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January 13, 2015

Chris Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20581

Re: AGA Comments on Proposed Rule, Records of Commodity Interest and Related Cash or Forward Transactions, 79 Fed. Reg. 68140 (Nov. 14, 2014)

Dear Mr. Kirkpatrick,

The American Gas Association (“AGA”) is pleased to submit these comments in response to the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) notice of proposed rulemaking to revise CFTC Rule 1.35(a) regarding the recordkeeping of commodity interest and related cash or forward transactions (“Proposed Rule”).¹

As discussed further below, AGA supports the Commission’s proposal to eliminate specific requirements that end-users keep records of transactions in a manner that is searchable and identifiable by transaction. AGA requests that the Commission exempt unregistered end-user members from requirements to maintain pre-trade communications and focus recordkeeping requirements on communications regarding material economic terms underlying final agreements. AGA also supports the Commission’s proposal to exempt end-users’ text message communications from recordkeeping, and to exempt intermediaries such as commodity trade advisors from the CFTC’s oral communications recordkeeping requirement. AGA further requests that the CFTC not create arbitrary distinctions between text messages and computer-based real-time communications

¹ *Records of Commodity Interest and Related Cash or Forward Transactions*, 79 Fed. Reg. 68140 et seq., 17 C.F.R. § 1 (Nov. 14, 2014) [hereinafter, “Proposed Rule”].

in their regulations, and provide a broader exclusion for all of these functionally equivalent communication methods from granular recordkeeping requirements. AGA also requests that any additional guidance on the form and manner of record retention, which may apply to end-users or their counterparties, should appear in CFTC Rule 1.31 rather than in CFTC Rule 1.35(a).

Finally, in light of the fact that other sophisticated entities such as registered exchanges will already maintain detailed records of swaps consistent with Rule 1.35(a), as will reporting counterparties to off-exchange swaps, AGA requests that the Commission provide clarifications that end-users may avail themselves of a safe harbor permitting them to reasonably rely on reporting counterparties, a DCM, a SEF, or another Commission registrant to meet certain CFTC recordkeeping obligations. AGA respectfully requests in the alternative that the Commission include language in its final rule providing that the Commission would consider end-user counterparties' good faith compliance with the recordkeeping rules as a mitigating factor when exercising its enforcement authority for any potential violations of the rule.

I. Communications

All correspondence and other communications in this proceeding should be served on the following:

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II. Statement of Interests

AGA represents more than 200 local energy companies that deliver clean natural gas throughout the United States. More than 65 million residential, commercial and industrial natural gas customers, or more than 175 million Americans, receive their gas from AGA members. AGA member companies provide natural gas service to retail customers under rates, terms and conditions that are

regulated at the local level by a state commission or other regulatory authority with jurisdiction. They use financial tools to hedge the commercial risks associated with providing natural gas service to customers, such as commodity cost volatility. These tools include futures contracts traded on CFTC-regulated exchanges and over-the-counter energy derivatives. AGA members also participate in the physical natural gas market and contract for pipeline transportation, storage and asset management services in order to procure and deliver affordable, reliable natural gas to their customers. AGA members have an interest in transparent and efficient financial markets for energy commodities, so that they can engage in risk management activities on their own behalf, at reasonable cost for the benefit of America's natural gas consumers. Under CFTC rules, AGA member companies are classified as "end-users" of futures and swaps, and are required to maintain books and records for all covered swaps transactions under CFTC Rule 1.31.

III. Comments

The CFTC proposed to modify its regulations for the recordkeeping of oral and written communications related to contracts in commodity futures, options, foreign exchange, swaps, and related cash or forward contracts used for hedging such transactions.² Under proposed regulation 1.35(a)(1)-(3), end-users who are members of a DCM or SEF would be required to continue maintaining full, complete and systematic records of data and memoranda for all transactions related to business dealings in commodity interests and related cash or forward transactions, including all orders, journals, ledgers, copies of statements, and other records which have been prepared in the course of business dealing in these transactions.³ End-users would also continue to be required to retain original source documents prepared for such transactions, whether or not those documents were prepared pursuant to a specific regulatory requirement or exchange rule.⁴ End-users would

² Proposed Rule, 79 Fed. Reg. 68140.

³ Proposed Rule Section § 1.35(a)(1), 79 Fed. Reg. 68146.

⁴ *Id.*

also still be required to make these records available for inspection by a Commission representative, as per CFTC Rule 1.31, and must keep the records in their native file format or original form for a period of five years, during which the records must be readily accessible for the first two of the five years.⁵ AGA submits the following comments on the Commission's proposal.

A. The Commission should exempt unregistered end-user members of DCMs and SEFs from requirements to maintain pre-trade communications, and focus recordkeeping requirements on communications regarding material economic terms underlying final agreements.

The Proposed Rule would generally require that end-users maintain records of pre-trade oral and written communications, *i.e.* communications provided or received that lead to the execution of a transaction in a commodity interest and related cash or forward transaction, and which concern quotes, solicitations, bids, offers, trading, and prices, and whether communicated electronically, via telephone, voicemail or fax, or via electronic or digital media.⁶ However, the Commission has proposed to exempt end-users and other unregistered members of DCMs and SEFs from the requirement to maintain records of electronic text messages sent or received in the course of business dealings and pre-trade communications leading to the execution of such transactions. Therefore, under the Proposed Rule, end-users who are members of DCMs and SEFs would be required to keep records in a form and manner as prescribed under CFTC Rule 1.31, for all covered communications, except text messages excluded by the Proposed Rule. The Commission has also proposed that under Rule 1.35, end-users would not be required to keep any records in a form and manner that is searchable or that would allow for identification of a particular transaction as proposed in Proposed Section 1.35(a)(2). Finally, the Commission has proposed to add to the list of entities excluded from oral communications recordkeeping, communications of a commodity trading advisor on behalf of its customers.⁷ The Commission stated its belief that access to oral and written

⁵ *Dissenting Statement, Commissioner J. Christopher Giancarlo*, Proposed Rule, 79 Fed. Reg. at 68148.

⁶ Proposed Rule, 79 Fed. Reg. 68146.

⁷ Proposed Rule, 79 Fed. Reg. 68146.

communications in a searchable format is necessary for regulatory oversight and monitoring of the derivatives markets, and to enforce Commission rules and regulations.⁸

AGA supports the Commission's proposal to exempt unregistered members of DCMS and SEFs from requirements to maintain records in a form and manner that is searchable and identifiable on a transaction-by-transaction basis. AGA also supports the Commission's proposed exclusion of market participants who may be intermediaries on DCMs and SEFs on behalf of end-users, from the oral communications recordkeeping requirement. AGA believes these changes will reduce costs to natural gas utilities that hedge and mitigate commercial risk on their own behalf through transactions in cash commodity interests on Commission-regulated exchanges.

AGA notes, however, that Rule 1.35(a) would continue to require a significant amount of information regarding commodity interest transactions from natural gas utilities trading on their own account in standard exchange products. AGA is concerned in particular that a requirement for record retention as to all communications "leading to" the execution of a transaction will disincentivize transactions in cleared products, due to the cumbersome and costly exercise of having to track whether or not specific communications ultimately led to execution of one or more trades. This requirement discourages end-users from participating on exchanges, even when direct access to these trading facilities would otherwise prove cost-effective, efficient and competitive for hedging and mitigating their commercial risks.

These concerns have been voiced extensively by commercial end-users since the publication of final rule 1.35(a), and a solution has been sought in a 2014 bipartisan bill, H.R. 4413, sponsored by the Chairman and Ranking Member of the House Committee on Agriculture and Subcommittee on General Farm Commodities and Risk Management. The bill would provide that unregistered members participating on DCMs and SEFs should only be required under Commission

⁸ Proposed Rule, 79 Fed. Reg. 68143.

recordkeeping rules pursuant to the Commodity Exchange Act to keep written records of final agreements and material economic terms of transactions between counterparties.⁹

AGA contends that the Commission's interest in obtaining transactional information for market oversight will be satisfied by a requirement that market participants maintain communications regarding the material economic terms of a transaction and the terms of a final agreement. AGA believes it is unnecessary for the Commission to impose an overbroad requirement for retention of all communications "leading to" execution of a transaction, because this standard could be construed to require that counterparties capture far more than the meaningful, material, economic terms that are significant to a final trade agreement, and far more than what the parties may themselves capture for their own internal recordkeeping purposes.

B. The Commission should exclude unregistered end-user members of DCMS and SEFs from written recordkeeping for all real-time text communications, including internet-based or cellular phone-based instant messages.

The CFTC stated that its proposed exclusion for text messages responds to comments made by end-users that text messaging is a primary method of communication regarding commodity interest transactions and related cash or forward transactions. The CFTC observed that text message retention is prohibitively expensive for this particular class of unregistered members. It was further observed that because a limited segment of unregistered entities relies on text messages, the CFTC believed that its ability to properly oversee markets would not be unduly affected by an exemption for text messages.¹⁰

AGA respectfully notes that providing an exception for only phone-based text messages, provides very limited relief for natural gas utilities since many of our members rely primarily on instant messaging and chat room functions to discuss the terms of potential trades with intermediaries who

⁹ See Proposed Section 4u, Recordkeeping Requirements Applicable to Non-registered Members of Certain Registered Entities, available [online](#).

¹⁰ Proposed Rule, 79 Fed. Reg. 68143.

then transact for the utilities' accounts on regulated exchanges. While it may not be possible to survey the entire end-user marketplace to determine which entities use text messages and which use computer IM as their primary mode of pre-trade communication, it is evident that all these forms of real-time communications can be substitutes for each other and should not be afforded disparate treatment under Commission rules. In all cases, keeping detailed, searchable records of every real-time conversation, whether communicated by texting on a cellular device, IM over the internet or chat rooms over Local Area Networks, poses the same cumbersome, unnecessary burden on end-users.

AGA contends that as registered members and the exchanges are already required to keep detailed records of relevant communications related to the execution of trades, these records should be more than sufficient to assist the Commission in properly overseeing and monitoring the derivatives markets. Further, AGA believes it is arbitrary for the Commission's recordkeeping rules to require that end-users maintain searchable formats for all pre-trade communications that are real-time computer-based messages, while exempting real-time phone-based messages. Therefore, AGA respectfully requests that the Commission exempt unregistered end-user members trading on their own account, and not behalf on customers, from the requirement to retain real-time, pre-trade communications via cellular phone text messages or internet-based chat and IM functions.

C. The CFTC should specify form and manner of recordkeeping only in Rule 1.31 and not require end-users to prescribe to specific searchability requirements in Rule 1.35(a).

AGA respectfully notes that the "form and manner" requirements which the Commission has proposed under Rule 1.35, may create confusion about how market participants should comply with the current books and records retention standard under CFTC Rule 1.31. Specifically, AGA is concerned that the Commission's proposed requirements in Proposed Rule section 1.35(a)(2)(i)-(ii) regarding "searchable" and "identifiable by transaction" are undefined terms that could be interpreted by market participants to imply a more stringent standard for the form and manner of record retention than what is already specified in Rule 1.31.

Under Rule 1.31, end-users and other covered market participants are already required to keep records in their original form for paper records, and in an original file format for electronic records, and would continue to be required to maintain these records irrespective of the changes proposed to Rule 1.35(a). As Rule 1.31 has become the industry-wide standard for compliance with the form and manner of records required to be kept for swaps activity, AGA believes that any additional guidance on the form and manner of record retention, which may apply to end-users or their counterparties, should appear in Rule 1.31 rather than in Rule 1.35(a). This includes any proposals to require that transactions be “searchable” in a specific format subject to Commission books and records inspection.

D. The Commission should provide a safe harbor for records kept by unregistered end-user members under Rule 1.35(a) and records kept by non-reporting end-user entities under Rule 1.31.

AGA commends the Commission for proposing to reduce recordkeeping burdens on end-users transacting on their own accounts as unregistered members of DCMs and SEFs. The proposed exclusions in this proposal can help further the Commission’s interest in ensuring that the recordkeeping and reporting rules place a lower burden on non-financial, end-user entities and rely mainly on sophisticated financial counterparties and registered entities that have more resources and technology to allocate for recordkeeping and reporting compliance. In keeping with this important policy goal, AGA believes that while end-users are voluntarily maintaining detailed business records for their bilateral over-the counter agreements and for their own-account trading on exchanges, the Commission should rely on the more sophisticated counterparty, such as a reporting party, registered member or exchange, when determining to inspect books or records to verify the accuracy of reported transaction data.

AGA is concerned that the Rule 1.31 final rule¹¹ discussion of the books and records inspection requirements may unnecessarily place a heightened burden on end-users to verify what counterparties or exchanges have recorded or reported on their behalf. Presently, the Commission does not provide non-reporting end-user counterparties to bilateral transactions, nor unregistered end-users transacting through advisory/broking intermediaries on exchanges, with safe harbor in the event that there are discrepancies between records held by these entities and those of more sophisticated counterparties or exchange members with respect to swaps transactions.

The Commission has briefly opined on the question of a safe harbor, in the preamble to the 2012 final rule codified at Rule 1.31 and Rule 1.35(a).¹² Specifically, the Commission stated in the regulatory preamble that “depending on the type of record and arrangements made for access, covered persons may reasonably rely on a DCM, SEF or other [CFTC] registrant to maintain certain records on their behalf.”¹³ The Commission believed that reliance on another party would not relieve a covered person from either the responsibility for compliance, or from liability for failure to comply, and stated that reliance is “only appropriate where the records maintained by the third party duplicate the information required to be kept.”¹⁴ The Commission further opined that for certain written communications like emails, it would be “unlikely that covered persons will be able to rely on recordkeeping by a third party because the third party recipient will not have a complete record of the distribution of the message by the sender.”¹⁵

The Commission has submitted in the instant proposal, and AGA agrees, that there is a limited regulatory interest in requiring unregistered members of exchanges to retain the same granularity of records as the exchanges or other Commission registrants. Additionally, AGA notes

¹¹ Final Rule, Adaptation of Regulations to Incorporate Swaps – Records of Transactions, 77 Fed. Reg. 75523 (December 21, 2012).

¹² *Id.*

¹³ *Id.* at 75531.

¹⁴ *Id.*

¹⁵ *Id.*

that our members, to the extent they trade in standardized exchange products on their own account, are not sophisticated financial entities. They will have counterparties to these standardized products that maintain a level of granularity in records pursuant to exchange rules and CFTC rules that should adequately fulfill the Commission's interests in market monitoring and oversight.

As such, AGA believes that the Commission should expand and amend its guidance to Rule 1.35 to provide that an unregistered end-user member may rely on a Commission registrant to maintain certain records on its behalf, and that reliance is appropriate when records maintained by the registrant would not only duplicate, but reflect a more detailed, searchable format of, records that may or may not otherwise be required to be kept by the unregistered member. AGA also contends that as these counterparties already have the regulatory obligation to maintain searchable and transaction-linked records, it is duplicative and burdensome for Commission rules to impose any obligation on unregistered end-user members to maintain the same degree of searchability in their records. To the extent that the Commission seeks compliance with granular searchability requirements, the Commission should permit unregistered members to be able to rely on the more sophisticated processes of Commission registrants to maintain records in the form and manner required by Rule 1.35(a).

AGA also requests that the Commission state in its final rule that end-users maintaining books and records under Rule 1.31 should be able to reasonably rely on accurate retention of records by their counterparties. This provision would clarify that non-reporting counterparties are required only to confirm the accuracy of records in the course of entering into transactions with counterparties, and are not required to further verify with the Commission or with swap data repositories whether trade data has been accurately recorded by reporting entities or third parties.¹⁶

¹⁶ See also Comments of the American Gas Association, *Review of Swap Data Recordkeeping and Reporting Requirements, Request for Comment*, 79 Fed. Reg. 16689, RIN 3038-AE14 (March 26, 2014) (requesting that the Commission issue a limited re-proposal of the Part 45 final rule to provide non-reporting end-users a safe harbor to reasonably rely on their reporting counterparties to accurately report swap transaction terms to swap data repositories).

AGA notes that counterparties engage in a documented exchange of material economic information during the trade confirmation process, all of which is held by a reporting party and accessible to the Commission. As such, the Commission's regulatory interest in ensuring that records are accurate as between the parties is already met through the thorough confirmation documentation that is cross-verified by the parties. For example, for each commodity swap entered into by a gas utility, the utility would enter the trade information into an internal trade capture system, and have a record of the communication used to initiate the deal, such as an email, voice mail, text or IM. These same records are then confirmed bilaterally and held in some form by the deal counterparty. Once an agreement is reached on these terms, the deal counterparty reporting the transaction sends additional terms serving as a transaction confirmation, and those terms are verified by back office personnel against the utility's deal capture system. The subsequent agreement of the parties, if achieved, is reflected on the transaction confirmation and returned to the deal counterparty. Thereafter, the utility as the non-reporting counterparty does not have access to further verify how the deal counterparty has retained records regarding the specific transaction or identified life cycle events with respect to the transaction for reporting purposes.

AGA contends that these confirmation processes provide an adequate, documented exchange of information and a reasonable means for non-reporting end-users to ensure that records are accurately created as between the counterparties. The Commission's rules should therefore not be construed to assign additional responsibilities to non-reporting end-users for recordkeeping maintenance, as their counterparties are already keeping detailed records for reporting purposes.

For these reasons, AGA requests that the Commission provide a safe harbor for end-users to rely on the record retention performed by a DCM, SEF, or a CFTC-registered counterparty, with respect to any of the records required to be maintained under Rule 1.31 or 1.35(a). A safe harbor provision furthers the Commission's policy interests in ensuring that end-user market participants undertake limited recordkeeping and reporting responsibilities commensurate with their non-financial status and limited resources, as compared to SD/MSP entities and registered entities. In the event

that the Commission does not provide explicit safe harbor for this purpose, AGA respectfully requests in the alternative that the Commission include language in its final rule providing that the Commission would consider end-user counterparties' good faith compliance with the recordkeeping rules as a mitigating factor when exercising its enforcement authority for any potential violations of the rule.

IV. Conclusion

AGA appreciates the opportunity to comment, and commends the Commission for taking this action pursuant to requests made by market participants at the End User Roundtable. Please do not hesitate to contact us if additional information or clarifications are required.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Arushi Sharma Frank", with a long horizontal flourish extending to the right.

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