oral Communications, Pursuant to Commission Regulation 1.35(a), in Connection with the Execution of Swap Transactions (Mar. 21, 2014), available at: <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-33.pdf> (“CFTC Staff Letter No. 14-33”); CFTC Staff Letter No. 14-60, Time-Limited No-Action Relief for Certain Members of Swap Execution Facilities and Designated Contract Markets from the Requirement to Record Oral Communications, Pursuant to Commission Regulation 1.35(a), in Connection with the Execution of

C. *End-User Roundtable*

On April 3, 2014, Commission staff hosted the End-User Roundtable to discuss, among other things, the impact of the amendments to Regulation 1.35(a) on various market participants. One of the primary issues discussed at the roundtable was the fact that many market end-users are subject to Regulation 1.35(a) simply by virtue of having trading privileges on a DCM or SEF.<sup>18</sup> One roundtable participant noted that many end-users that have trading privileges rely on text messages to communicate to market intermediaries their interest to engage in commodity interests and related cash and forward transactions.<sup>19</sup> Some roundtable participants stated it is prohibitively expensive to retain text messages.<sup>20</sup>

Many roundtable commenters also noted that, given the nature of their business, it is very difficult to maintain required written records in a manner identifiable and searchable by transaction.<sup>21</sup> As explained by one end-user participant, because they do not manage their positions on a transaction-by-transaction basis, but on a portfolio basis, they are not able to identify the extent to which certain records must be kept for certain transactions.<sup>22</sup>

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Swap Transactions (Apr. 25, 2014), available at: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-60.pdf> (“CFTC Staff Letter No. 14-60”); CFTC Staff Letter No. 14-72, Time-Limited No-Action Relief for Members of Designated Contract Markets and Swap Execution Facilities that Are Not Registered with the Commission from the Requirement to Record Written Communications, Pursuant to Commission Regulation 1.35(a), in Connection with the Execution of a Transaction in a Commodity Interest and Related Cash or Forward Transactions (May 22, 2014), available at: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-72.pdf> (“CFTC Staff Letter No. 14-72”).

<sup>18</sup> See End-User Roundtable Transcript.

<sup>19</sup> *Id.* at 55.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at 14-16.

The End-User Roundtable also addressed the oral recordkeeping requirement for members of a DCM or SEF that are CTAs. One CTA participant stated that as a fiduciary that manages assets on a discretionary basis, a CTA's investment decisions are made independently by the CTA based on a client's investment guidelines, rather than ongoing communications with the client.<sup>23</sup> The CTA participant therefore observed that the oral recordkeeping provision of Regulation 1.35(a) would not further the interest of customer protection with respect to CTAs.<sup>24</sup>

*D. CFTC Letter No. 13-77*

On December 10, 2013, the Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG") and the Managed Funds Association ("MFA") submitted a letter to the CFTC Division of Swap Dealer and Intermediary Oversight ("DSIO") seeking interpretive guidance and relief that would confirm their view that those asset managers, including CTAs, that participate on a SEF would not be members of a SEF for purposes of the Final Rule, or for guidance or relief that would otherwise exempt asset managers from the Final Rule.<sup>25</sup> In the alternative, SIFMA AMG and MFA sought additional time to allow asset managers that are members of SEFs to come into compliance with the Final Rule. In response, DSIO and the Division of Market Oversight (together, the "Divisions") issued a no-action letter on December 20, 2013 granting relief to CTAs that are members of SEFs from the

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<sup>23</sup> *Id.* at 64-65.

<sup>24</sup> *Id.*

<sup>25</sup> See SIFMA AMG and MFA Letter, Request for Interpretive Guidance on Application of Rule 1.35(a) to Asset Managers (Dec. 10, 2013), available at <http://www.sifma.org/issues/item.aspx?id=8589946605> and CFTC Staff Letter No. 13-77.

requirement under the Final Rule to record oral communications.<sup>26</sup> That relief was set to expire on May 1, 2014. The Divisions believed that additional time for these asset managers was warranted given that SEFs had only recently begun publishing their rulebooks, and the requestors' representations that asset managers needed more time to adjust their recordkeeping processes in order to comply with the Final Rule.

*E. CFTC Letter No. 14-33*

On March 21, 2014, trueEX, a registered DCM and provisionally registered SEF, submitted a letter to the Divisions requesting relief on behalf of CTAs that are members of trueEX from the requirement under the Final Rule to record oral communications that lead to the execution of swap transactions on trueEX DCM.<sup>27</sup> In response to the trueEX request, and citing to the relief in CFTC Letter No. 13-77 granted to CTAs that are members of SEFs, the Divisions issued no-action relief to CTAs that are members of trueEX DCM from the requirement to record oral communications that lead to the execution of swap transactions on trueEX DCM.<sup>28</sup> That relief was set to expire on May 1, 2014.

*F. CFTC Letter No. 14-60*

On April 17, 2014, SIFMA AMG submitted another letter to the Divisions requesting exemptive relief from the recordkeeping requirements of Regulation 1.35(a) for asset managers that are members of SEFs or DCMs in connection with the execution of swaps.<sup>29</sup> SIFMA AMG contended that the costs of compliance associated with the

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<sup>26</sup> Id.

<sup>27</sup> See CFTC Staff Letter No. 14-33.

<sup>28</sup> Id.

<sup>29</sup> See SIFMA AMG Letter, CFTC Staff Public Roundtable to Discuss Dodd-Frank End-User Issues and Request for Interpretative Guidance and Relief on Application of Rule 1.35(a) to Asset Managers (Apr. 17,

rule's oral and written recordkeeping requirements for asset managers significantly outweighed the benefits.<sup>30</sup>

The Divisions considered SIFMA AMG's concerns in relation to the prior no-action relief granted to asset managers and comments from the recent end-user roundtable discussion, and issued a no-action letter on April 25, 2014 which provides no-action relief to CTAs that are members of SEFs or DCMs from the requirement to record oral communications in connection with the execution of swaps. This relief will expire on December 31, 2014.<sup>31</sup>

*G. CFTC Letter No. 14-72*

On December 12, 2013, the Commodity Markets Council ("CMC") submitted a request ("CMC Request") for interpretive guidance to the Divisions regarding the electronic recordkeeping requirements of Regulation 1.35(a) on behalf of members of DCMs and SEFs that are not registered or required to register with the Commission in any capacity ("Unregistered Members").<sup>32</sup> CMC stated that although text messaging and other electronic communications had become the primary mode of communication for Unregistered Members, these firms had encountered difficulties in securing a technology solution for storing and searching those records.<sup>33</sup>

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2014), available at: <http://www.sifma.org/issues/item.aspx?id=8589948677>, and CFTC Staff Letter No. 14-60.

<sup>30</sup> *Id.*

<sup>31</sup> *See* CFTC Staff Letter No. 14-60. SIFMA's letter requested relief from the oral and written recordkeeping requirements of the regulation, but the Divisions addressed the request for relief solely with respect to oral communications.

<sup>32</sup> *See* CMC Letter, Request for Interpretive Guidance—Rule 1.35 Contained Within the Final Rules on Adaptation of Regulations to Incorporate Swaps—Records of Transactions (Dec. 12, 2013), available at: <http://www.commoditymks.org/wp-content/uploads/2014/05/CMC-Rule-1.35-Interpretive-Guidance-Request-Letter-12.12.2013a.pdf>, and CFTC Staff Letter No. 14-72.

<sup>33</sup> *Id.*

The Divisions considered this concern in conjunction with similar comments raised at the End-User Roundtable discussion regarding the “searchability” requirement, and granted limited no-action relief to Unregistered Members from the requirements under Regulation 1.35(a) to: (i) retain text messages, and (ii) store required records in a form and manner identifiable and searchable by transaction.<sup>34</sup> Under the no-action letter, the relief for Unregistered Members will remain effective until any final Commission action with respect to the CMC Request, including a rulemaking, order, or a determination not to take action.

## **II. The Proposal**

The Commission carefully considered all of the comments submitted prior to the adoption of the Final Rule. In drafting the Final Rule, the Commission aimed to address its goals of promoting market integrity and customer protection with the consequential burdens imposed on market participants. In light of the concerns raised at the End-User Roundtable and letters to the Commission from the public requesting guidance and exemptive relief, the Commission is considering further amendments to Regulation 1.35(a). In response to several requests from market participants for guidance on how to comply with the requirement under Regulation 1.35(a) that records be “identifiable and searchable by transaction,” the Commission is proposing to amend the language of Regulation 1.35(a) to: (i) provide that all records that are required to be maintained under this regulation must be searchable; and (ii) clarify that all such records must be kept in a form and manner that allows for identification of a particular transaction, except that records of oral and written communications provided or received concerning quotes,

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<sup>34</sup> Id.

solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions are required to be searchable, but need not be kept in a form and manner that allows for identification of a particular transaction.<sup>35</sup>

The Commission also understands that compliance with some aspects of the rule imposes burdens on certain Unregistered Members and CTAs. The Commission also has a particular interest in protecting customers who engage with intermediaries to access the commodities markets. Thus, the Commission is proposing to exclude Unregistered Members from the requirement to retain text messages, and from the requirement to maintain records in a particular form and manner. The Commission also recognizes that many CTAs who are members of DCMs or SEFs and have discretionary trading authority do not have routine discussions with end-clients regarding transactions in commodity interests, and is therefore proposing to further balance CTAs' recordkeeping burden by excluding them from the oral recordkeeping requirement of Regulation 1.35(a).

A. *Proposing to Amend Regulation 1.35(a) to Clarify the “Identifiable” and “Searchable” Requirements of the Rule Generally*

Regulation 1.35(a) mandates that required records be maintained in a form and manner “identifiable and searchable by transaction.”<sup>36</sup> The Commission has received several requests from market participants for guidance on how to comply with this requirement. The Commission is now proposing that all required records must be searchable, but not “searchable by transaction.” The current rule also states that all

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<sup>35</sup> The proposed amendment to Regulation 1.35(a) does not modify, limit, restrict or reduce the obligations that exist under Regulation 1.31 to produce required records in native file format, and to produce those records in such a manner as to preserve the full functionality that may be available in native file format.

<sup>36</sup> 17 CFR 1.35(a)(1).

required records be “identifiable by transaction.” The Commission is clarifying that this means records must be kept in a form and manner that allows for identification of a particular transaction, with certain exception, as described below.

*B. Proposing that Records of Oral and Written Communications that Lead to the Execution of a Transaction Be Searchable, but not Kept in a Form and Manner that Allows for Identification of a Particular Transaction*

As it does for all records, Regulation 1.35(a) states that records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media, be kept in a form and manner identifiable and searchable by transaction. The Commission has received several requests from market participants for guidance on how to comply with this requirement. The Commission believes that access to these oral and written communications is necessary for the Commission to oversee and monitor the derivatives market and to enforce Commission rules and regulations. The Commission therefore is not altering the existing requirements that covered entities maintain these records in a searchable format. The Commission therefore is proposing to amend Regulation 1.35(a) to clarify that records of oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions are required to be searchable, but are not required to be kept in a form and manner that allows for identification of a

particular transaction. This means that there would be no requirement for a market participant to link or otherwise identify a record of a communication that leads to the execution of a transaction with a particular transaction.

*C. Proposing to Exclude Unregistered Members of Designated Contract Markets or Swap Execution Facilities from the Requirements to Retain Text Messages and to Maintain Required Records in a Particular Form and Manner*

Pursuant to the Final Rule, FCMs, RFEDs, IBs, and all members of DCMs or SEFs must retain written records of commodity interests and related cash or forward transactions.<sup>37</sup> The CEA defines “member” as an individual, association, partnership, corporation, or trust (i) owning or holding membership in, or admitted to membership representation on, the registered entity or derivatives transaction execution facility; or (ii) having trading privileges on the registered entity or derivatives transaction execution facility.<sup>38</sup>

For various reasons relating to the nature of their market activity, many end-user market participants that meet this definition of member are not registered or required to register with the Commission. Many of these end-users have noted that text messaging is their primary method of communication regarding commodity interest transactions and related cash or forward transactions.<sup>39</sup> These end-users have further stated that it is prohibitively expensive for them, in light of their business, to retain text messages.<sup>40</sup> Accordingly, the Proposal would exclude Unregistered Members from the requirement

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<sup>37</sup> 17 CFR 1.35(a)(1).

<sup>38</sup> 7 U.S.C. 1a(34).

<sup>39</sup> See CFTC Letter 14-72 and End-User Roundtable Transcript at 55.

<sup>40</sup> See End-User Roundtable Transcript.

under Regulation 1.35(a) to retain text messages. Although text messages are a primary means of communication for a significant number of Unregistered Members, certain other Unregistered Members (e.g., commodity trading firms) do not rely on text messages to the same extent to transact in commodity interests and related cash and forward transactions. Because all Unregistered Members must retain all other required written records and electronic communications, the Commission believes that its ability to properly oversee and monitor the derivatives market is not unduly affected. In addition, the Commission notes that the Proposal does not change the written recordkeeping requirement for all registered members, including with respect to text messages.

Some end-users subject to the Final Rule also have stated that maintaining the required written records in a manner that is identifiable and searchable by transaction is difficult given the nature of the relationship between their cash or forward transactions and their trading and hedging practices in the derivatives markets. The Commission notes that the “searchable” and “identifiable” requirements do not require covered entities to link all of their transactions in commodity interests to related cash or forward transactions (e.g., their hedges with related hedged positions) by a specific identifier. Nonetheless, the Commission recognizes that the proposed requirement that covered entities keep records in a searchable format and in a form and manner that allows for identification of a particular transaction may pose additional burdens on those Unregistered Members who manage their positions on an aggregate basis. Therefore, the Proposal also would exclude Unregistered Members from these requirements. The Commission understands that these exclusions may result in an incremental burden on the Commission, if it is required to search through these records. The Commission believes,

however, that as long as Unregistered Members maintain their records, this Proposal would not unduly compromise the Commission's ability to oversee and monitor the derivatives market and to enforce Commission rules and regulations.

*D. Proposing to Exclude Commodity Trading Advisors from the Requirement to Record and Maintain Oral Communications*

The Final Rule requires, among other things, that all CTAs that are members of a DCM or SEF record all oral communications that lead to the execution of a transaction in a commodity interest.<sup>41</sup> The Proposal would exclude members of a DCM or SEF that are CTAs from this oral recordkeeping obligation. Removing CTAs from the requirement to record and keep oral communications, as with removing unregistered members of a DCM or SEF from certain aspects of the written recordkeeping requirements, is consistent with the Commission's goals of balancing its interest in protecting customers and ensuring market integrity, with the burdens of affected market participants. The Commission understands that many CTAs who are members of a DCM or SEF have discretionary trading authority over their customers' accounts and, therefore, those CTAs would not be having routine telephone conversations with customers that lead to the execution of an order on a DCM or SEF. Nevertheless, the Commission is not proposing to remove members of a DCM or SEF that are CTAs from the written recordkeeping requirements of 1.35(a) because certain CTAs may receive orders from customers that the CTAs then execute on behalf of the customer on a non-discretionary basis, or may receive instructions changing or limiting their discretionary authority. Although the Commission believes it is consistent with the regulatory goals of Rule 1.35(a) to ensure that customer

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<sup>41</sup> 17 CFR 1.35(a)(1).

communications regarding orders be captured, the cost of recording and keeping oral communications weighs against the benefits of achieving these goals. The same cannot be said for the costs of recording and maintaining written records, which costs the Commission understands to be significantly less than the same costs regarding oral communications.

### **III. Request for Comments**

The Commission seeks comment on all aspects of this Proposal. In particular, the Commission seeks comment on the following questions:

1. What are the potential effects of removing the requirement that records of oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions are not required to be kept in a form and manner that allows for identification of a particular transaction?
2. What are the potential effects of excluding Unregistered Members from the requirement to retain text messages?
3. Is existing technology for storing text messages cost prohibitive for Unregistered Members to use? Are there other impediments to using this technology?
4. What are the potential effects of excluding Unregistered Members from the requirements to store required records in a form and manner that is searchable and in a form and manner that allows for identification of a particular transaction?
5. Rather than excluding all Unregistered Members from these aspects of the written recordkeeping obligations of the rule, would the interests of promoting customer protection and minimizing recordkeeping burdens be better balanced by excluding only

small Unregistered Members from these requirements? If so, how would “small” Unregistered Members be defined?

6. Would the exclusion of text messages from the written records requirement for all Unregistered Members incentivize Unregistered Members, especially commodity trading firms, to switch their method of communication? If so, should the Commission use a certain threshold in setting this exclusion, ensuring that the Commission can continue to properly oversee and monitor the derivatives market and enforce Commission rules and regulations?

7. What is the potential effect on the market of excluding members of DCMs or SEFs that are CTAs from the oral recordkeeping requirement of the Final Rule?

8. Is there a significant difference in the administrative burden of the oral recordkeeping requirement of Regulation 1.35(a) for large and small CTAs that would warrant exclusion of small CTAs, but not large CTAs?

9. If so, how would “large” CTAs be defined?

10. Would the Proposal impact the Commission’s ability to carry out its market oversight responsibilities with regard to the overall derivatives market? If so, how?

11. Does the Proposal serve the public interest? In what ways?

#### **IV. Related Matters**

##### **A. Regulatory Flexibility Act**

The Regulatory Flexibility Act<sup>42</sup> requires that Federal agencies consider whether the rules they propose will have a significant economic impact on a substantial number of

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<sup>42</sup> 5 U.S.C. 601 et seq.

small entities and, if so, they must provide a regulatory flexibility analysis reflecting the impact. Whenever an agency publishes a general notice of proposed rulemaking for any rule, pursuant to the notice-and-comment provisions of the Administrative Procedure Act<sup>43</sup> a regulatory flexibility analysis or certification typically is required.<sup>44</sup> The Proposal, if adopted, will not have a significant economic impact on affected persons because the Proposal will relieve them from certain regulatory obligations that would otherwise apply to them. Specifically, the (proposed) amendment to 1.35(a) would provide relief from certain elements of the existing recordkeeping requirements of that section, and the Proposal would not impose any new regulatory obligations on the affected persons. Thus, the Proposal would not have any appreciable economic impact on affected entities.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the Proposal will not have a significant economic impact on a substantial number of small entities.

#### B. Paperwork Reduction Act

The Proposal will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the Paperwork Reduction Act (“PRA”).<sup>45</sup> All recordkeeping or information collection requirements relevant to the subject of this proposed rulemaking, or discussed herein, already exist under current law. The title for this collection of information is “Adaptation of Regulations to Incorporate Swaps—

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<sup>43</sup> 5 U.S.C. 553. The Administrative Procedure Act is found at 5 U.S.C. 500 et seq.

<sup>44</sup> See 5 U.S.C. 601(2), 603–05.

<sup>45</sup> 44 U.S.C. 3501 et seq.

Records of Transactions,” OMB control number 3038-0090. This collection of information is not expected to be impacted by the rule amendment proposed herein, as the calculations which are already reflected in the burden estimate are not expected to appreciably change because of the relief provided in the Proposal. The PRA burden hours associated with this collection of information are therefore not expected to be increased or reduced as a result of the amendment proposed. Accordingly, the PRA does not apply. The Commission invites public comment on the accuracy of its estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the amendments proposed herein.

### C. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

#### 1. Background

The Commission is proposing an amendment to Regulation 1.35(a) which would: (i) provide that all records that are required to be maintained under this regulation must be searchable; (ii) clarify that all records be kept in a form and manner that allows for identification of a particular transaction, except that records of oral and written

communications leading to the execution of a transaction in a commodity interest and related cash or forward transactions are not required to be kept in a form and manner that allows for identification of a particular transaction; (iii) exclude unregistered members of DCMs and SEFs from the requirements to retain text messages and to maintain records in a particular form and manner; and (iv) exclude CTAs from the oral recordkeeping requirement.

The Commission believes that the baseline for this cost and benefit consideration is the existing rule 1.35(a). While CFTC Staff Letters 14-60 and 14-72, as discussed above, currently provide no-action relief that is substantially similar to the relief the proposed amendments provide to certain market participants and end users, the Commission preliminarily believes that CFTC Staff Letters 14-60 and 14-72 should not set or affect the baseline from which the Commission considered the costs and benefits of the Proposal. This is because, as they indicate, CFTC Staff Letters 14-60 and 14-72 do not necessarily represent the position or view of the Commission or any other office or division of the Commission.

## 2. Costs

The Commission believes that the Proposal will not impose any additional costs upon those affected market participants and end users, but instead will reduce some of the regulatory burdens and associated costs that Regulation 1.35(a) imposes upon them. The Commission preliminarily believes that it may be difficult to quantify what costs the Proposal imposes upon other market participants, the markets themselves, or the general public. The Commission preliminarily believes that one of the costs associated with the Proposal will be that certain market participants and end-users will no longer be required

to create and maintain certain types of records that are useful for the Commission in exercising its oversight of the markets, including for market surveillance, enforcement, and ensuring market integrity. Comments are invited regarding the extent of all of these costs, and any other costs that would result from adoption of the Proposal, including estimates of monetary or other measurements thereof.

### 3. Benefits

The Commission believes that the Proposal will have a tangible benefit for those market participants and end-users that are excluded from some of the regulatory burdens and associated costs of Regulation 1.35(a) under the Proposal. The Commission preliminarily believes that it may be difficult to quantify what other benefits the Proposal may have for other market participants, the markets themselves, or the general public. Comments are sought regarding these benefits and any other benefits resulting from adoption of the Proposal, and to the extent they can be quantified, estimates of the monetary or other value thereof.

### 4. Section 15(a)

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors:

#### a. Protection of Market Participants and the Public

The proposed amendments to Rule 1.35(a) are intended, in part, to reduce some of the regulatory burdens on certain market participants and end-users. The Commission recognizes that there may be a trade-off between reducing regulatory burdens while at the same time ensuring that the recordkeeping obligations Rule 1.35(a) imposes upon market participants and end users are sufficient to support the effort by the Commission to fulfill

its regulatory mission. Are the scope and reach of the proposed amendments appropriate to achieve these goals?

Under the proposed amendments to Rule 1.35(a) certain market participants and end-users will no longer be required to create and maintain certain types of records that would be useful for the Commission in exercising its oversight of the markets, including for market surveillance, enforcement, and ensuring market integrity. What effect, if any, will the proposed amendments have on the ability of the Commission to obtain information necessary to effectively oversee the markets and investigate and prosecute misconduct?

b. Efficiency, Competitiveness, and Integrity of Markets

The proposed amendments to Rule 1.35(a) are intended, in part, to reduce some of the regulatory burdens on certain market participants and end-users. Will the proposed amendments actually decrease the regulatory burdens on certain market participants and end-users? If so, will this result in increased efficiency and competition among end-users, without compromising market integrity?

What effect, if any, will the proposed amendments to Rule 1.35(a) have on the ability of customers to trade in efficient, competitive, and liquid markets?

Will the proposed amendments to Rule 1.35(a) reduce the regulatory burdens for unregistered end-users that are DCM or SEF members? If so, will reducing this regulatory burden increase or decrease the efficiency, competitiveness and integrity of the markets?

c. Price Discovery

The Commission preliminarily believes that the proposed amendments will not have any effect on price discovery. The Commission recognizes that, under the Proposal, certain market participants and end-users will no longer be required to create and maintain certain types of records that may be useful for the Commission in exercising its oversight of the markets, including for market surveillance, enforcement, and ensuring market integrity. Might this be perceived as a reduction in Commission surveillance or enforcement capability that potentially could result in increased market misconduct that ultimately affects price discovery?

d. Sound Risk Management

The proposed amendments to Rule 1.35(a) are intended, in part, to reduce some of the regulatory burdens on certain market participants and end-users. Will the proposed amendments actually decrease the regulatory burdens on certain market participants and end-users? If so, what effect, if any, will this have on the risk management practices of market participants and end-users?

e. Other Public Interest Considerations

The Commission has not identified any other public purpose considerations for this rulemaking.

5. Request for Comment

The Commission invites comments from the public on all aspects of its preliminary consideration of costs and benefits associated with the Proposal. The Commission also invites comments from the public on all aspects of its preliminary consideration of the five factors that the Commission is required to consider under

Section 15(a) of the CEA. The questions below relate to areas that the Commission preliminarily believes may be relevant. In addressing these or any other aspect of the Commission's preliminary assessment, commenters are encouraged to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the Proposal.

a. What are the costs and benefits to market participants, if any, associated with the Proposal? Please explain and, to the extent possible, quantify these costs.

b. What are the costs and benefits to the public, if any, associated with the Proposal? Please explain and, to the extent possible, quantify these costs.

c. To what extent does the Proposal protect market participants and the public? How, if at all, could the Proposal be altered to better protect market participants and the public?

d. How, if at all, does the Proposal affect the efficiency, competitiveness, and financial integrity of markets?

e. How, if at all, does the Proposal affect price discovery?

f. How, if at all, does the Proposal affect sound risk management for market participants and end-users?

g. How, if at all, does the Proposal affect the public interest?

h. What are the costs and benefits to market participants and the public, if any, associated with the application of this rule for activities outside of the United States?

Please explain, and to the extent possible, quantify these costs.<sup>46</sup>

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<sup>46</sup> Pursuant to CEA section 2(i) this rule will apply to swaps activities outside the United States to the extent they meet the requirements of that section. See 7 U.S.C. 2(i).

## List of Subjects in 17 CFR Part 1

Agricultural commodity, Agriculture, Brokers, Committees, Commodity futures, Conflicts of interest, Consumer protection, Definitions, Designated contract markets, Directors, Major swap participants, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements, Swap dealers, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as set forth below:

### PART 1 – GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. The authority citation for part 1 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a-1, 7a-2, 7b, 7b-3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a-1, 16, 16a, 19, 21, 23, and 24 (2012).

2. In § 1.35, revise paragraph (a) to read as follows:

#### § 1.35 Records of commodity interest and related cash or forward transactions.

(a) Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets or swap execution facilities. (1)

Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall keep full, complete, and systematic records, which include all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity interests and related cash or forward transactions. Included among such records shall be all orders (filled, unfilled, or canceled), trading cards, signature cards, street books, journals, ledgers, canceled checks, copies of confirmations, copies of statements of purchase and sale, and all other records,

which have been prepared in the course of its business of dealing in commodity interests and related cash or forward transactions. Among such records each member of a designated contract market or swap execution facility must retain and produce for inspection are all documents on which trade information is originally recorded, whether or not such documents must be prepared pursuant to the rules or regulations of either the Commission, the designated contract market or the swap execution facility. For purposes of this section, such documents are referred to as “original source documents.” Also included among the records required to be kept by this paragraph are all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media.

(2) Form and manner. (i) All records required to be kept pursuant to paragraph (a)(1) of this section shall be searchable; and

(ii) All records required to be kept pursuant to paragraph (a)(1) of this section shall be kept in a form and manner that allows for identification of a particular transaction, except for records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media.

(3) Provided, however, for a member of a designated contract market or swap execution facility that is not registered or required to register with the Commission in any capacity, records required to be kept pursuant to paragraph (a)(1) of this section:

- (i) Are not required to be kept pursuant to paragraph (a)(2) of this section; and
- (ii) Do not include text messages sent or received by such member.

(4) Provided, however, the requirement in paragraph (a)(1) of this section to record oral communications shall not apply to:

(i) Oral communications that lead solely to the execution of a related cash or forward transaction;

(ii) Oral communications provided or received by a floor broker that do not lead to the purchase or sale for any person other than the floor broker of any commodity for future delivery, security futures product, swap, or commodity option authorized under section 4c of the Commodity Exchange Act;

(iii) An introducing broker that has generated over the preceding three years \$5 million or less in aggregate gross revenues from its activities as an introducing broker;

(iv) A floor trader;

(v) A commodity pool operator;

(vi) A commodity trading advisor;

(vii) A swap dealer;

(viii) A major swap participant; or

(ix) A member of a designated contract market or swap execution facility that is not registered or required to be registered with the Commission in any capacity.

(5) For purposes of paragraph (a)(1) of this section, “related cash or forward transaction” means a purchase or sale for immediate or deferred physical shipment or delivery of an asset related to a commodity interest transaction where the commodity interest transaction and the related cash or forward transaction are used to hedge, mitigate the risk of, or offset one another.

(6) Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall retain the records required to be kept by this section in accordance with the requirements of § 1.31, and produce them for inspection and furnish true and correct information and reports as to the contents or the meaning thereof, when and as requested by an authorized representative of the Commission or the United States Department of Justice.

(7) (i) The Commission may in its discretion establish an alternative compliance schedule for the requirement to record oral communications under paragraph (a)(1) of this section that is found to be technologically or economically impracticable for an affected entity that seeks, in good faith, to comply with the requirement to record oral communications under paragraph (a)(1) of this section within a reasonable time period beyond the date on which compliance by such affected entity is otherwise required.

(ii) A request for an alternative compliance schedule under paragraph (a)(7)(i) of this section shall be acted upon within 30 days from the time such a request is received, or it shall be deemed approved.

(iii) The Commission hereby delegates to the Director of the Division of Swap Dealer and Intermediary Oversight or such other employee or employees as the Director

may designate from time to time, the authority to exercise the discretion.

Notwithstanding such delegation, in any case in which a Commission employee delegated authority under this paragraph believes it appropriate, he or she may submit to the Commission for its consideration the question of whether an alternative compliance schedule should be established. The delegation of authority in this paragraph shall not prohibit the Commission, at its election, from exercising the authority set forth in paragraph (a)(7)(i) of this section.

(iv) Relief granted under paragraph (a)(7)(i) of this section shall not cause an affected entity to be out of compliance or deemed in violation of any recordkeeping requirements.

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Issued in Washington, DC, on November 4, 2014, by the Commission.

Christopher J. Kirkpatrick,  
Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

**Appendix to Records of Commodity Interest and Related Cash or Forward  
Transactions – Commission Voting Summary**

On this matter, Chairman Massad and Commissioners Wetjen and Bowen voted in the affirmative. Commissioner Giancarlo voted in the negative.