



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000

Division of Swap Dealer and
Intermediary Oversight

Division of
Market Oversight

Gary Barnett
Director

Vincent A. McGonagle
Director

CFTC Letter No. 14-147
No-Action
December 16, 2014
Division of Swap Dealer and Intermediary Oversight
Division of Market Oversight

Re: No-Action Relief from Certain Recordkeeping Requirements under Commission Regulation 1.35(a)

Ladies and Gentlemen:

This letter provides no-action relief regarding certain of the recordkeeping obligations under Regulation 1.35(a). First, this letter grants no-action relief to commodity trading advisors (“CTAs”) that are registered with the Commodity Futures Trading Commission (the “Commission” or “CFTC”) and are members of designated contract markets (“DCMs”) or of swap execution facilities (“SEFs”) from the requirement to record oral communications under Regulation 1.35(a). This provision is an extension and expansion of the relief granted in CFTC Staff Letter No. 14-60, which granted relief to CTAs that are members of DCMs or SEFs from the requirement under Regulation 1.35(a) to record all oral communications that lead to the execution of swap transactions. That relief was scheduled to expire on December 31, 2014. Second, this letter provides no-action relief with regard to the form and manner requirements that apply to records of oral and written communications that lead to the execution of a transaction in a commodity interest and related cash or forward transactions. Specifically, the Division of Swap Dealer and Intermediary Oversight and the Division of Market Oversight (together, the “Divisions”) would not recommend an enforcement action against a market participant on the grounds that such records are not linked to a particular transaction.

I. Background

A. Regulation 1.35(a)

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”).¹ The Final Rule requires, among other things, and with certain exceptions, that each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a DCM or SEF keep full, complete, and systematic records of all transactions relating to its business of dealing in commodity interests and related cash or forward transactions. The Final Rule includes a requirement that such records be maintained in a “form and manner identifiable and searchable by transaction.”² In addition, the Final Rule also states that for each member³ of a DCM or SEF that is registered with the Commission as a CTA, included among such records are all oral communications that lead to the execution of a transaction in a commodity interest.⁴

B. CFTC Staff Letter No. 14-60

On April 3, 2014, Commission staff held a “Public Roundtable to Discuss Dodd-Frank End-User Issues,” which included, among other things, a discussion of continuing concerns on the part of asset managers with respect to Regulation 1.35 compliance. On April 17, 2014, the Asset Management Group of the Securities Industry and Financial Markets Association (“SIFMA AMG”) submitted a letter to the Divisions, in response to the Roundtable, requesting exemptive relief from the recordkeeping requirements of Regulation 1.35(a) for asset managers, including CTAs, that are members of SEFs or DCMs in connection with the execution of swaps.⁵ SIFMA AMG contended that the costs of compliance associated with the rule’s oral and written recordkeeping requirements for asset managers significantly outweighed the benefits.⁶

The Divisions considered SIFMA AMG’s concerns in relation to the prior no-action relief granted to asset managers and comments from the 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.⁷ This relief expires on December 31, 2014.⁸

¹ See Adaptation of Regulations to Incorporate Swaps—Records of Transactions, 77 Fed. Reg. 75523 (Dec. 21, 2012) (“Final Rule Adopting Release”).

² 17 C.F.R. § 1.35(a)(1).

³ The Commodity Exchange Act (“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. 7 U.S.C. § 1a(34). The CEA can be accessed through the Commission’s website.

⁴ See Final Rule Adopting Release. “Commodity interest” means (1) any contract for the purchase or sale of a commodity for future delivery; (2) any contract, agreement or transaction subject to a Commission regulation under section 4c or 19 of the CEA; (3) any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the CEA; and (4) any swap. 17 C.F.R. 1.35(y).

⁵ See 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, 2014), available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59828&SearchText>.

⁶ *Id.*

⁷ CFTC Staff Letter No. 14-60 extended the no-action relief that had been provided to certain CTAs in CFTC 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/@lrllettergeneral/documents/letter/13-77.pdf> and in CFTC

II. Proposed Amendment to Regulation 1.35(a)

On November 3, 2014, the Commission proposed an amendment to Regulation 1.35(a) (“Proposed Amendment”).⁹ The Proposed Amendment would codify the temporary no-action relief provided in CFTC Staff Letter No. 14-60, which granted relief to CTAs that are members of DCMs or SEFs from the requirement under Regulation 1.35(a) to record all oral communications that lead to the execution of swap transactions. The Proposed Amendment also would expand the no-action relief provided in CFTC Staff Letter No. 14-60 to cover all oral communications by those CTAs, not just those oral communications that lead to the execution of swap transactions. Finally, the Preamble to the Proposed Amendment states that under the proposed rule, 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.¹⁰ The Proposed Amendment provides for a 60-day comment period for the matters raised, including those addressed in this no-action letter. The comment period will end on January 13, 2015.

III. No-Action Relief

The Divisions find it appropriate to grant the following no-action relief. With respect to oral recordkeeping by CTAs, the Divisions are extending the current no-action relief granted under CFTC Staff Letter No. 14-60, providing relief for CTAs that are members of a DCM or SEF from the oral recordkeeping requirements under Regulation 1.35(a) with respect to swap transactions. The Divisions also are expanding the no-action relief provided to those CTAs in CFTC Staff Letter No. 14-60 to cover all required oral communication under Regulation 1.35(a), not just those oral communications that lead to the execution of swap transactions. Accordingly, with respect to Regulation 1.35(a), the Divisions would not recommend an enforcement action against a CTA that is a member of a DCM or SEF for not maintaining records of oral communications.¹¹

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/@llettergeneral/documents/letter/14-33.pdf>.

⁸ See CFTC Staff Letter No. 14-60. SIFMA AMG’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.

⁹ Notice of Proposed Rulemaking, Records of Commodity Interest and Related Cash or Forward Transactions, 79 Fed. Reg. 68140 (Nov. 14, 2014).

¹⁰ *Id.* at 68143.

¹¹ This letter does not affect the relief granted in 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/@llettergeneral/documents/letter/14-72.pdf> (“CFTC Staff Letter No. 14-72”). Under that letter, members of DCMs and SEFs that are not registered or required to register with the Commission in any capacity do not have to retain text messages and do not have to comply with the form and manner requirements for maintaining required records. The relief provided in this letter remains effective until the

With respect to the form and manner requirements of Regulation 1.35(a), the Divisions would not recommend an enforcement action against a market participant on the grounds that its records of oral and written communications that lead to the execution of a transaction are not linked or otherwise identified with a particular transaction.

This no-action relief shall expire on the earlier of: (i) **December 31, 2015**; or (ii) the effective date of any Commission action with respect to the Proposed Amendment.

This letter, and the positions taken herein, represent the views of the Divisions and do not necessarily represent the positions or views of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in the Regulations issued thereunder. Further, this letter, and the relief contained herein, is based upon the representations previously made to the Divisions in connection with the no-action letters referenced herein. Any different, changed or omitted material facts or circumstances might render this no-action relief void. This letter does not create or confer any rights or obligations on any person or persons subject to compliance with the CEA that bind the Commission or any of its other offices or division. As with all no-action letters, the Divisions retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, at their discretion.

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 Katherine Driscoll, Associate Director, at (202) 418-5544, and for DMO issues, please do not hesitate to contact Duane Andresen, Associate Director, at (202) 418-5492.

Very truly yours,

Gary Barnett
Director
Division of Swap Dealer and Intermediary Oversight

Vincent A. McGonagle
Director
Division of Market Oversight

Cc: Regina Thoele, Compliance
National Futures Association, Chicago

Jamila A. Piracci, OTC Derivatives
National Futures Association, New York