

August 8, 2011

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Notice of Proposed Rulemaking – Adaption of Regulations to
Incorporate Swaps/RIN No. 3038-AD53

Dear Mr. Stawick:

National Futures Association (NFA) appreciates the opportunity to comment on the Commodity Futures Trading Commission's (CFTC or Commission) proposed rulemaking to amend a number of existing Commission regulations to conform those regulations to the new statutory and regulatory framework established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Although NFA supports the Commission's efforts to conform its existing regulations with the new requirements under Dodd-Frank, we offer the following comments relating to two specific proposed amendments.

Regulation 1.35(a)

Commission Regulation 1.35(a) currently requires FCMs, RFEDs, IBs and members of a designated contract market (and as amended members of a swap execution facility ("SEF")) to retain certain required records and to produce them for inspection upon request. The Commission is proposing to add to the list of required records "all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that "lead to the execution" of transactions in a commodity interest or cash commodity, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media" (emphasis supplied). In the accompanying Federal Register Release, the Commission states that the proposed rule would explicitly require FCMs, RFEDs, IBs, and members of DCMs and SEFs to record all such oral communications.



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Currently, Regulation 1.35 does not establish an obligation for an FCM, RFED and IB to record oral communications. If, therefore, the Commission intends that the proposed language imposes a new and sweeping obligation to record all oral communications via telephone and mobile device that might someday, somehow "lead to the execution" of an order, NFA would point out two significant problems with the proposal.

First, if, as the Commission states, its intent is to harmonize Commission Regulation 1.35 with proposed Regulation 23,202(a)(1), the record keeping rule for swap dealers, the broad application of the proposed amendments to Regulation 1.35 would seem to have the opposite effect. In the Federal Register notice describing the proposed record keeping rule for swap dealers, the Commission stated that the proposed rule would require SDs and MSPs to maintain recordings of telephone calls and other communications created in the normal course of business, but would **not** establish an affirmative new requirement to create recordings of all telephone conversations if the complete audit trail can be met through other means.

Second, the Commission's estimate of the costs of recording and retaining all oral communications in any way related to the execution of an order focuses exclusively on the costs of procuring and operating an appropriate recording system. The release does not address the industry wide costs of retaining those recordings for five years under the standards proposed by the Commission. NFA Compliance Rule 2-9's Interpretive Notice entitled *Enhanced Supervisory Requirements* requires firms that meet objective criteria indicating potential sales practice problems to record all of their customer conversations. In practice, the NFA rule applies only to a handful of firms. Applying such a rule to all 1700 registered FCMs, RFEDs and IBs will exponentially increase the aggregate cost to the industry while the potential benefits of doing so are conjectural at best.

Finally, we note that the Commission indicates that the proposed amendments to Regulation 1.35 are intended to address Commission case law finding that tape recordings of customer telephone conversations made by registered firms are beyond the scope of Regulation 1.35. We recognize that audio recordings have been very useful to the Commission in enforcement proceedings and agree that the previous case law needs to be addressed. That result could be achieved, however, by requiring firms that choose to record oral communications to retain those recordings and produce



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them upon request without imposing sweeping new obligations on all registered FCMs, RFEDs, and IBs.

Regulation 1.31(a)

Currently, Commission regulation 1.31 permits registrants to store required records using electronic storage media that comply with specified standards. The Commission is proposing to amend Regulation 1.31(a) to require registrants to maintain all required records in their original form (for paper records) or native file format (for electronic records) and produce those records to the Commission in the form specified by the Commission. In support of this change, the Commission notes that the change should not place any unreasonable burden on registrants because it is consistent with current Commission practice and the Federal Rules of Civil Procedure (F. R.), specifically citing F.R. 34(b).

NFA requests that the Commission clarify that this proposed amendment does not alter the current recordkeeping requirements that permit a registrant to maintain paper records (except those specifically identified in 1.31(d)) on micrographic media or electronic storage media that meet certain standards in lieu of maintaining the paper record in its original form. NFA believes the amendments as currently written could be read to require a registrant to maintain paper records in their original form even if a registrant also maintains a copy of the paper record on micrographic media or electronic storage media.

NFA also questions the need for maintaining electronic records in their native format. The Commission does not identify any obstacles or issues it has encountered with the current electronic records storage requirements. Additionally, NFA does not agree that the Commission's proposal is consistent with the requirements of F.R. 34(b). Based on our understanding, F.R. 34(b) does not require that electronic records be stored in their native format, and although this rule may permit a party to ask for an electronic record in a certain format, the producer of the record is not required to produce it in that form if it does not maintain the record in the requested electronic format. As a result, NFA does not believe this amendment is necessary and we recommend that the Commission continue to permit registrants to maintain electronic records using any electronic format that meets the standards currently required by Regulation 1.31.



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Thank you for providing NFA with the opportunity to comment on these proposed rule changes. If you have any questions concerning this letter, please do not hesitate to contact the undersigned at (312) 781-1413 or ts Sexton@nfa.futures.org or Carol Wooding at (312) 781-1409 or cwooding@nfa.futures.org.

Sincerely,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

Thomas W. Sexton, III
Senior Vice President and
General Counsel