

August 8, 2011

Mr. David Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581  
[secretary@cftc.gov](mailto:secretary@cftc.gov)

RE: Tagging Requirements in Proposed § 1.35

Dear Mr. Stawick:

Barclays Capital<sup>1</sup> (“Barclays”) appreciates the opportunity to submit this letter in response to the Commodity Futures Trading Commission’s (the “CFTC” or the “Commission”) notice of proposed rule making regarding the amendment of Regulation 1.35 concerning Records of Cash Commodity, Futures and Option Transactions.<sup>2</sup> As a general matter, Barclays strongly endorses the comments filed by the Futures Industry Association (“FIA”) on August 8, 2011, with the following additional comments.

The proposed rule requires Regulated Entities<sup>3</sup> to record “all” written and oral communications, regardless of medium, that lead to the execution of a transaction in a commodity interest or cash commodity.<sup>4</sup> In addition, the proposed rule requires each transaction record to be “tagged” with the following information:

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<sup>1</sup> Barclays Capital is the investment banking division of Barclays Bank PLC. Barclays Capital provides large corporate, governmental and institutional clients with comprehensive solutions to their strategic advisory, financing and risk management needs. Barclays Capital has offices around the world and employs over 25,000 people.

<sup>2</sup> 76 FR 33,066 – 33,113 (June 7, 2011) (the “proposed rule”).

<sup>3</sup> Under the proposed rule, “Regulated Entities” are futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of any designated contract market or swap execution facility.

<sup>4</sup> 76 FR 33,091 (June 7, 2011) (Regulated Entities are required to record “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.”).

- 1) Identifiable by transaction, and
- 2) Identifiable by counterparty.

Speaking as an entity with significant experience in preserving electronic records and taping calls, Barclays shares the view of the FIA and other commentators that the proposed rule, particularly the “tagging” requirement, goes too far.<sup>5</sup>

Among other things, we are concerned that the CFTC may not have undertaken a comprehensive cost/benefit analysis of the “tagging” requirements, which we believe to be both unduly burdensome and, to the best of our knowledge, impossible to satisfy given the current state of technology. Further, while we understand the perceived benefit to the CFTC of “tagging”, we believe that the benefit is derived primarily from the fact of retention and that little incremental benefit is derived from prescribing the specific manner in which a Regulated Entity must retain and retrieve records. To the extent that there is a benefit derived from the additive prescriptive requirements, we do not think it is sufficient to justify the massive burden being placed on market participants.

#### I. Unduly Burdensome

We share the FIA’s view that the proposed rule is unduly burdensome because it effectively requires: (a) manual tagging, (b) of all communications potentially leading to an executed transaction. As far as we are aware, there is no currently available technology that can automatically “tag” emails, instant messages, or incoming calls in the prescribed manner, let alone one that could handle the potential volume. Without an automated process, the proposed rule would effectively require all employees of Regulated Entities to manually identify and tag each of their communications that lead to an executed transaction. Barclays estimates that, in the U.S. alone, it manages approximately 500,000 to 800,000 instant messages and 2,500,000 to 3,000,000 emails per day. Large Regulated Entities can send and receive over 2.4 billion electronic communications a year, which does even not include phone recordings. Manually reviewing and tagging all this data in the manner proposed by the Commission would be burdensome to the point of impossibility.<sup>6</sup>

As a practical matter, we believe that Regulated Entities will have to record a far larger subset of communications than the proposed rule suggests. Although the proposed rule only requires Regulated Entities to record communications that “lead to the execution of

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<sup>5</sup> The Commission cites the Financial Services Authority Policy Statement, dated November 2010, regarding the taping of mobile phones, to illustrate that the proposed rule is similar to record retention rules in other jurisdictions (*See* 76 FR 33,072). However, note that such FSA rule: (a) does not contain a tagging requirement, and (b) only requires firms to use “reasonable steps” to make such recording. FSA Conduct of Business sourcebook §§11.8.5, 11.8.5A.

<sup>6</sup> Additional complications arise when more than one transaction or potential transaction is discussed in a single record. Like phone conversations, many instant messages are retained in bundles that contain multiple unique comments that are difficult to separate or identify by transaction. In order to retain by transaction, it would be necessary to break them out individually for manual review. As a large financial institution is likely to have upwards of hundreds of millions of unique comments per day, this would also be massively burdensome.

transactions”, an individual will not be able to know prospectively if a proposed transaction will ever be executed. This will require manual retroactive tagging of every communication that could ever lead to a transaction, which would be extremely complicated (if not impossible) in the context of an ongoing broad-based global client relationship.

In discussing the cost/benefit analysis for the proposed rule, the Commission does not specifically consider the cost or administrative burden of tagging communications. Rather, it states that the costs of the proposed rule would be “minimal” for large Regulated Entities such as Barclays “because the information and data required to be recorded is data a prudent [Regulated Entity] would already maintain during the ordinary course of business.”<sup>7</sup> While certain large Regulated Entities do record transactions, to our knowledge, none tag recordings in the required manner. Barclays urges the Commission to fully explore the costs of tagging to Regulated Entities prior to issuing a final rule.

## II. Impossibility of Comprehensive Automated Prospective Tagging

Not only does the “lead to” requirement significantly increase the number of communications that must be stored, it also makes it impossible to tag in real time at the time the communication is sent or received (*i.e.* before any transaction exists). In order to tag communications and sort them by transactions that have not yet occurred, individuals must make guesses about whether or not their communications will lead to future transactions. This is an impossible task that must, by definition, be done after the fact, when both the transaction and the specific transaction number exist, which will inevitably lead to mis-tagging and the resulting inaccurate retention of records.

As an example, consider an instant message discussion between Trader A and Trader B regarding the direction of the relevant market. Five hours later, they execute a transaction in the same market. At the time of the first conversation, Trader A will not know that the first conversation will lead to a trade. Therefore, at the time of the communication, Trader A will either not tag it or mis-tag it.

The alternative to real-time tagging is to tag retroactively after a trade has been completed. This will require Regulated Entities to review past communications after a trade occurs to determine if they “lead to” the trade in question. This is essentially no different than the process that is currently in place to respond to an inquiry regarding a trade. If the Commission submits an inquiry regarding a trade, a Regulated Entity will review all communications to determine which are relevant to the inquiry and the trade in question. The proposed rule could be potentially interpreted as requiring Regulated Entities to diligence all trades in such a manner – a task that is effectively impossible and confers no obvious benefit when compared to existing practice.

Furthermore, Barclays is not aware of any commercially available technology that would allow Regulated Entities to comply with the requirement that phone recordings (both mobile and land-based) be tagged by transaction and counterparty. While there are services available that allow land-based phone lines to enter tagging numbers prior to making a call, it

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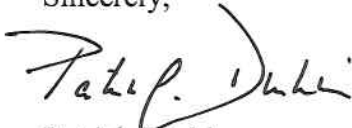
<sup>7</sup> 76 FR 33,081.

is far more challenging to: (a) tag incoming calls, (b) tag calls after the number has been dialed, or (c) allow for multiple tags. Without this ability, Regulated Entities will run afoul the proposed rule in circumstances where: (x) counterparties call Regulated Entities, (y) parties discuss a transaction that the Regulated Entity did not anticipate discussing when making a call, and (z) multiple transactions are discussed on a call.

### III. Conclusion

Barclays is concerned that the current state of technology is not sufficient to allow Regulated Entities to accurately and comprehensively tag communications with transaction specific and counterparty specific identifiers in the required manner. Given the challenges of manual, prospective and retroactive tagging, we believe that a Regulated Entity should be permitted to retain its records in a manner of its choosing so long as the retention method enables the Regulated Entity to respond to inquiries in a timely and comprehensive fashion. If a fully automated solution (without manual intervention) becomes available in the future, the Commission could decide to revisit the requirement at that time.

Sincerely,



Patrick Durkin  
Managing Director  
Barclays Capital

Cc: Honorable Gary Gensler, Chairman

Honorable Michael Dunn, Commissioner

Honorable Jill E. Sommers, Commissioner

Honorable Bart Chilton, Commissioner

Honorable Scott O'Malia, Commissioner

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