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CFTC Provides Relief from Certain Recordkeeping Requirements Applicable to CPOs and CTAs

Effective December 24, 2015, the Commodity Futures Trading Commission (the “CFTC”) revised its Rule 1.35(a) to provide relief from certain recordkeeping requirements for commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”), whether registered with the CFTC or not, that are members of a designated contract market or have trading privileges on a swap execution facility. Under the revised Rule, CPOs and CTAs still are required to keep records of all transactions in commodity interests and related cash or forward transactions.¹ However, CPOs and CTAs not registered with the CFTC need not keep transaction records that are in the form of text messages (defined as short message service (“SMS”) or multimedia messaging service (“MMS”) telephone transmissions).² In addition, CPOs and CTAs not registered with the CFTC need not keep records of written pre-trade communications.³ Moreover, CPOs or CTAs, whether registered or not, are not required to keep records of oral communications. Finally, there is no prescribed form or manner in which the required records must be kept, and no prescribed methodology by which records must be searched or retrieved. Instead, CPOs and CTAs must keep records so as to permit prompt, accurate and reliable location, access and retrieval of any particular information and to allow for identification of a particular transaction.

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Prior to this amendment, the CFTC last amended Rule 1.35(a) in December 2012 as part of a series of rulemakings that it intended to integrate certain existing rules more fully within the framework created by the Dodd-Frank Wall Street Reform and Consumer Protection Act for swap dealers and major swap participants. Shortly after that amendment became effective, market participants raised concerns about the difficulty of complying with its requirements. Since the amendment was adopted, the CFTC staff issued several no-action letters relieving market participants from certain provisions of the Rule.⁴ In particular, compliance with the requirement for records to be kept in a manner “identifiable and searchable by transaction” and with the requirement for registered CTAs to keep records of oral communications were found to be particularly difficult. The revised Rule addresses the first issue by clarifying that records need not be converted to searchable electronic databases and that CPOs and CTAs may keep records however they deem prudent and appropriate for their particular businesses. The revised Rule addresses the second issue by dropping the requirement that registered CTAs keep records of oral communications, agreeing with market participants that the requirement was not necessary in light of the unduly burdensome nature of compliance.

Market participants also raised concerns over the incompatibility of Rule 1.35(a) with Rule 1.31, which is the general rule setting forth the form and manner in which books and records required to be kept under the Commodity

¹Related cash and forward transactions are defined as “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.” Records of Commodity Interest and Related Cash or Forward Transactions, 80 Fed. Reg. 80,247, 80,256 (Dec. 24, 2015).

²Text messages do not include those written communications exchanged by internet-based messaging services.

³Written pre-trade communications include “all . . . 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 any related cash or forward transactions, . . . whether transmitted by . . . facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media[.]” See *supra* note 1, at 80,255-256.

⁴CFTC Letter No. 14-60 dated April 25, 2014; CFTC Letter No. 14-72 dated May 22, 2014; CFTC Letter No. 14-147 dated December 16, 2014; CFTC Letter No. 15-65 dated December 8, 2015.

Exchange Act and the CFTC rules must be maintained. Although the CFTC staff has noted previously that Rule 1.31 may be outdated,⁵ the CFTC did not adopt any revisions to Rule 1.31 as part of this rulemaking.

For further information, please contact [Deborah Monson](#) or your usual Ropes & Gray adviser.

⁵CFTC Letter No. 14-114 dated September 8, 2014 (“Parties have expressed their concern that certain portions of Commission Regulation 1.31 may no longer be in keeping with modern data management practices. The Division intends to perform a review of the requirements of Commission Regulation 1.31 and their applicability to the current technological environment.”).