



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Division of
Market Oversight

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CFTC Letter No. 13-77
No-Action
December 20, 2013
Division of Swap Dealer and Intermediary Oversight
Division of Market Oversight

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Re: 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)

Ladies and Gentlemen:

This letter is in response to a December 10, 2013 letter received by the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) of the Commodity Futures Trading Commission (“**Commission**”) from the Asset Management Group of the Securities Industry and Financial Markets Association and from the Managed Funds Association (collectively, the “**Trade Associations**”).¹ In the letter, the Trade Associations sought relief² from the recordkeeping

¹ Although the request was submitted to DSIO, this no-action letter is being issued jointly by the Directors of DSIO and the Division of Market Oversight (“**DMO**”), respectively.

² In the December 10, 2013 letter, the Trade Associations requested, in part, interpretive guidance. In lieu of interpretive guidance, the Division is issuing no-action relief in this letter. Nothing in this letter should be construed as interpretive guidance.

requirements of Commission Regulation (“**Regulation**”) 1.35(a),³ to the extent that such requirements apply to Asset Managers.⁴

The Commission promulgated Part 1 of its regulations pursuant to the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* The Commission recently amended Regulation 1.35(a) in order to integrate the Regulation more fully with the new statutory framework for swaps created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010), and to conform the existing recordkeeping requirements of Regulation 1.35(a) to the recordkeeping requirements for swap dealers and major swap participants, as set forth in Regulation 23.202.⁵ Regulation 1.35(a), as amended, states, in relevant part, that each member of a designated contract market (“**DCM**”) or swap execution facility (“**SEF**”) “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.”⁶ As part of the systematic recordkeeping system that is required under Regulation 1.35(a), the Regulation states that:

“[I]ncluded 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.”⁷

Regulation 1.35(a) further states that the requirement to record oral communications shall not apply to certain enumerated persons, including commodity pool operators and members of a DCM or SEF that are not registered or required to be registered with the Commission in any capacity.⁸ Affected entities must be compliant with the requirement to record oral communications by December 21, 2013.

In their December 10, 2013 letter, the Trade Associations “request[ed] interpretive guidance and relief that would confirm that those Asset Managers that participate on a SEF would not be members of a SEF for purposes of the Rule or [that would] otherwise exempt Asset

³ 17 CFR 1.35(a).

⁴ While “Asset Manager” is not a registration category or defined term under the Commodity Exchange Act or the regulations promulgated pursuant thereto, the Trade Associations defined the term broadly for purposes of its letter to include certain persons who are required to register with the Commission (commodity pool operators and commodity trading advisors) as well as certain persons who are not required to register with the Commission.

⁵ Adaptation of Regulations To Incorporate Swaps—Records of Transactions, 77 Fed. Reg. 75523 (Dec. 21, 2012).

⁶ 17 CFR 1.35(a)(1).

⁷ *Id.*

⁸ 17 CFR 1.35(a)(1)(v), (viii).

Managers from application of the Rule.”⁹ In the alternative, the Trade Associations sought additional time to allow Asset Managers that are members of SEFs to come into compliance with Regulation 1.35(a). The Trade Associations noted that, given that SEFs have only recently begun publishing their rulebooks, certain members of SEFs may need additional time to adjust their current recordkeeping processes in order to be compliant with the recordkeeping requirements, as articulated in the SEF rulebooks and in Regulation 1.35(a).

Based upon the representations made by the Trade Associations with respect to the compliance issues discussed above, DSIO and DMO believe that time-limited no-action relief is warranted with respect to the requirement to record oral communications. Accordingly, DSIO and DMO will not recommend that the Commission take enforcement action against a commodity trading advisor that is a member of a SEF for failure to comply, **prior to May 1, 2014**, with the requirement under Regulation 1.35(a) to record oral communications.¹⁰

This letter, and the positions taken herein, represent the views of DSIO and DMO only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. As with all no-action letters, the relief issued by this letter does not excuse the affected persons from compliance with any other applicable requirements contained in the Act or in the Regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the information made available to DSIO and DMO. Any different, changed or omitted material facts or circumstances might render this no-action relief void.

⁹ Letter from Trade Associations to Mr. Gary Barnett, Director, DSIO, at 3-4 (Dec. 10, 2013).

¹⁰ Because certain types of Asset Managers – including CPOs and members of a DCM or SEF that are not registered or required to be registered with the Commission in any capacity – already are expressly excluded from the requirement under Regulation 1.35(a) to record oral communications, DSIO and DMO have limited the relief provided in this no-action letter to commodity trading advisors.

Should you have any questions, please do not hesitate to contact the undersigned. In the alternative, for DSIO issues, please do not hesitate to contact Frank Fisanich, Chief Counsel, at (202) 418-5949, or Ward Griffin, Associate Chief Counsel, at (202) 418-5425, and for DMO issues, please do not hesitate to contact Jonathan Lave, Associate Director, at (202) 418-5983.

Very truly yours,

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