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January 13, 2015

Chris Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Records of Commodity Interest and Related Cash or Forward Transactions--CFTC
Regulation 1.35(a), RIN 3038-AE23

Dear Mr. Kirkpatrick:

The Commodity Markets Council ("CMC") appreciates the opportunity to submit the following comments to the Commodity Futures Trading Commission (the "CFTC" or "Commission") as part of its notice of proposed rulemaking on "Records of Commodity Interest and Related Cash or Forward Transactions" (the "Proposed Rule 1.35 Amendments" or "1.35").¹

Introduction

CMC is a trade association that brings together exchanges and their industry counterparts. Our members include commercial end-users which utilize the futures and swaps markets for agriculture, energy, metal and soft commodities. Our industry member firms include regular users and members of such designated contract markets (each, a "DCM") as the Chicago Board of Trade, Chicago Mercantile Exchange, ICE Futures US, Minneapolis Grain Exchange and the New York Mercantile Exchange. They also include users of swap execution facilities (each, a "SEF"). The businesses of all CMC members depend upon the efficient and competitive functioning of the risk management products traded on DCMs, SEFs or over-the-counter ("OTC") markets. As a result, CMC is well positioned to provide a consensus view of commercial end-users of derivatives on the impact of the Commission's proposed regulations. Our comments, however, represent the collective view of CMC's members, including end-users, intermediaries and exchanges.

¹ 79 Fed. Reg. 68140 (November 14, 2014) (the "Proposing Release"), available at:

CMC sets forth the following 3 points for consideration by the Commission:

- I. Market participants who do not hold a fiduciary relationship with customers should not be required to comply with the unduly burdensome requirements of 1.35. Many would choose to forgo SEF or DCM membership and access the markets through agents rather than shoulder the burden of 1.35. This would decrease SEF and DCM membership, increase costs to market participants and consumers, and diminish transparency in the market place.
- II. Excluding members and registrants with no fiduciary duty to customers from the burdens of 1.35 is consistent with Commission precedent and congressional intent.
- III. The intersection between Commission Regulations 1.31 & 1.35 is a concern to market participants that should be addressed.

I. Requiring Non-Fiduciaries to Comply with 1.35 would be Unduly Burdensome and would Discourage SEF and DCM Membership.

CMC recognizes the Commission's actions to amend CFTC Regulation 1.35 ("Rule 1.35") and applauds its efforts. However, CMC members still believe that the costs and burdens associated with Rule 1.35 as currently written vastly outweigh any benefits. CMC members remain concerned about the scope of Rule 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" ("pre-trade communications").

Although unregistered members of a DCM or SEF are now exempted from the requirement to retain text messages and certain oral communications, unregistered and registered CMC members alike are still troubled by the requirement to retain written and electronic records of pre-trade communications. This is particularly troubling for large commercial end-user CMC members that do hundreds—if not thousands—of cash or forward transactions every day and only hedge net exposures with derivatives. With no practical way to determine which particular cash and forward activity is "related" to their derivatives trades, these companies have no choice but to keep all pre-trade communications for all cash and forward activity, which is very burdensome and gives the appearance of CFTC regulation of cash commodity markets, which is beyond the scope of the CEA.

Our members believe the proposed changes do not go far enough in providing relief and that the rule will force members to either withdraw from or forego membership in DCMs and SEFs, or, out of an abundance of caution, spend significant amounts of time and resources in a commercially impracticable attempt to capture all required records. CMC believes that the

Commission should encourage membership in DCMs and SEFs in order to further promote transparency in the marketplace and to reduce costs for consumers of commodities. If further

relief and clarification is not provided and Rule 1.35 discourages membership in DCMs and SEFs, this will reduce transparency in the marketplace, limit the ability of commercial firms to utilize modern and efficient means of communication, and lead to legal and regulatory uncertainty for farmers, ranchers, and other end-users and customers.

These negative consequences have very real and substantial costs. Furthermore, making the requested regulatory changes to alleviate these burdens on end-users and customers will neither limit the Commission's ability to oversee derivatives markets nor impede the Commission's mission to promote market integrity and protect customers in the derivatives markets.

II. Excluding Members and Registrants with no Fiduciary Duty to Customers is Consistent with Commission Precedent and Congressional Intent.

The CMC respectfully requests that the Commission exclude persons who do not trade on behalf of customers from the requirements of Rule 1.35. This would be consistent with the Commission's historic approach to 1.35 and Congressional intent.²

Although the CMC prefers a direct and clear exclusion from 1.35 for commercial end-users with no fiduciary duty to customers, an alternative approach would be to make a distinction between "trading privileges" on a registered entity which would make a market participant a member of a SEF per Commission Regulation 1.3q(1)(ii) and those that are simply executing

² Regulation 1.35(a) is largely a product of the long-time regulation of the businesses of fiduciary intermediaries such as futures commission merchants ("FCMs") and introducing brokers ("IBs") operating in futures markets. Section 4g(a) of the Act, 7 U.S.C. § 6g(a) (2014), provides generally that FCMs, IBs, floor brokers, and floor traders shall make, keep, and hold open for inspection "... such reports as are required by the Commission regarding the transactions and positions of such person, and the transactions and positions of the customer thereof, in commodities for future delivery on any board of trade in the United States or elsewhere" Sections 4g(b) through (d) of the Act also provide that: registered entities, including designated contract markets, are required to "maintain daily records"; floor brokers, IBs, and FCMs are required to "maintain daily records for each customer in such manner and form as to be identifiable with the trades referred to in subsection (b)..."; and "daily trading records shall be maintained in a form suitable to the Commission for such period as may be required by the Commission. Prior to the December 2012 amendments to Regulation 1.35, the Commission has always applied the record keeping requirements to those that execute customer orders and provide a fiduciary duty to customers. Amendments to Regulation 1.35 in December 1948, June 1963, and September 1971, and the February 2009 Division of Market Oversight Advisory all place the recordkeeping burden strictly on those handling or on the opposing side of customer order executions. The recordkeeping burden was never inclusive of the customer and should not now be expanded.

trades for their own account (i.e. “execution privileges”). This distinction is consistent with the Commission’s historic approach, as “trading privileges” is associated with executing futures transactions on behalf of customers. Execution privileges, in contrast, should be read in the context of electronic platforms, such as SEFs, that are used by end-users to facilitate transactions between eligible contract participants. An entity that only executes swaps directly on a SEF for its own account should be deemed to have “execution privileges” and not “trading privileges,” and should not be considered a “member” of that SEF.

A third possible way the Commission could address customer and end-user issues would be to simply remove the term “member” in the regulation, and insert the congressional definition in the Commodity Exchange Act which strictly applies these recordkeeping regulations to “FCMs, IBs, floor brokers, and floor traders.”³ This alternative is not as desirable to the CMC as the above-suggested alternatives, but would address the concerns of unregistered CMC members with very little modification to the existing rule. The Commission could simply remove the definition of “member” as applicable to Regulation 1.35 in a manner consistent with congressional intent and prior CFTC staff precedent.

In the last Congress the U.S House of Representatives passed bipartisan legislation that took a similar approach by carving out “members” who are not registered with the Commission from the requirements of 1.35 save for the maintenance of written records of the final agreement between the parties and the material economic terms of the transaction. H.R. 4413 would have amended the Commodity Exchange Act by creating a new provision to read as follows:

“SEC. 4u. RECORDKEEPING REQUIREMENTS APPLICABLE TO NON-REGISTERED MEMBERS OF CERTAIN REGISTERED ENTITIES.

Except as provided in section 4(a)(3), a member of a designated contract market or a swap execution facility that is not registered with the Commission and not required to be registered with the Commission in any capacity shall satisfy the recordkeeping requirements of this Act and any recordkeeping rule, order, or regulation under this Act by maintaining a written record of each transaction in a contract for future delivery, option on a future, swap, swaption, trade option, or related cash or forward transaction. The written record shall be sufficient if it includes the final agreement between the parties”

Amending the Commissions Proposed Rule could reflect this approach were it to be revised as follows:

Proposed Part 1.35 is revised to read as follows:

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³ Commodity Exchange Act, Section 4g(a).

(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) Shall be limited to a written record reflecting the final agreement of the parties with respect to each transaction in a contract for future delivery, option on a future, swap, swaption, trade option, or related cash or forward transaction; and
- (ii) Are not required to be kept pursuant to paragraph (a)(2) of this section.

Revising or clarifying this definition would ensure that the historic congressional intent of Regulation 1.35 would be rightly placed on fiduciaries without unduly burdening end-users and customers by forcing them to record all written or electronic communications.

III. The Intersection between Regulations 1.31 & 1.35 is a Concern to Market Participants.

While the Proposed Rule 1.35 Amendments to clarify the “identifiable” and “searchable” requirements of Rule 1.35(a) generally are helpful and respond to many market participants’ comments, CMC remains concerned that they do not go far enough to address the heavy compliance burdens imposed on end-user firms that meet the CEA definition of “member” of a SEF or DCM, but that are not registered with the Commission.⁴ One source of concern not discussed in prior CMC comment letters is that Rule 1.35(a)(6) would still require members of a SEF or DCM (even those that are not registered with the Commission) to comply with Rule 1.31. CMC members find compliance with Rule 1.31’s incorporation of outdated technology and incongruity with standard market practices overly burdensome, infeasible and costly. From a practical perspective, 1.31’s requirement to maintain native files is impossible in conjunction with 1.35’s heightened requirements. For example, iMessages sent with covered communications would need to be kept in iMessage format – NOT PDF, screenshot, or any sort of database. CMC strongly believes that there is a need for the CFTC to revise Rule 1.31 given advancements in technology and current business practices, and ideally to do so in conjunction with the revisions to Rule 1.35(a).

Given the burden and cost of compliance with 1.35 as drafted, in conjunction with 1.31, members of SEFs or DCMs who are not fiduciaries, should be excluded from the requirement that records required to be maintained pursuant to 1.35 be kept in accordance with 1.31.

Conclusion

Absent additional relief, unregistered market participants will be discouraged from becoming or remaining members of a SEF or DCM because of the regulatory costs and burdens. Where available, market participants may choose to trade through an agency arrangement instead of

⁴ See supra n. 2.

as a member. This would result in increased hedging cost to CMC members and to consumers. This would also decrease transparency because transactions would be conducted through an intermediary. A simple, sensible way forward would be to limit the application of 1.35 to registrants that act as fiduciaries on behalf of customers.

Thank you for issuing the Proposed Rule 1.35 Amendments and the opportunity to provide comments on the commercial impacts of this rulemaking. If you have any questions or concerns regarding this letter, please do not hesitate to contact Kevin Batteh at Kevin.Batteh@Commoditymkts.org.

Sincerely,



Kevin K. Batteh
General Counsel
Commodity Markets Council