

January 13, 2015

Via Electronic Mail

Mr. Christopher J. Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

**Re: Records of Commodity Interest and Related Cash or Forward Transactions;
RIN 3038-AE23**

Dear Mr. Kirkpatrick:

The Investment Adviser Association (“IAA”)¹ appreciates the opportunity to submit comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) regarding the CFTC’s proposed amendments to recordkeeping Regulation 1.35(a) under the Commodity Exchange Act (“CEA”).² The Proposal seeks to codify and expand certain no-action relief, issued by the CFTC staff subsequent to the adoption of amendments to Regulation 1.35(a) in 2012, to exempt commodity trading advisors (“CTAs”), as members of a designated contract market (“DCM”) or swap execution facility (“SEF”), from the oral recordkeeping requirement in Regulation 1.35(a). We strongly support the proposed oral recordkeeping exemption for CTAs. In addition, we request that the Commission exempt CTAs from the written recordkeeping requirements under Regulation 1.35.

I. Background of Regulation 1.35

The CFTC amended Regulation 1.35(a) on December 17, 2012 to integrate provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act for futures commission merchants (“FCMs”), certain introducing brokers (“IBs”), retail foreign exchange dealers (“RFEDs”), and certain other registrants that are members of DCMs or SEFs. Regulation 1.35(a) requires that these registrants keep full, complete, and systematic records of all transactions relating to their business of dealing in commodity interests and related cash or forward

¹ IAA is a not-for-profit association that represents the interests of investment adviser firms registered with the Securities and Exchange Commission (the “SEC”). Founded in 1937, the IAA’s membership consists of more than 550 advisers that collectively manage approximately \$14 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our website: www.investmentadviser.org.

² See Records of Commodity Interest and Related Cash or Forward Transactions, CFTC Release RIN 3038–AE23, 79 Fed. Reg. 68140 (Nov. 14, 2014) (“Proposal”), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2014-26983a.pdf>.

Mr. Christopher J. Kirkpatrick
Commodity Futures Trading Commission
January 13, 2015
Page 2 of 7

transactions and record all *oral* 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, whether communicated by telephone, voicemail, mobile device, or other digital or electronic media, and to keep those records for one year.³ The 2012 Regulation also requires FCMs, IBs, RFEDs, and all members of a DCM or SEF to record and keep 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 or 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, and to keep those written records for five years.⁴ Furthermore, the Regulation requires that the records be maintained in a “form and manner identifiable and searchable by transaction.”⁵ The Commission excluded commodity pool operators (“CPOs”), as well as swap dealers, major swap participants, and others, from the oral recordkeeping requirements. CTAs, however, as members of DCMs or SEFs, were not excluded from such requirements.

The 2012 Regulation did not contemplate the CTA business model, and it created significant compliance costs and obstacles for CTAs. Thus, at the request of industry participants, including the IAA, the CFTC staff subsequently provided no-action relief to CTAs from certain aspects of the oral recordkeeping requirements of Regulation 1.35(a).⁶ The

³ See Adaption of Regulations to Incorporate Swaps—Records of Transactions, CFTC Release RIN 3038-AD53, 77 Fed. Reg. 75523 (Dec. 21, 2012) (“2012 Regulation”), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-30691a.pdf>.

⁴ See 2012 Regulation.

⁵ Regulation 1.35(a)(1).

⁶ The CFTC staff granted an initial request for no-action relief for CTAs from these requirements in 2013, but the relief only extended until May 1, 2014. See *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)*, CFTC Letter No. 13-77 (Dec. 20, 2013), available at: <http://www.cftc.gov/ucm/groups/public/@lrflettergeneral/documents/letter/13-77.pdf>. Thereafter, in March 2014, the IAA, in support of other requests for no-action relief, requested that CFTC staff exempt CTAs that participate on a SEF from Regulation 1.35(a). See IAA Request for Interpretive Guidance and Relief on Application of Rule 1.35(a) to Asset Managers, Letter to CFTC from Karen L. Barr, IAA General Counsel (Mar. 18, 2014), available at https://www.investmentadviser.org/eweb/docs/Publications_News/Comments_and_Statements/Current_Comments_Statements/140318cmnt.pdf. On April 25, 2014, the CFTC issued further no-action relief to CTAs that are members of DCMs or SEFs for failure to comply, prior to December 31, 2014, with the requirement under Regulation 1.35(a) to record oral communications in connection with the execution of swaps. See *Time-Limited No-Action Relief for Certain Members of Swap Execution Facilities and Designated Contract Markets from the Requirement to Record Oral Communications, Pursuant to Commission Regulation 1.35(a), in Connection with the Execution of Swap Transactions*, CFTC Letter No. 14-60 (Apr. 25, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrflettergeneral/documents/letter/14-60.pdf>. The relief in CFTC Letter 14-60 expired December 31, 2014. On December 16, the CFTC staff issued CFTC Letter 14-147 to provide two areas of further relief for CTAs from certain recordkeeping requirements under CFTC Regulation 1.35(a). First, the letter expands the no-action relief provided in CFTC Letter 14-60 issued on April 25, 2014 to registered CTAs that are members of DCMs or of SEFs from the requirement to record *all* oral communications, not just those that led to the

Proposal seeks to codify the no-action relief provided by the CFTC staff since the Regulation's adoption in 2012. Specifically, the Proposal would exclude members of DCMs or SEFs that are CTAs from the oral recordkeeping requirements.⁷

In addition, the Proposal would modify the requirement to maintain records in a "form and manner identifiable and searchable by transaction" to a requirement that records must be "searchable"⁸ and kept in a format that allows for "identification of a particular transaction."⁹ The CFTC explained that this change eliminates a requirement to link or otherwise identify a record of communication that leads to the execution of a transaction with a particular transaction.¹⁰

II. The Proposed Amendments to Regulation 1.35(a) to Exempt CTAs from the Oral Recordkeeping Requirements are Appropriate

The IAA strongly supports the Commission's proposed amendments. The Proposal would exclude members of a DCM or SEF that are CTAs from the requirement to record all oral communications. As the Commission notes, "many CTAs who are members of DCMs or SEFs and have discretionary trading authority do not have routine discussions with end-clients regarding transactions in commodity interests."¹¹ The Commission further notes that the Proposal "balance[s] CTAs' recordkeeping burden by excluding them from the oral recordkeeping requirement of Regulation 1.35(a),"¹² consistent with the Commission's "goals of balancing its interest in protecting customers and ensuring market integrity, with the burdens of affected market participants."¹³ We agree and appreciate the Commission's acknowledgment that "many CTAs who are members of a DCM or SEF have discretionary authority over their

execution of swap transactions, as was the case under CFTC Letter 14-60. Second, the letter provides no-action relief to market participants that do not link or identify records of oral and written communications that lead to the execution of a transaction in a commodity interest and related cash or forward transactions to a particular transaction. See DSIO and Division of Market Oversight, *No-Action Relief from Certain Recordkeeping Requirements under Commission Regulation 1.35(a)*, CFTC Letter No. 14-147 (Dec. 16, 2014), available at <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/14-147.pdf>. The relief is available until the earlier of December 31, 2015 or the effective date of any Commission action with respect to the Proposal.

⁷ Proposed Rule 1.35(a)(4)(vi).

⁸ See proposed Regulation 1.35(a)(2) ("[a]ll records required to be kept pursuant to paragraph (a)(1) of this section shall be searchable.")

⁹ Proposal at 68142.

¹⁰ Proposal at 68143.

¹¹ Proposal at 68142.

¹² *Id.*

¹³ Proposal at 68143.

customers' accounts and would not be having routine telephone conversations with customers that lead to the execution of an order on a DCM or SEF."¹⁴

The Proposal would remove unnecessary and expensive regulation affecting CTAs as market participants. The costs and burdens to record and maintain oral communications are significant and would not serve any important policy objective. For example, CTAs would need to initially purchase or develop and implement significant new technologies, systems and procedures, as well as implement employee training, in order to comply with the expansive coverage of current Regulation 1.35(a) requirements, at great cost and with little benefit. We understand from member firms that the costs to initially implement such systems could start in the hundreds of thousands of dollars per firm. Furthermore, ongoing costs associated with such recordkeeping requirements would also be extensive.¹⁵

We also note that CTAs are already subject to extensive recordkeeping requirements under CFTC Regulation 4.33.¹⁶ Further, the IAA's CTA member firms also are investment advisers registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940 ("Advisers Act"). Our members manage their clients' assets as fiduciaries and generally on a discretionary basis. These dually-registered CTAs maintain extensive records

¹⁴ *Id.* In CFTC Letters 14-60 and 14-147, the CFTC staff recognized that many CTAs that are members of DCMs or SEFs and have discretionary trading authority do not have routine discussions with end-clients regarding transactions in commodity interests.

¹⁵ The Proposal requests comment on whether to only exempt small CTAs from the oral recordkeeping requirement. We strongly disagree with such an approach. As discussed above, the costs and burdens to implement the required systems would be burdensome and onerous, regardless of the size of the firm. Accordingly, the Commission should not make a distinction for the burden to a CTA depending on size of firm or volume of transactions.

¹⁶ For example, under Regulation 4.33, CTAs must keep copies of each confirmation or acknowledgment of a commodity interest transaction, and each purchase and sale statement and each monthly statement received from a FCM, a retail foreign exchange dealer or a swap dealer, as well as an itemized daily record of each commodity interest transaction of the commodity trading advisor, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying commodity, swap type and counterparty, the FCM and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized; however, that if the trading advisor is a counterparty to a swap, it must comply with swap data recordkeeping and reporting requirements, as applicable. We note that Regulation 1.35(a) requires that the records be kept in accordance with the requirements of CFTC Regulation 1.31. However, current Regulation 1.31 is outdated and unworkable. In this regard, the IAA submitted a joint petition for rulemaking in July 2014 to amend CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33 to seek amendments to the recordkeeping rules. *See* Joint IAA, MFA, AIMA Petition for Rulemaking to Amend CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33 (July 21, 2014) ("Petition for Rulemaking"), available at:

https://www.investmentadviser.org/eweb/docs/Publications_News/Comments_and_Statements/Current_Comments_Statements/140721cmnt.pdf.

Mr. Christopher J. Kirkpatrick
Commodity Futures Trading Commission
January 13, 2015
Page 5 of 7

under the Advisers Act relating to their advisory business and client transactions.¹⁷ Under SEC Advisers Act rules, these CTAs are not, however, required to maintain oral communications with their clients.

Finally, we note that the Proposal would not impact the CFTC's ability to provide market oversight because the CFTC would maintain access to oral communications under CFTC regulations that require swap dealers, FCMs, DCMs, and SEFs to maintain oral and written records of their business with CTAs. In addition, Regulation 4.33, as discussed above, requires CTAs to maintain detailed records of their transactions on behalf of clients that are available to the CFTC.

III. The CFTC Should Exempt CTAs from Written Recordkeeping Requirements under Regulation 1.35

We appreciate the Commission's proposal to amend Regulation 1.35(a) to eliminate the requirement for CTAs to record oral communications. We also urge the CFTC to further exempt CTAs from the written recordkeeping requirements under Regulation 1.35.¹⁸ CTAs that are discretionary asset managers manage client assets pursuant to contractual agreements with clients and are subject to specific recordkeeping requirements under CFTC Regulation 4.33, as noted above,¹⁹ as well as the Advisers Act recordkeeping requirements. An exemption from Regulation 1.35 for CTAs would alleviate duplicative written recordkeeping regulations while still permitting the Commission to "promote market integrity and protect customers."²⁰ Regulation 4.33 requires CTAs to maintain extensive records relating to their transactions in commodity interests for clients.²¹ On the other hand, the types of records contemplated in

¹⁷ See Advisers Act Rule 204-2 (requiring record retention by SEC-registered investment advisers, of, among others: (i) all written communications received and sent relating to: any receipt, disbursement, or delivery of funds or securities; and the placing or execution of purchase or sell orders; (ii) portfolio management records, including memorandum of each order to buy or sell any security or of instructions received by the adviser regarding the purchase, sale, receipt or delivery of any security, showing: the terms and conditions of the order, instruction, modification or cancellation; the account for which the order was entered and the date of entry; the bank, broker or dealer by or through whom the order was executed (where appropriate); and designation of orders entered pursuant to use of a discretionary power; and (iii) additional records if the adviser has custody of the client funds and securities.)

¹⁸ We do not address the threshold question of whether CTAs are or should be subject to Regulation 1.35(a) by virtue of being a "member" of a DCM or SEF. The CEA defines a "member" in Section 1(a)(34) as having trading privileges on the registered entity or derivatives transaction execution facility. However, some SEF rulebooks identify as members participants with varying levels of access and/or functionality and use of the SEF.

¹⁹ In addition, CTAs (and CPOs) registered with the SEC could provide the CFTC with the same access to their SEC-required records as required to be provided to the SEC.

²⁰ See 2012 Regulation, 77 Fed. Reg. at 75528.

²¹ Regulation 4.33 requires that CTAs maintain, among other records, with respect to clients or subscribers, records of all transactions and confirmations of each commodity interest transaction, as well as records of each commodity

Regulation 1.35 are more akin to those records created and kept by FCMs and IBs, rather than by CTAs (*e.g.*, trading cards, signature cards, and street books).²² Market participants with whom CTAs engage, such as FCMs, IBs, and DCMs/SEFs, already are subject to recordkeeping requirements and would maintain the exact same set of records covered in Regulation 1.35. Moreover, if CTAs were exempt from Regulation 1.35's written recordkeeping requirements, the Commission would continue to have access to searchable written records of CTAs under Regulation 4.33 relating to each commodity interest transaction, showing important details of the transaction and swap data reporting requirements. Therefore, the application of Regulation 1.35's written requirements to CTAs is duplicative and unnecessary, and we request the Commission exempt CTAs from the application of Regulation 1.35, including the related written recordkeeping requirements thereunder.

IV. The Commission Should Grant the IAA's Petition for Rulemaking and Amend Recordkeeping Regulation 1.31 and Recordkeeping Rules

In the Proposal, CFTC Commissioner Giancarlo seeks comment regarding any perceived need to revise Regulation 1.31 given advancements in technology and current business practices.²³ As noted above, the IAA and other industry groups recently filed a Petition for Rulemaking seeking amendments to CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33. Our recommended changes to Regulation 1.31, include, for example, eliminating the requirements to keep records in their native (and potentially outdated) format and to retain third-party technical consultants. Many CTAs (and CPOs) find compliance with Regulation 1.31 unduly burdensome, infeasible, and costly, due to the requirement to implement outdated technology and disregard developments in standard market practices with respect to electronic recordkeeping and third-

interest transaction and books and records of all other transactions in all cash market transactions. Regulation 4.33(a)(3) requires CTAs to maintain all powers of attorney and other documents, or copies thereof, authorizing the CTA to direct the commodity interest account of a client or subscriber of the CTA, which would capture any instructions changing or limiting the CTA's discretionary authority. *See* Proposal at 68144. However, to the extent the CFTC determines Regulation 4.33 is not sufficient for the Commission's stated regulatory purposes in the Proposal, the CFTC should instead consider amending Regulation 4.33 to address any recordkeeping concerns the Commission may have for CTAs. Regulation 4.33 also requires CTAs to maintain books and records in accordance with the electronic recordkeeping requirements in Regulation 1.31. *See* Petition for Rulemaking. In addition, under Advisers Act Rule 204-2(f) governing those CTAs and CPOs that are registered with the SEC, a firm that determines to discontinue its advisory business must arrange for the preservation of its records for the remainder of the period specified in the recordkeeping rule before its ceases to conduct business. Such an adviser must notify the SEC of the exact location where its records will be maintained during this period. *See* Advisers Act Rule 204-2(f) (requiring that "[a]n investment adviser subject to [the recordkeeping rule 204-2], before ceasing to conduct or discontinuing business as an investment adviser shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the Commission in writing [] of the exact address where such books and records will be maintained during such period.")

²² *See* Rule 1.35(a)(1).

²³ *See* Proposal at 68148 (Appendix 3--Dissenting Statement of Commissioner J. Christopher Giancarlo).

Mr. Christopher J. Kirkpatrick
Commodity Futures Trading Commission
January 13, 2015
Page 7 of 7

party recordkeepers.²⁴ Thus, we again urge the Commission to grant the IAA's Petition for Rulemaking and address these issues related to outdated recordkeeping requirements in Regulation 1.31.

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The IAA appreciates the Commission's consideration of our comments. We look forward to working with you on these important issues. If you have any questions or require additional information, please contact the undersigned or Kathy D. Ireland, IAA Acting General Counsel, at (202) 293-4222.

Respectfully submitted,

/s/ Monique S. Botkin

Monique S. Botkin
IAA Associate General Counsel

Cc: The Honorable Timothy G. Massad, Chairman
The Honorable Mark P. Wetjen, Commissioner
The Honorable Sharon Y. Bowen, Commissioner
The Honorable J. Christopher Giancarlo, Commissioner

Mr. Thomas J. Smith, Acting Director, Division of Swap Dealer and Intermediary Oversight

Mr. Erik Remmler, Deputy Director, Division of Swap Dealer and Intermediary Oversight

Ms. Katherine Driscoll, Associate Director, Division of Swap Dealer and Intermediary Oversight

²⁴ See Petition for Rulemaking, *supra* n. 16.