



January 13, 2015

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: RIN 3038-AE23
Records of Commodity Interest and Related Cash Forward Transactions
Rule 1.35 (a)

Dear Mr. Kirkpatrick,

The Minneapolis Grain Exchange, Inc. (MGEX or Exchange), a Designated Contract Market (DCM) and Derivatives Clearing Organization (DCO), would like to thank the Commodity Futures Trading Commission (CFTC or Commission) for the opportunity to comment on the above referenced matter published in the November 14, 2014 Federal Register Vol. 79, No. 220.¹

The Exchange appreciates the Commission's continued efforts to address the rulemaking requirements placed upon it by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed amendments are important positive steps forward and MGEX applauds the Commission for promulgating amendments after the End-User Roundtable and letters of concern from the industry. MGEX recognizes the Commission's work to modify and amend Rule 1.35 but has three principal concerns with respect to the current proposed rulemaking that it would like to address:

One, that the proposed amendments to Rule 1.35(a) are technologically and practically incompatible with current Rule 1.31.

Two, should the proposed amendments be adopted, Rule 1.35(a) will still be unduly burdensome to a large group of market participants without providing the intended benefits of the amendments.

¹ 79 Fed. Reg. 68142 (November 14, 2014), available at:
<http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2014-26983a.pdf>

Three, that Unregistered (as such term is defined in the Federal Register Vol. 79, No. 220) individuals or entities should not be subject to any of the written or electronic recordkeeping requirements of Rule 1.35(a) because the policy and legal justifications for 1.35 do not extend to those individuals/entities—as they do to individuals or entities registered with the CFTC.

PROPOSED AMENDMENT: “that all required records must be searchable, but not ‘searchable by transaction’”²

MGEX agrees that an amendment to the “identifiable” and “searchable” requirements of Rule 1.35 is necessary; however, the current proposal does not go far enough and is still onerous as proposed. Specifically, the searchability of records that must be kept in “native file format,” as required by Rule 1.31, is practically impossible with current technological capabilities.

Rule 1.31 provides that:

All books and records required to be kept by the Act or by these regulations shall be kept in their original form (for paper records) or native file format (for electronic records)...For purposes of this section, native file format means an electronic file that exists in the format in which it was originally created.³

This standard of “native file format” is technologically inconsistent with the proposed requirement that records be searchable. Since Rule 1.31 was adopted, technological capabilities have changed but Rule 1.31 has not been sufficiently updated to adequately keep pace. While it provides detail about how to record Microfiche, Rule 1.31 does not provide helpful or practical guidance for the recording of texts, instant messaging, chatroom conversations or other electronic media. Despite being out of date, Rule 1.31 applies to “All books and records required to be kept” and would therefore still apply to the technology articulated in Rule 1.35: telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media.⁴

For example, if one were to receive a text message with trading instructions from a client they could not 1) easily take a screen shot, 2) input this text message into a database or spreadsheet, or 3) use PDF format to document the text message. The text message must be kept in original SMS or MMS form, which is inherently not searchable despite current technology. Moreover, obtaining direct access to the raw “native file” format in Rule 1.31 would be complex if not impossible considering that the principal US carriers [Verizon, AT&T, Sprint, T-Mobile, Virgin, US Cellular etc.] all use different platforms, different operating systems, different hardware, and store their information differently. Keeping such text messages in native file format and keeping

² *Id.*

³ 17 CFR 1.31

⁴ 79 Fed. Reg. 68142 (November 14, 2014)

them in a searchable form are mutually exclusive in the current technological environment.

Beyond text messages, the technical problems escalate when discussing instant messaging, chat rooms, etc. and compliance with both Rules 1.35 and 1.31. Each electronic messaging service/program/platform is different in terms of how data is created, modified, stored, transmitted, etc. Moreover, there are hundreds of potential services that a person/entity may use to communicate.

While MGEX acknowledges the importance of retaining communications, the combined requirements of Rules 1.35 and 1.31 are exceedingly onerous, if not impossible for even the most sophisticated entity, much less an individual.

CONCLUSIONS:

- MGEX supports the current proposed amendment to eliminate the searchable by transaction requirement.
- MGEX supports a further amendment to entirely eliminate the searchable requirement.

OR

- Alternatively, MGEX supports keeping the searchable requirement but significantly amending Rule 1.31. Such amendment to Rule 1.31 should eliminate the requirement that electronic data be kept in native file format and allow for practical and cost effective alternatives to store electronic communications. Also, MGEX supports instituting a safe harbor/temporary suspension of Rule 1.31 while Rule 1.31 is updated to reflect current technology.

PROPOSED AMENDMENT: Records of oral and written communications provided or received ... are not required to be kept in a form and manner identifiable and searchable by transaction.⁵

MGEX reiterates its concerns regarding records being “searchable” as discussed above.

Otherwise, MGEX supports the amendment providing that records of 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 or related cash or forward transaction do NOT have to be linked or identified to a particular transaction.

CONCLUSIONS:

⁵ 79 Fed. Reg. 68142 (November 14, 2014).

- MGEX supports eliminating the requirement to identify and/or link a communication to a specific transaction.
- MGEX supports a further amendment to entirely eliminate the searchable requirement.

OR

- Alternatively, MGEX supports keeping the searchable requirement but significantly amending Rule 1.31. Such amendment to Rule 1.31 should eliminate the requirement that electronic data be kept in native file format and allow for practical and cost effective alternatives to store electronic communications. Also, that a safe harbor/temporary suspension of Rule 1.31 be instituted while Rule 1.31 is updated.

PROPOSED AMENDMENT: “Exclude members of a DCM or Swap Execution Facility (SEF) that are Commodity Trading Advisors (CTAs) from this oral recordkeeping obligation.”⁶

MGEX supports the exclusion of CTAs from the oral recordkeeping requirement.

CONCLUSION:

- Because CTAs will still be required to maintain written records from their clients including electronic and digital written communication, 1.31 and its relationship to 1.35 must be addressed to take into account technological realities.

PROPOSED AMENDMENT: “Exclude Unregistered Members from the requirement under Regulations 1.35(a) to retain text messages⁷” and exclude Unregistered Members from the “searchable” and “identifiable” recordkeeping requirements.⁸

MGEX supports the exclusion of Unregistered Members from the requirement to retain text messages and the requirement to maintain records in a particular form and manner.

However, MGEX does not believe this proposal goes far enough to address other concerns affecting Members of contract markets. Only Registered entities, whether they are Members of a DCM/SEF or not, should be required to maintain the records outlined in 1.35. Comparatively, Unregistered Members of a DCM/SEF should not be required to maintain all written and electronic records as outlined in Rule 1.35.

The goal of 1.35 was to promote “market integrity and customer protection⁹” as well as to balance the interests of customers with the burdens on market participants.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Registered entities are often in the position of handling and managing client/customer funds and have general capabilities to record and maintain communications and documents. Protecting the customers of these Registered entities is consistent with the policy goals of 1.35. Because of the fiduciary responsibility of Registered entities, the balance of interests reasonably supports having heightened recordkeeping requirements for Registered entities.

However, the requirements of Rule 1.35 are quite burdensome and therefore should not be extended to Unregistered entities or Unregistered Members. An Unregistered Member of a DCM may be an individual that trades only for themselves, has purchased the membership for investment purposes, and/or is engaged in low risk commercial hedging. These Unregistered Members often do not have the financial resources, technical know-how, or capabilities of complying with Rule 1.35, particularly in light of Rule 1.31 [see discussion above]. Rule 1.35's requirements present a significant and unreasonable burden on these Unregistered Members—so much so that membership at a DCM is dis-incentivized.

If an Unregistered Member is unable to comply with Rules 1.35 and 1.31, they may be compelled to sell their membership simply to avoid the unreasonable financial compliance costs and risks of non-compliance. Such a sale is bad for the former member because they have to pay higher exchange fees. Also, the sale is bad for the DCM and the broader derivatives industry because a strong membership is fundamental to a functioning exchange and marketplace. Similarly, the sale is bad for the CFTC and end users. If an Unregistered Member sells because of the burdensome recordkeeping requirements they may choose to trade through an agent because being a Member was too costly; such a situation discourages transparency. A diverse, strong and well-regulated membership is extremely valuable to contract markets, the CFTC, the marketplace, customers, and Members and as such should not be discouraged through unreasonable and excessive recordkeeping requirements.

The balance of interests is different for Registered versus Unregistered individuals/entities. Registered entities are already held to a higher recordkeeping standard and have allocated financial and personnel resources to comply with 1.35.

MGEX is very concerned that if all the proposed amendments to Rule 1.35 are fully implemented, that membership in a contract market will be significantly discouraged.

CONCLUSIONS:

- MGEX supports the exclusion of Unregistered Members from retaining text messages.
- MGEX supports the exclusion of Unregistered Members from the requirement to keep records in a form and manner that is searchable and identifiable.

- MGEX supports a further amendment that Unregistered Members are also excluded from the other detailed recordkeeping requirements of Rule 1.35 for written and electronic communications.

MGEX appreciates that the CFTC has chosen to propose amendments to Rule 1.35 and has provided an opportunity for comments. MGEX understands the policy behind Rule 1.35 and appreciates the importance of keeping adequate records. Transaction documents should always be kept regardless of whether one is Registered or Unregistered. Such documents that must be kept include: filled orders, unfilled orders, canceled orders, trading cards, signature cards, street books, journals, ledgers, cancelled checks, copies of confirmations, copies of statements of purchase and sale, as well as all other records prepared in the course of its business dealing in commodity interest and related cash or forward transactions. MGEX asserts that recordkeeping beyond these transactions documents should be tailored and that Unregistered Members should not be subject to the same heightened standard as Registered entities. MGEX is concerned that the inclusion of Unregistered Members in the broad recordkeeping requirements for written and electronic communications is more likely to be harmful to DCMs, Members, the CFTC, and customers than helpful.

Moreover, the practical application of Rule 1.35, especially as it is proposed to be amended, is very problematic because of the strict and out-of-date requirements of Rule 1.31.

If you have any questions or concerns regarding this letter, please feel free to contact Emily Spott at (612) 321-7188 or espott@mgex.com. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Emily Spott". The signature is written in a cursive style with a large initial "E" and a small "Spott" at the end.

Emily Spott
Assistant Corporate Counsel

cc: Mark G. Bagan, CEO, MGEX