



January 13, 2015

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
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
("CFTC Regulation 1.35(a)" or "Rule"), RIN 3038—AE23

Dear Mr. Kirkpatrick:

Intercontinental Exchange, Inc. ("ICE") appreciates the opportunity to comment on the Commodity Futures Trading Commission ("CFTC" or "Commission") proposal to amend Regulation 1.35(a)¹. As background, ICE operates regulated derivatives exchanges and clearing houses in the United States, Europe, Canada and Singapore. As the operator of U.S. and international exchanges, trade repositories and a swap execution facility that list both OTC and futures markets, ICE has a practical perspective of the implications of the proposed requirements of Regulation 1.35(a).

Executive Summary

- The Commission should codify the relief under CFTC Letter 14-72 to exclude certain unregistered members of a DCM or SEF and should expand the relief to "members" that are not Commission "registrants" as well;
- The Commission should undertake a complete evaluation of various recordkeeping rules to assure that the rules work harmoniously and not cause commercial end users to take transactions away from Swap Execution Facilities or Designated Contract Markets, defeating the Dodd/Frank Wall Street Financial Reform and Consumer Protection Act's ("Dodd/Frank") transparency objectives.

¹ *Records of Commodity Interest and Related Cash or Forward Transactions*, 79 FR 68140 (Nov. 14, 2014).



Proposed changes to Part 1.35, records of cash commodity, futures and options transactions

ICE supports the Commission’s efforts to balance the goals of promoting market integrity and customer protection while eliminating unnecessary burdens on market participants. Consistent with these goals, we believe the emphasis under Regulation 1.35(a), in particular for maintaining detailed, searchable audit-trail records, is properly placed on the CFTC registrants that maintain a fiduciary duty while interacting with customers/commercial end users to facilitate their access to DCM and SEF markets as execution and/or clearing intermediaries. Unregistered members do not have customers – they are the customers. Thus, imposing the full recordkeeping obligations under the rule on them would not advance the goal of customer protection in any meaningful fashion but instead create an unintended tax or added costs for users of the markets.

According to the Commission, the proposed rule is intended to promote “regulatory parity,” as the Commission proposed a similar rule for swap dealers (“SDs”) and major swap participants (“MSPs”).² However, it is worth noting that the Commission in its proposed rule regarding reporting and recordkeeping requirements for SDs and MSPs states that the rule “would not establish an affirmative new requirement to create recordings of all telephone conversations if the complete audit trail requirement can be met through other means, such as electronic messaging or trading.”³ In contrast, this rule would create new obligations on almost all market participants. As the Commission states: “[t]he proposed regulation is primarily a recordkeeping requirement, which will obligate those firms that do not already do so to tape the telephone lines of their traders and sales forces.”⁴ This increased obligation will have a large impact on the current market.

By adding this obligation to DCM and SEF participants, the Commission’s proposed regulations have created a clear bias against trading on a DCM or SEF. Given that these venues are the cornerstone to the Commission’s efforts to increase transparency in the swaps markets, adding this surtax directly contradicts the Commission’s goals. In addition, every transaction on a SEF or DCM is electronically recorded and kept for at least five years. Therefore, placing these requirements on a firm that is not intermediating customer transactions is duplicative and unnecessary. Indeed, the Commission seems to have acknowledged as much when it asked for comments on “the potential costs and benefits of requiring **registrants** to record and maintain oral communications as provided in the proposed rules”.⁵ The increased trading cost, decreased

² 75 Fed. Reg. 76,666 (Dec. 9, 2010) (Proposed regulation 23.202(a)(1) would require “[e]ach swap dealer and major swap participant [to] make and keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media”)

³ Id. at 76,668.

⁴ 76 Fed. Reg. 33066 at 33079 (June 7, 2011).

⁵ Id.



transparency and duplicative burdens outweigh the benefit of slightly easier access to certain records. Finally, adding the recordkeeping requirements to all DCM or SEF participants is a substantial change to existing practices and an increase in costs to current market participants.

Conclusion

ICE appreciates the opportunity to comment on the proposal. For the reasons cited above, ICE supports the Commission's proposal to amend Regulation 1.35(a) to formalize the relief under CFTC Letter 14-72, specifically, to exclude unregistered members of a DCM or SEF from the requirements to maintain records of text messages and to maintain written records required under Regulation 1.35(a) in a manner that is identifiable and searchable by transaction but we encouraged the Commission to expand the relief to "members" that are not Commission "registrants" as well. ICE also generally supports the other changes to Regulation 1.35(a) that the Commission is proposing.

Again, ICE thanks the Commission for the opportunity to comment on the proposed rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Kara Dutta", is centered on the page.

Kara Dutta
Intercontinental Exchange Inc.