

## CLIENT MEMORANDUM

# CFTC Proposes To Exclude CTAs From Oral Recordkeeping Requirements; Other Amendments

November 26, 2014

## AUTHORS

**Rita M. Molesworth | P. Georgia Bullitt | Deborah A. Tuchman | Lisa J. Eskenazi | Jonathan C. Burwick**

---

The Commodity Futures Trading Commission has proposed several amendments to the recordkeeping requirements set forth in CFTC Rule 1.35(a).<sup>1</sup> Rule 1.35 generally governs the records that must be maintained by market participants who handle customer orders. The Proposal is, in large part, a response to comments from industry participants. Since amendments to Rule 1.35(a) were adopted in December 2012,<sup>2</sup> the CFTC staff has issued multiple no-action letters relieving various market participants from certain aspects of the Rule. Among other relief issued over the past 12 months, a registered commodity trading advisor deemed to be a member of a designated contract market (“DCM”) or swap execution facility (“SEF”) (a “member CTA”) was temporarily relieved of the obligation to record oral communications that lead to the execution of a swap transaction.<sup>3</sup> If the amendments are adopted as proposed, every member CTA would be excluded from the Rule 1.35 oral recordkeeping requirements, regardless of its CFTC registration status. Comments on the Proposal are due by January 13, 2015.

---

<sup>1</sup> Records of Commodity Interest and Related Cash or Forward Transactions, 79 Fed. Reg. 68140 (Nov. 14, 2014) (the “Proposal”).

<sup>2</sup> Adaptation of Regulations to Incorporate Swaps—Records of Transactions, 77 Fed. Reg. 75523 (Dec. 21, 2012).

<sup>3</sup> See CFTC No-Action Letter No. 13-77 (Dec. 20, 2013) and CFTC No-Action Letter No. 14-60 (Apr. 25, 2014).

---

## CFTC Proposes To Exclude CTAs From Oral Recordkeeping Requirements; Other Amendments

Continued

### *Relief From Oral Recordkeeping Requirements For Registered Member CTAs*

CFTC Rule 1.35(a), among other things, requires registered member CTAs to record oral communications leading to the execution of a transaction in a commodity interest.<sup>4</sup> The CFTC proposes to exclude all CTAs, including registered member CTAs, from the oral recordkeeping requirements of the Rule. The Proposal notes that because CTAs typically have discretionary trading authority over client accounts, CTAs generally do not communicate with clients about transactions to be effected on their behalf. Thus, the oral recordkeeping requirement is of limited regulatory utility with respect to CTAs. Moreover, because CTAs do not routinely maintain recordings of their telephone communications, the cost of compliance would appear to outweigh the potential benefits.

But for the Proposal, registered member CTAs would be expected to comply with the oral recordkeeping requirements of Rule 1.35(a) beginning on January 1, 2015.<sup>5</sup> The Proposal does not explicitly extend this compliance date for CTAs and the proposed amendments will not be adopted prior to January 1, 2015. Prior to the end of this year, however, the CFTC or its staff is expected to issue some form of continuing relief for registered member CTAs to cover the gap period between December 31, 2014 and the effective date of the final rule amendments.

### *Relief For Unregistered Members From Certain Recordkeeping Requirements*

Rule 1.35(a) currently requires that all parties subject to the Rule preserve text messages that lead to the execution of a transaction in a commodity interest or a related cash or forward transaction. The Rule also requires that records maintained under the Rule “be kept in a form and manner identifiable and searchable by transaction.” In December 2013, the CFTC staff granted time-limited no-action relief to Unregistered Members from these specific requirements.<sup>6</sup> The proposed amendments would codify this relief. Thus, Unregistered Members would not have to keep text messages, or maintain other records in a searchable form.

As proposed, the amendments would not relieve registered members of DCMs or SEFs from the requirement to preserve such text messages as well as copies of all other written records required by Rule 1.35(a). Pursuant to CFTC Rule 1.31, these records are currently required to be maintained in a form that is not subject to alteration.

---

<sup>4</sup> The oral recordkeeping requirements of the Rule, as currently in effect, do not apply to a member of a DCM or SEF (including a member CTA) that is not registered or required to be registered with the CFTC in any capacity (an “Unregistered Member”).

<sup>5</sup> See CFTC No-Action Letter No. 14-60 (Apr. 25, 2014).

<sup>6</sup> CFTC No-Action Letter No. 14-72 (May 22, 2014). This relief will remain effective until the CFTC or its staff issues interpretative guidance, a rulemaking, or an order regarding these requirements, or makes a determination not to take any such action.

---

## CFTC Proposes To Exclude CTAs From Oral Recordkeeping Requirements; Other Amendments

Continued

### *Records Would Have To Be Searchable But Not Identifiable By Transaction*

As noted above, currently all records maintained under Rule 1.35(a) must be kept in a form and manner identifiable and searchable by transaction. The proposed amendments to Rule 1.35(a) would clarify that certain pre-execution records need not be identifiable by transaction, although they must be searchable. Thus, there would be no obligation for a market participant to link the record of a transaction with the record of each communication resulting in that transaction.

### *Comments Of Commissioner Giancarlo*

Commissioner J. Christopher Giancarlo dissented from the Proposal, suggesting that it should have gone further. He noted that, although the proposed amendments address many of the difficulties with current Rule 1.35 identified by market participants, the Proposal leaves several issues unresolved. In his dissent, Commissioner Giancarlo encouraged market participants to identify remaining issues with the Rule, including how it intersects with the more broadly applicable recordkeeping requirements outlined in CFTC Rule 1.31 (which, among other things, requires that records be maintained in a non-rewritable, non-erasable format if stored electronically). To that end, he also asked market participants to comment on whether Rule 1.31 itself should be amended, given current technology and business practices.

---

If you have any questions concerning the foregoing or would like additional information, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), P. Georgia Bullitt (212-728-8250, gbullitt@willkie.com), Deborah A. Tuchman (212-728-8491, dtuchman@willkie.com), Lisa J. Eskenazi (212-728-8509, leskenazi@willkie.com), Jonathan C. Burwick (212-728-8108, jburwick@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).

November 26, 2014

Copyright © 2014 Willkie Farr & Gallagher LLP.

**WILLKIE FARR & GALLAGHER<sub>LLP</sub>**