



## 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

Gary Barnett  
Director

Division of  
Market Oversight

Vincent A. McGonagle  
Director

CFTC Letter No. 14-72  
No-Action  
May 22, 2014  
Division of Swap Dealer and Intermediary Oversight  
Division of Market Oversight

Gregg Doud  
Commodity Markets Council  
1300 L Street NW, Suite 1020  
Washington, DC 20005

**Re: 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**

Dear Mr. Doud:

This letter responds to a letter, dated December 12, 2013, received by the Division of Swap Dealer and Intermediary Oversight (“**DSIO**” and, together with the Division of Market Oversight (“**DMO**”), the “**Divisions**”) of the Commodity Futures Trading Commission (“**Commission**”) from the Commodity Markets Council (“**CMC**”) (the “**December 2013 Letter**”). This letter also responds to comments received during and after the staff’s April 3, 2014 “Public Roundtable to Discuss Dodd-Frank End-User Issues,” which included, among other things, a discussion of continuing concerns on the part of members of a designated contract market (“**DCM**”) or a swap execution facility (“**SEF**”) who are not registered with the Commission with respect to Regulation 1.35 compliance (“**Roundtable Comments**”).<sup>1</sup>

In the December 2013 Letter, CMC commented on the recordkeeping requirement of Commission Regulation (“**Regulation**”) 1.35(a) with respect to written communications that lead to the execution of a transaction in a commodity interest and related cash or forward transactions and its application to members of a DCM or SEF who are not registered with the Commission or acting on behalf of a customer for which the commodity interest is held. Various Roundtable Comments echoed CMC’s comments.

---

<sup>1</sup> Public comments received by the Commission in response to the April 3, 2014 Roundtable may be found on the Commission’s website at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1485>.

The Commission promulgated Part 1 of its regulations pursuant to the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* In December 2012, the Commission amended Regulation 1.35(a) 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. Regulation 1.35(a), as amended, states, in relevant part, that each member<sup>2</sup> of a DCM or 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.”<sup>3</sup> Regulation 1.35(a) further requires that “[s]uch records shall be kept in a form and manner identifiable and searchable by transaction.” 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.”<sup>4</sup>

Regulation 1.35(a) further states that the requirement to record oral communications shall not apply to certain enumerated persons, including a member of a DCM or SEF that is not registered or required to be registered with the Commission in any capacity (hereinafter “**Covered Members**”).<sup>5</sup> The December 2012 amendments to Regulation 1.35(a) became effective on February 19, 2013.

CMC explained in the December 2013 Letter that, although many of its members are members of DCMs and will become members of SEFs, they are not otherwise required to be registered with the Commission. Therefore, pursuant to Regulation 1.35(a)(1)(viii), they are

---

<sup>2</sup> Under Section 1a(34) of the Commodity Exchange Act, a “member” of a registered entity is “an individual, association, partnership, corporation, or trust—(A) owning or holding membership in, or admitted to membership representation on, the registered entity ...; or (B) having trading privileges on the registered entity...” 7 USC 1a(34).

<sup>3</sup> 17 CFR 1.35(a)(1). The term “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.” 17 CFR 1.35(a)(2).

<sup>4</sup> *Id.*

<sup>5</sup> 17 CFR 1.35(a)(1)(viii).

exempt from the requirement to record oral communications, but must keep written communications. CMC expressed concerns regarding Regulation 1.35's requirement to retain written communications made via "digital or electronic media" that "lead to the execution of transactions in a commodity interest and related cash or forward transactions." CMC contended that text messages, instant messaging and other electronic communications have replaced telephone conversations as the primary mode of communication for its Covered Members and that its Covered Members have not found a technology solution for searching, retaining and archiving digital or electronic media that is not cost-prohibitive. In the Roundtable Comments, end-users contended that this challenge exists particularly with respect to the recording and keeping of text messages. Moreover, in one of the Roundtable Comments, the Federal Home Loan Banks asserted that although they already maintain records of transactions that are related to, or executed in connection with, their swap transactions, they are concerned about their ability to meet the "searchability" requirement of Regulation 1.35 with respect to "related cash or forward transactions."<sup>6</sup>

Given the concerns raised by CMC in the December 2013 Letter and by various commercial end-users in the Roundtable Comments, the Divisions find it appropriate to grant limited relief with respect to the requirement that Covered Members keep digital or electronic written communications, specifically with respect to keeping text messages. Further, the Divisions find it appropriate to grant relief with respect to the requirement that Covered Members keep written records of all transactions relating to its business of dealing in commodity interests and related cash or forward transactions in a form and manner identifiable and searchable by transaction. Accordingly, the Divisions will not recommend that the Commission take enforcement action against a Covered Member for failure to comply with the requirement under Regulation 1.35(a) to record text messages or with the requirement under Regulation 1.35(a) to keep the records required to be kept under Regulation 1.35 in a form and manner identifiable and searchable by transaction. Covered Members, however, will continue to be required to keep all other written records (including other types of electronic and digital media such as emails and instant messages) required under Regulation 1.35(a).<sup>7</sup>

The relief provided in this letter will remain effective until the effective date of any final Commission action with respect to the December 2013 Letter, including without limitation a rulemaking, an order, or a determination not to take action with respect to the December 2013 Letter.

---

<sup>6</sup> See April 17, 2014 Letter re: Comments on CFTC Rule 1.35 in Response to the CFTC's Roundtable to Discuss Dodd-Frank End-User Issues from Sutherland Asbill & Brennan LLP on behalf of the Federal Home Loan Banks at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59823&SearchText=>.

<sup>7</sup> Although CMC requested broader relief from the recordkeeping requirements of Regulation 1.35(a), the Divisions find it appropriate, in this letter, to limit the relief solely to those specific matters addressed herein.

As with all no-action letters, the Divisions retain the authority, in their discretion, to further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein.<sup>8</sup>

This letter, and the positions taken herein, represent the views of the Divisions 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 the Divisions. Any different, changed or omitted material facts or circumstances might render this no-action relief void.

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 or Fern Simmons, Special Counsel, at (202) 418-5901. For DMO issues, please do not hesitate to contact Nancy Markowitz, Deputy Director, at (202) 418-5453.

Very truly yours,

Gary Barnett  
Director  
Division of Swap Dealer and Intermediary Oversight

Vincent A. McGonagle  
Director  
Division of Market Oversight

---

<sup>8</sup> Commission guidance or action taken during the pendency of this no-action relief, could supersede the relief granted herein.