
CFTC Issues Oral Recordkeeping No-Action Relief to Asset Managers

THURSDAY, MAY 01, 2014

On April 25, 2014, the Commodity Futures Trading Commission (CFTC) extended time-limited no-action relief for certain asset manager members of swap execution facilities (SEFs) and designated contract markets (DCMs) from the oral recordkeeping requirement of CFTC Regulation 1.35(a) in connection with the execution of swaps.¹ This no-action relief expires on December 31, 2014.

CFTC Regulation 1.35(a), which was amended in 2012 following the passage of the Dodd-Frank Act, requires that each member of a DCM or SEF keep 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, including “all oral communications 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.”² The oral communications recordkeeping requirement effectively includes all oral communications leading to the execution of a swap other than face-to-face communication. The rule became effective on December 21, 2013.³

The CFTC Regulation 1.35(a) oral communications requirement does not apply to commodity pool operators (CPOs) and members of a DCM or SEF that are not registered or required to be registered with the CFTC in any capacity. Commodity trading advisors (CTAs), however, are not among the exempted entities. While all asset managers that are members of a SEF or DCM or registered as a CPO or CTA are subject to CFTC Regulation 1.35, only those registered as CTAs are subject to the oral recordkeeping requirement. The CFTC had previously provided relief from the oral communications requirement for CTAs that are members of SEFs⁴ and for CTAs that are members of trueEX, a DCM.⁵ The relief granted under both of these letters was set to expire on May 1, 2014. The latest no-action relief extends until December 31, 2014 the relief previously granted and expands the scope of applicable persons to include all CTAs that are members of a SEF or DCM.

CFTC Regulation 1.35—and in particular the oral recordkeeping requirements—has remained a

significant concern for asset managers that are members of a SEF or DCM. The extension is no doubt welcomed by the industry. It only delays, however, the effectiveness of what will remain an operationally and financially burdensome rule for asset managers. The CFTC is aware of the concerns regarding the rule; indeed, the April 25, 2014 no-action relief is largely in response to discussions with industry trade groups and a comment letter by the Asset Management Group (AMG) of the Securities Industry and Financial Markets Association (SIFMA). In the comment letter, SIFMA AMG requested the exemption of asset managers from all aspects of Regulation 1.35(a).⁶

The latest CFTC no-action relief only temporarily alleviates the concerns raised by the oral recordkeeping requirements. It remains to be seen how the CFTC will permanently resolve asset manager concerns regarding the rule. The expectation is that postponement will give the CFTC additional time to address industry concerns and allow it to evaluate further the costs and benefits of the rule. In the meantime, it will allow CTAs additional time to consider compliance measures. It will also allow asset managers that are CPOs additional time to evaluate whether CTA registration is necessary or whether they may be able to deregister as CTAs.

¹ See CFTC Letter No. 14-60, Time-Limited No-Action Relief for Certain Members of Swap Execution Facilities and Designated Contract Markets from the Requirements to Record Oral Communications, Pursuant to Commission Regulation 1.35(a), in Connection with the Execution of Swap Transactions (Apr. 25, 2014), available at: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-60.pdf>.

² 17 C.F.R. 1.35(a)(1).

³ See Adaptation of Regulations to Incorporate Swaps, 77 Fed. Reg. 75,523 (December 21, 2012).

⁴ See CFTC Letter No. 13-77, 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) (Dec. 20, 2013), available at: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-77.pdf>.

⁵ See CFTC Letter No. 14-33, Time-Limited No-Action Relief for Certain Members of a Designated Contract Market from the Requirement to Record Oral Communications, Pursuant to Commission Regulation 1.35(a), in Connection with the Execution of Swap Transactions (Mar. 21, 2014), available at: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-33.pdf>.

⁶ See SIFMA AMG Comment Letter re: CFTC Staff Public Roundtable to Discuss Dodd-Frank End-User Issues and Request for Interpretative Guidance and Relief on Application of Rule 1.35(a) to Asset Managers (Apr. 17, 2014).

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