



January 13, 2015

VIA ELECTRONIC FILING (<http://comments.cftc.gov>)

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: **RIN 3038—AE23**

Dear Mr. Kirkpatrick:

The National Rural Electric Cooperative Association (“NRECA”) and American Public Power Association (“APPA”) appreciate the opportunity to submit our joint comments to the Commodity Futures Trading Commission (“CFTC” or “Commission”) in support of the proposal to amend CFTC Regulation 1.35(a) (the “Proposal”)¹ to, among other things, formalize the relief under CFTC Letter 14-72 for certain market participants, including commercial end-users, that may become subject to the rule.

In addition, we have identified three interpretive issues under existing CFTC recordkeeping rules, including Regulation 1.35(a), that we respectfully request the Commission to address promptly, either when it finalizes its rulemaking on the Proposal or otherwise.² Such action is necessary so that a commercial end-user may correctly understand and evaluate its recordkeeping obligations, including under Regulation 1.35(a) should it decide to become a “member” of a designated contract market (a “DCM”) or a

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

² We also respectfully request the Commission to undertake a more holistic evaluation of how various recordkeeping rules impact commercial end-users of swaps and other CFTC-regulated derivatives, to assure that the rules work together in a rational manner as they apply to both the evolving futures market structure (including direct market access) and the new and evolving swaps market structure being adopted by the Commission in its Dodd-Frank Act rulemakings, and do not impose unnecessary, overlapping or inconsistent requirements on commercial end-users. NRECA and APPA provided comments in the Commission’s rulemaking docket for the Adaptation Rulemaking (defined below), calling attention to the fact that the Commission adaptation efforts may have been premature, given the iteration of the Commission’s Dodd-Frank Act rulemakings, and may have also overlooked some of the structural differences between the futures markets and the swaps markets being developed under the CFTC’s new regulatory requirements. See <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=48031&SearchText=>.

swap execution facility (a “SEF”) when it is not registered or required to register with the Commission in any capacity (an “Unregistered Member”³).

I. Background on NRECA and APPA

Formed in 1942, NRECA is the national service organization for more than nine hundred not-for-profit rural electric utilities and public power districts that provide electric energy to approximately forty-two million consumers in forty-seven states or twelve percent of the nation’s population. Kilowatt-hour sales by rural electric cooperatives account for approximately eleven percent of all electric energy sold in the United States. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members.⁴

APPA is the national service organization representing the interests of publicly-owned electric utilities in the United States. More than two thousand public power systems provide over fifteen percent of all kilowatt-hour sales to ultimate customers. APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Some publicly-owned electric utilities generate, transmit, and sell power at wholesale and retail, while others purchase power and distribute it to retail customers, and still others perform all or a combination of these functions. Public power utilities are accountable to elected and/or appointed officials and, ultimately, the American public. The focus of a public power utility is to provide reliable and safe electricity service, keeping costs low and predictable for its customers, while practicing good environmental stewardship.

NRECA and APPA have been active participants in the Commission’s rulemakings implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), commenting on behalf of their not-for-profit electric utility members that enter into energy commodity transactions and related “swaps” and other commodity interests to hedge or mitigate commercial risks associated with their electric utility operations. Certain NRECA and APPA members currently enter into energy and energy-related commodity interests, such as swaps executed bilaterally and futures or options on futures executed on or subject to the rules of a DCM, where they may have compelling reasons to trade on the DCM as a member. We anticipate others may wish to do so in the future. In addition, other NRECA and APPA members may wish to execute energy commodity swaps as a member on a SEF.

³ Used in this comment letter as the Commission defines the term in the Proposal. *See id.* at 68142.

⁴ 13 C.F.R. §121.201, n.1. The vast majority of NRECA’s and APPA’s members meet the definition of “small entities” under the Small Business Regulatory Enforcement Fairness Act (“SBREFA”). Only four distribution cooperatives and approximately twenty-eight generation and transmission cooperatives (out of more the 900) do not meet the definition. In addition, the vast majority of the more than 2,000 public power systems represented by APPA also meet the definition. The RFA incorporates by reference the definition of “small entity” adopted by the Small Business Administration (the “SBA”). The SBA’s small business size regulations state that entities which provide electric services are “small entities” if their total electric output for the preceding fiscal year did not exceed four million megawatt hours.

As a general matter, commercial end-users, including NRECA's and APPA's members, are not registered or required to register in any capacity with the CFTC, and thus would be "Unregistered Members" (as that term is used in the Proposal) of any DCM or SEF on which they might be granted direct trading privileges or direct market access. A commercial end-user may find that the most cost-efficient and effective way to hedge its commercial risks is to execute the standardized commodity interests offered on a particular DCM or SEF directly as a member. In addition, a particular DCM or SEF may require an entity, including a commercial end-user, to obtain direct market access or trading privileges, i.e., to become a member, in order to enter into/execute the transactions offered on such regulated entity.⁵

Our comments are on behalf of commercial end-users, including Unregistered Members that wish to execute commodity interests on a DCM or a SEF for their own account (and without responsibilities to any third-party customers), via direct market access to the registered entity's trading facilities.

II. Comments

A. Support for the Proposed Changes to Regulation 1.35(a)

NRECA and APPA commend the Commission's ongoing efforts to balance the goals of promoting market integrity and customer protection while eliminating unnecessary burdens on market participants, especially commercial end-users such as our members. Consistent with those twin 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 interact with commercial end-users, to facilitate the commercial end-users' access to DCM and SEF markets as execution and/or clearing intermediaries. Unregistered Members do not have customers. Thus, imposing the same full recordkeeping obligations under the Commission's rules on Unregistered Members, in our view, would not advance the goal of customer protection in any meaningful fashion.

We fully support 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 regulatory requirement to maintain records of text messages, and also to exclude Unregistered Members from the requirement to maintain written records required under Regulation 1.35(a) in a manner that is identifiable and searchable by transaction. In addition, we ask the Commission to confirm that the proposed exclusion for text messages covers text messages in the form of, contained in or relayed via instant messaging, chat rooms, mobile devices or other digital or electronic media.

NRECA and APPA also generally support the other changes to Regulation 1.35(a) that the Commission is proposing. Moreover, we concur with the reasons offered by the Commodity Markets Council that led to the Commission staff issuing CFTC Letter 14-72 and with the comments by others at the End-User Roundtable on April 3, 2014, in support

⁵ The Nodal Exchange, which lists various power-related futures and options on futures contracts, is one example that is relevant for NRECA's and APPA's members.

of further changes to Regulation 1.35 to relieve commercial end-users from costly regulatory burdens that serve to discourage commercial end-users from becoming members of DCMs or SEFs or from otherwise entering into or executing commodity interest transactions on DCMs and SEFs.

B. Requests for Clarification Regarding Related Issues Under Regulation 1.35 and Other CFTC Recordkeeping Rules

We believe that Regulation 1.35 and other CFTC recordkeeping rules raise a number of other issues for commercial end-users. The various recordkeeping rules for commodity interest transactions (including both listed futures/options on futures and swaps) and/or for related cash or forward commodity transactions are interrelated, and the CFTC should approach its review of these rules using a holistic approach to assure that the rules apply in a rational and consistent manner. For example, the rules vary in delineating the type of information and records a person must capture, in ways that discourage commercial end-users from executing swaps on SEFs,⁶ contrary to the Dodd-Frank Act's objective to migrate trading of standardized swaps to SEFs (or DCMs).

Of pressing concern, we respectfully request the Commission to address the following specific interpretive issues when it finalizes its rulemaking on the Proposal or otherwise promptly address these three issues (e.g., through a staff advisory or interpretive guidance):

- Clarify that the recordkeeping obligations under Regulation 1.35(a), as applied to an Unregistered Member, are limited to such person's transactions in commodity interests on the DCM or SEF of which it is a member and cash or forward transactions related to such commodity interest transactions.
- Confirm that a commercial end-user may voluntarily choose to record oral conversations relating to its commodity interest transactions without creating a regulatory obligation to maintain such records under Regulation 1.35(a) or under other CFTC recordkeeping rules.
- Clarify how the "through termination of the swap plus five years" record retention requirement (under various CFTC rules) applies to records relating to an option or swaption that is comprised of multiple underlying options/swaptions that are exercised daily or on another regular, periodic cycle over time; in particular, to confirm that the five year post-termination period applies separately to each

⁶ The recordkeeping obligations imposed on a commercial end-user as a counterparty to a swap under Regulation 45.2(b) (as a "non-SD/MSP") are much more narrowly-focused than under Regulation 1.35(a), which could be triggered by virtue of obtaining trading privileges on a SEF – *which under some SEF rules is deemed to occur simply by executing one swap on that SEF* – or the recordkeeping obligations under Regulation 18.05, which could be triggered by virtue of the level of a person's daily trading volume of a swap *on a SEF*. We believe the heightened recordkeeping burdens under Regulations 1.35(a) and 18.05 discourage commercial end-users from executing energy commodity swaps on SEFs, and may contribute to the reasons why SEFs have thus far been largely unsuccessful in building trading liquidity in energy commodity swaps.

constituent option/swaption starting on the date it is terminated, through exercise, expiration or otherwise.

1. Scope of the Commodity Interest Transactions and “Related” Cash or Forward Transactions Covered by Regulation 1.35(a)

The language of Regulation 1.35(a) creates ambiguity as to the scope of the commodity interest transactions covered by the rule, which in turn defines the scope of those “related cash or forward transactions” that are also covered by the rule. Specifically, Regulation 1.35(a) requires a member, including an Unregistered Member, of a DCM or SEF to:

“keep full, complete, and systematic 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.” (Emphasis added.)

Regulation 1.35(a) also provides that a member must, in addition, keep records:

“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.” (Emphasis added.)

The phrase “relating to its business of dealing in commodity interests” in Regulation 1.35(a) is undefined. In other contexts, though, with respect to commodity interests that are swaps, an Unregistered Member is presumed not to be engaged in a regular business of dealing when its annual swaps dealing activity falls below certain thresholds set by the Commission under the “swap dealer” de minimis rules.⁷ Yet that phrase,⁸ along with the phrase “execution of a transaction in a commodity interest” that appears later in Regulation 1.35(a), creates uncertainty as to whether an Unregistered Member must keep the records required under the rule with respect to any or all of its other commodity interest transactions, in addition to the transaction(s) it executes as a member of a particular DCM or SEF. At the same time, the use of the term “business of dealing” in Regulation 1.35(a), while contributing to the ambiguity, could also be read to imply a nexus to transactions that occur on or subject to the rules of the DCM or SEF of which the Unregistered Member is a member, thus also supporting the narrow reading.

In addition, the phrase “and related cash or forward transactions,” also undefined, creates ambiguity for a nonfinancial commodity based operating business, such as the operations of NRECA’s member electric cooperatives and APPA’s government-owned electric

⁷ See CFTC Regulation 1.3(ggg)(4), 17 C.F.R. § 1.3(ggg)(4).

⁸ The phrase was part of Regulation 1.35(a) before the CFTC made changes to various rules to “adapt” the CFTC rules as a whole in anticipation of the Commission’s new Dodd-Frank Act regulatory jurisdiction over swaps. *Adaptation of Regulations to Incorporate Swaps – Records of Transactions*, 77 FR 75523 (Dec. 21, 2012) (the “Adaptation Rulemaking”). The phrase also predates the CFTC and Securities and Exchange Commission’s earlier joint adoption of rules further defining the Dodd-Frank Act term “swap dealer.” *Further Definition of “Swap Dealer,”* 77 FR 30596 (May 23, 2012).

utilities, as to which ongoing business operations (the commercial risks of which are being hedged using commodity interests) may be “related to” the commodity interest transactions that trigger the scope of the Regulation 1.35(a)’s reference to a generalized “relationship” between commodity interest dealing business or transactions and cash or forward transactions.

In reality, we believe the spirit, intention and logic of Regulation 1.35(a) support a narrow reading that the rule’s recordkeeping obligations apply only to an Unregistered Member’s transaction(s) in commodity interests on the particular DCM or SEF of which it is a member, and only to the cash or forward transactions that are hedged using those DCM or SEF-executed commodity interest transactions.⁹ We believe that reading is consistent with the Commission’s intention in other contexts to limit the burdens of its rules on commercial end-users, which guided, for example, its careful drafting of narrowly prescribed recordkeeping obligations for non-swap dealer/non-major swap participant counterparties to swaps under Regulation 45.2(b).

A broad reading of Regulation 1.35(a) that would sweep a commercial end-user’s entire commodity interest trading, and, as a result, potentially sweep its entire nonfinancial commodity-based business operations, within the scope of the recordkeeping requirements merely because the commercial end-user executes commodity interests as a member of just one DCM or SEF – or worse is deemed to be acting as a member under the rules of a particular SEF simply by executing one or a very small number of swaps on that SEF¹⁰ – would discourage commercial end-users from obtaining direct (i.e., member) trading privileges on any DCM or SEF.¹¹ Moreover, the current uncertainty and risk that the Commission could apply such an over-broad reading is, we believe, having that chilling effect. The chilling effect is problematic when direct access to a regulated entity’s trading facility as a member may be the most cost-effective and efficient means to transact on that regulated entity or, depending on the rules of the DCM or SEF, the only means to transact in the standardized products offered on a particular DCM or SEF.

For these reasons, a commercial end-user may well refrain from becoming a member of a DCM or SEF at all, when faced with the prospect that doing so could mean it will become subject to the much broader and more costly – and we believe unnecessary – recordkeeping burdens imposed under Regulation 1.35(a) with respect to all of its commodity interest

⁹ We note that many commercial end-users hedge or mitigate the commercial risks of their ongoing electric operations on a dynamic basis, in light of evolving weather, “load” or demand, availability and deliverability of supply and regulatory obligations, and on an aggregate or portfolio basis (of assets/liabilities/commercial risks), rather than matching specific commodity interests to hedge specific quantities of underlying commodities or contracts, as might be the case for a trading entity.

¹⁰ This issue for commercial end-users is partially the consequence of language contained in the rules of certain SEFs, which we understand have not yet been fully reviewed or approved by the Commission as its evaluation is still ongoing of the applications of the SEFs that have been granted temporary SEF registration.

¹¹ Adding to the regulatory costs, Regulation 1.35(a) is also far more proscriptive in setting out specific audit trail records that a commercial end-user that becomes a member of a DCM or SEF must create and maintain (but for which there is no customer to benefit from such audit trail detail) compared to other CFTC recordkeeping rules that may also apply to a commercial end-user that enters into a commodity interest transaction.

transactions, including its off-facility (bi-lateral) swap transactions and its futures or options on futures transactions executed on DCMs as a non-member, along with all its related cash and forward transactions.

Thus, we ask the Commission to confirm that an Unregistered Member only needs to comply with Regulation 1.35(a) recordkeeping requirements for transactions in commodity interests executed on or subject to the rules of a DCM or SEF on which is it a member, and such person's cash or forward commodity transactions related to such DCM or SEF-executed commodity interest transactions. Alternatively, we ask the Commission to amend Regulation 1.35(a) to explicitly reflect that narrower scope. Should the Commission decide to clarify directly in the rule, we propose for consideration potential changes to Regulation 1.35(a) in Annex A, attached to this letter.

2. Recordkeeping Requirements for Voluntary Recordings of Oral Conversations Under CFTC Regulation 1.35(a) and Other CFTC Recordkeeping Rules

A commercial end-user may be subject to recordkeeping obligations under multiple CFTC rules, including Regulations 1.35(a) (if a member of a DCM or SEF), 18.05 (if a large futures trader or a futures or swaps volume threshold account holder or controller), 20.6(c) (if a large trader for certain commodity swaps), 32.3(b) (if it enters into a commodity trade option) and 45.2(b) (if it enters into a swap), with the overlay of Regulation 1.31 records format, retention and inspection requirements in certain cases (the "Recordkeeping Rules"). Various Recordkeeping Rules identify the types of records that a person subject to the rules is required to maintain, including the information or content to be covered.

None of the Recordkeeping Rules imposes an explicit obligation on a commercial end-user that is not a "member" of a DCM or a SEF and is not otherwise registered with the Commission (that is, an Unregistered Member) to make recordings of oral conversations, nor do we read the Recordkeeping Rules to explicitly require such an entity to retain recordings if it voluntarily makes them.

Some commercial end-users find it a convenient or prudent business practice to record telephone conversations with brokers or with bilateral swap counterparties for use in the unanticipated event of a dispute with the broker or counterparty over a term of an oral transaction or instruction, even though Unregistered Members are clearly excluded from the requirement to record oral communications under Regulation 1.35(a)(4)(ix). If a commercial end-user elects voluntarily to record a telephone conversation, it is our understanding that those recordings do not become records that such person must then retain under Regulation 1.35(a) or the other Recordkeeping Rules, and we believe that is how the rules are widely interpreted by commercial end-users.

That said, we are aware that, due to ambiguity in the way the various Recordkeeping Rules are written, some commercial end-users are concerned that voluntary telephone recordings may be subject to the Recordkeeping Rules, including the applicable record retention period requirements. We believe such an interpretation is contrary to the Commission's deliberate decision in its December 2012 Adaptation Rulemaking amendments to

Regulation to 1.35(a) to exclude Unregistered Members from the obligation to record conversations, which was first imposed on various Commission registrants in that rulemaking. Moreover, such an interpretation would lead to the illogical result that commercial end-users must retain recordings of conversations for five years, or longer for swap transactions or related cash or forward transactions, whereas CFTC registrants are required to maintain certain recordings they prepare as required by Regulation 1.35(a) for only one year as provided in Regulation 1.31(a).¹²

Faced with such a costly recordkeeping burden, a commercial end-user may have to forgo what it views as an otherwise sound business practice (recording conversations as a source of evidence to resolve a dispute with its broker or counterparty). That outcome, too, would be illogical, as the Commission's rules would be interpreted to actively discourage a commercial end-user from potentially protecting its own interests vis-a-vis a broker, dealer or other registered market intermediary, contrary to the Commission's policy goal of customer protection.

Such an interpretation is also, in our view, contrary to the Commission's 1996 *Gilbert v. Lind-Waldock & Co.*¹³ decision in which the Commission determined that a person is not required under Regulation 1.35(a) to keep tape recordings it prepares when such records are not records it is required to prepare. Finally, nothing in the adopting releases for the Recordkeeping Rules suggests the Commission intended to require a person to retain recordings of oral conversations that the person voluntarily prepares.

In light of the forgoing, we respectfully request the Commission to confirm our understanding that a commercial end-user that is an Unregistered Member of a DCM or a SEF may voluntarily record oral conversations relating to its commodity interest or related cash or forward transactions without creating an obligation to retain such records in accordance under Regulations 1.35(a) or other Recordkeeping Rules.¹⁴

3. Clarification of Record Retention Period for Options or Swaptions with Multiple Constituent Parts

An entity that is required under CFTC Recordkeeping Rules to prepare and maintain records relating to transactions in commercial or commodity trade options, commodity options or swaptions, is generally required to maintain such records through the term of the transaction and for a period of five years thereafter. *See* Regulations 1.31(a), 45.2(c) and

¹² The one-year record retention period also applies to recordings made by swap dealers in accordance with Regulation 23.202.

¹³ [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,720 (June 17, 1996). The Commission rejected a Judgment Officer's determination that Lind-Waldock, a registered futures commission merchant, violated Regulation 1.35(a) by not retaining tape recordings it prepared of conversations with a futures customer. See footnote 23 of the decision.

¹⁴ Likewise, other persons, including CFTC registrants, that are not otherwise required to record conversations under CFTC Regulation 1.35(a) should be permitted to voluntarily record their conversations without an obligation to retain such records under any of the Recordkeeping Rules.

32.3(b).¹⁵ However, it is unclear due to ambiguity in the language of the Recordkeeping Rules how the record retention period applies to records relating to an option or swaption that is comprised of multiple underlying options/swaptions that are exercised daily or on another periodic and frequent interval (a “Serial Option”).

In the energy sector, it is common for a commercial end-user to enter into long-term Serial Options, frequently with overall transaction durations of up to 20 years or even longer. If a 20 year Serial Option were treated as one ongoing transaction, the recordkeeping requirement would mandate keeping all accreting transaction records for up to 25 years after the individual option or swaption component was exercised or allowed to expire and, therefore, if viewed as a distinct option, terminated. Therefore, we respectfully request clarification that, for recordkeeping purposes only, a person may treat each constituent option or swaption in a Serial Option as a separate transaction, with the consequence that the records pertaining to that constituent transaction must be kept for five years following the termination of the constituent option, whether through exercise, expiration or otherwise. We believe that approach strikes an appropriate balance in preserving records that may be useful for market surveillance without imposing unnecessary and costly recordkeeping burdens on commercial end-users.

III. Conclusion

NRECA and APPA support the Commission’s proposed amendments to Regulation 1.35(a). We also urge the Commission to address the pressing interpretive issues discussed above in its final rulemaking on the Proposal, or otherwise promptly address those issues, to clarify recordkeeping obligations that apply to commercial end-users, including to Unregistered Members, under the existing Recordkeeping Rules. It is important for commercial end-users to have a clear understanding of their existing obligations to avoid inadvertent non-compliance.

We also respectfully request the Commission to undertake a more complete, comprehensive reevaluation of the Recordkeeping Rules to assure that the rules work together in a rational manner for futures market participants and swaps market participants, and do not impose unnecessary, duplicative or inconsistent requirements on commercial end-users. We understand that such reevaluation would be a more long term initiative. On behalf of our members, many of which are “small entities” struggling to comply in good faith with the Commission’s rules as they enter into commodity interest transactions to hedge commercial risks of electric utility operations, we look forward to assisting the Commission in such initiative.

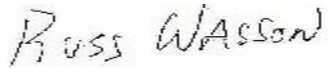
¹⁵ This standard does not, however, apply to a person subject to recordkeeping obligations with respect to certain nonfinancial commodity swaps or swaptions under CFTC Regulation 20.6(c). Instead, it is permitted to keep the records in accordance with its recordkeeping schedule and in its normal record retention format, in lieu of following the requirements of Regulation 1.31. Such a person, though, would also likely be subject to recordkeeping obligations relating to its nonfinancial commodity swaps and swaptions under Regulation 45.2, which in contrast imposes the “term plus five years” record retention period for data and memoranda pertinent to a swap transaction. This is an example of the potentially overlapping or inconsistent requirements that commercial end-users face under the Recordkeeping Rules.

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Please contact the undersigned with any questions.

Respectfully submitted,



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ANNEX A
PROPOSED ADDITIONAL AMENDMENTS TO REGULATION 1.35(A)

§ 1.35 Records of commodity interest and related cash or forward transactions.

(a) *Futures commission merchants, retail foreign exchange dealers, introducing brokers, and members of designated contract markets or swap execution facilities.* (1) Each futures commission merchant, retail foreign exchange dealer, introducing broker, and member of a designated contract market or swap execution facility shall keep full, complete, and systematic 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. Included among such records shall be all orders (filled, unfilled, or canceled), trading cards, signature cards, street books, journals, ledgers, canceled checks, copies of confirmations, copies of statements of purchase and sale, and all other records, which have been prepared in the course of its business of dealing in commodity interests and related cash or forward transactions. Among such records each member of a designated contract market or swap execution facility must retain and produce for inspection are all documents on which trade information is originally recorded, whether or not such documents must be prepared pursuant to the rules or regulations of either the Commission, the designated contract market or the swap execution facility. For purposes of this section, such documents are referred to as “original source documents.” Also included among the records required to be kept by this paragraph are all oral and 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 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) *Form and manner.* (i) All records required to be kept pursuant to paragraph (a)(1) of this section shall be searchable; and

(ii) All records required to be kept pursuant to paragraph (a)(1) of this section shall be kept in a form and manner that allows for identification of a particular transaction, except for 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 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.

(3) *Provided, however,* for a member of a designated contract market or swap execution facility that is not registered or required to register with the Commission in any capacity⁵;

(i) The phrases “business of dealing in commodity interests” and “execution of a transaction in a commodity interest” for purposes of paragraph (a)(1) of this section, refer to the member’s execution of a transaction in a commodity interest on a designated contract market or swap execution facility on which it is a member; and

(ii) Records ~~records~~ required to be kept pursuant to paragraph (a)(1) of this section:

(A) ~~(A)~~ Are not required to be kept pursuant to paragraph (a)(2) of this section; and

(B) (ii) Do not include text messages sent or received by such member.

* * * *