



| asset management group

January 13, 2015

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

**Re: Records of Commodity Interest and Related Cash or Forward Transactions; Notice of Proposed Rulemaking**

Dear Mr. Kirkpatrick:

The Asset Management Group (“**AMG**”)<sup>1</sup> of the Securities Industry and Financial Markets Association (“**SIFMA**”) appreciates the opportunity to provide comments on the proposed amendments to Commodity Futures Trading Commission (the “**Commission**”) Rule §1.35(a), published in the Commission’s recent Notice of Proposed Rulemaking (the “**Notice**”).<sup>2</sup> As the Commission is aware, we have advocated for relief from the provisions of Rule §1.35(a)<sup>3</sup> for our members, whom are asset managers.<sup>4</sup> In this regard, we commend the Commission for its work to refine its recordkeeping rules and strongly support the Commission’s proposals to: (i) exempt commodity trading advisors (“**CTAs**”) from the oral recordkeeping requirements under Rule §1.35(a), (ii) clarify that records of oral and written communications leading to the execution of a transaction in a commodity interest and related cash or forward transactions not be required to be kept in a form and manner that allows for identification of a particular transaction,

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<sup>1</sup> AMG’s members represent U.S. asset management firms whose combined assets under management exceed \$30 trillion. The customers of AMG member firms include, among others, registered investment companies, ERISA plans and state and local government pension funds, many of whom invest in commodity futures, options and swaps as part of their respective investment strategies.

<sup>2</sup> See Records of Commodity Interest and Related Cash or Forward Transactions; Notice of Proposed Rulemaking, 79. Fed. Reg. 68140 (Nov. 14, 2014).

<sup>3</sup> See Request for Interpretative Guidance, submitted by AMG and the Managed Funds Association, on December 10, 2013 and CFTC Staff Public Roundtable to Discuss Dodd-Frank End-User Issues and Request for Interpretative Guidance and Relief on Application of Rule § 1.35(a) to Asset Managers, submitted by AMG on April 17, 2014 (collectively, the “**Previous AMG Letters**”).

<sup>4</sup> Although the term “asset managers” is not defined under the Commodity Exchange Act, for purposes of this letter, we are using the term “**Asset Managers**” to mean regulated investment advisers, including those registered with the Commission (i.e., as a CTA or CPO), the Securities and Exchange Commission (the “**SEC**”), a U.S. state or a foreign regulatory authority.

and (iii) exclude “**Unregistered Members**”<sup>5</sup> from the requirements to retain text messages and to maintain written records in a manner that would not be required to comply with the “searchable” and “identifiable by transaction” requirements. Nonetheless, we believe that some additional changes to Rule §1.35(a) are warranted.

In particular, we believe that the Commission should expand the proposed exclusion from the requirement that written records regarding “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” be “kept in a form and manner that allows for identification of a particular transaction” to cover *all records* maintained by CTAs and commodity pool operators (“**CPOs**”) as well as other **Asset Managers** to which the rules would otherwise apply.<sup>6</sup> In addition, AMG asks that the relief extended to Unregistered Members under the proposed rule and as described in the Notice in respect to text messages be extended to Asset Managers that are members of a swap execution facility (a “**SEF**”) or designated contract market (“**DCM**”). Finally, with respect to the related issue of compliance with the requirements of Commission Rules §§ 1.31, 4.7(b) and (c), 4.23 and 4.33 highlighted in the Previous AMG Letters, we support the positions taken in the letter submitted on July 21, 2014 by the Managed Funds Association, the Investment Adviser Association and the Alternative Investment Management Association (the “**MFA/IAA/AIMA Letter**”) that the Commission should exclude CTAs and CPOs from the requirement in Rule §1.31(b)(1)(ii)(A) that digital storage medium or systems must preserve records in a non-rewritable, non-erasable format, known as “write once ready many” (“**WORM**”). We further request that the exclusion extend to all Asset Managers that are members of a DCM or SEF.<sup>7</sup>

**A. The Commission Should Adopt its Proposals to (i) Exclude CTAs that are members of SEFs from Oral Recordkeeping Requirements, and (ii) Provide that written records retained under Rule §1.35(a) be Searchable**

In 2012, when the Commission first passed changes to Rule §1.35(a) covering recordkeeping requirements for SEF members, the Commission noted that the purpose of the amendments was to provide consistent treatment for members and swap dealers and major swap participants.<sup>8</sup> At that time, the Commission excluded the following categories from the ambit of its oral recordkeeping rules: members of DCMs and SEFs that were registered as CPOs; members that were not required to be registered with the Commission in any capacity; and

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<sup>5</sup> The Notice defined this group as “members of DCMs or SEFs that are not required to register with the Commission in any capacity.” Notice at 68142.

<sup>6</sup> Rule §1.35(a) would apply to these entities to the extent the entities were members of a designated contract market or swap execution facility.

<sup>7</sup> Rule §1.35(a)(3) provides that the requirements of Rule §1.31 apply to records retained under Rule §1.35(a) by, among other persons, any “member of a designated contract market or swap execution facility.” As a result, the group of regulated Asset Managers to which the requirements under Rule §1.31 (including, without limitation the WORM requirement) applies is larger than simply CTAs and CPOs.

<sup>88</sup> See Adoption of Regulations To Incorporate Swaps – Records of Transactions, 77 Fed Reg. 75523 (Dec. 21, 2012) at 75524.

certain small introducing brokers and floor traders.<sup>9</sup> The exclusion was granted “based on the Commission’s experience that such [excluded] entities are either unlikely to or prohibited from having customer interface or an effect on market integrity.”<sup>10</sup> The Commission noted that it sought to adopt alternatives relating to recordkeeping that “would achieve the Commission’s objectives and the benefits of promoting market integrity and protecting customers albeit at lower cost.”<sup>11</sup> We believe that the proposed amendment to the oral recordkeeping requirements achieves the Commission’s objectives. We note that the exclusion should not result in a lack of available records because oral records will still need to be maintained by the futures commission merchants, swap dealers and major swap participants with which CTAs typically transact. In addition, the amendment will not result in a lack of oversight over CTAs as those entities will continue to be subject to the Commission’s oversight and rules, including the recordkeeping rules specifically applicable to CTAs, as well as subject to oversight by regulators and courts under fiduciary standards. The proposed amendment will also encourage CTAs to participate on DCMs and SEFs as members and, thus, support an important congressional objective of moving execution of cleared swaps to regulated and transparent trading facilities with open access to all participants.

Similarly, we support the Commission’s proposed clarification that all records maintained under Rule §1.35(a) be “searchable.” We recognize that a primary purpose of the recordkeeping obligations under Rule §1.35(a) is to allow the Commission to oversee both the trading markets for commodity interests and certain market participants.<sup>12</sup> In order to achieve that goal, we agree that records of DCM and SEF members should be accessible to examination staff and to Commission employees investigating market events. Regulatory access to records does not, however, mandate a “one size fits all” approach to record retention. In that regard, we urge the Commission to read its requirements that records be “searchable” in a flexible manner to allow for a variety of approaches to record retention, similar to the approach contemplated by SEC rules, which require that records be retained in a manner so as to be accessible by the SEC but do not prescribe a particular methodology.<sup>13</sup> In our experience, the SEC’s approach has allowed investment advisers to leverage new technology and preserve records in a cost effective manner without impeding regulatory surveillance of the markets or oversight of advisers.

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<sup>9</sup> Id.

<sup>10</sup> Id. at 75529.

<sup>11</sup> Id. at 75528.

<sup>12</sup> Notice at 68145.

<sup>13</sup> See, e.g., SEC Rule 204-2((g)(2) (“The investment adviser must (i) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record; (ii) Provide promptly any of the following that the Commission (by its examiners or other representatives ) may request: (A) A legible, true, and complete copy of the record in the medium and format in which it is stored; (B) A legible, true, and complete printout of the record; and (C) Means to access, view, and print the record; and (iii) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this Rule 204-2.”)

**B. The Commission Should Extend the Proposed Exclusions for (i) Retention of Text Messages and (ii) Maintenance of All Written Records maintained under Rule 1.35(a) in a Manner that is Identifiable by Transaction to All Asset Manager Members of a DCM or SEF**

We support the Commission’s proposal to exclude Unregistered Members of SEFs and DCMs from: (i) the requirements to retain text messages in any form and (ii) the requirements to maintain written records in a manner that is identifiable by transaction.<sup>14</sup> We request that these be extended to apply as well to all Asset Managers, whether or not registered with the Commission.

We agree that these exclusions will reduce regulatory burdens on impacted market participants and will increase efficiency and competition among end-users without compromising market integrity. However, we believe that the proposed exclusions for Unregistered Members from retention of text messages and retention of all records in a form that is identifiable by transaction should be extended to all Asset Manager members of DCMs and SEFs, including members that are registered CTAs and CPOs. The funds and accounts managed by Asset Manager members provide a significant source of liquidity to the swaps market, which will almost certainly be reduced if the costs and burdens of trading are too high. In addition, this group of end-users presents very little risk from a safety and soundness perspective because they are already subject to comprehensive regulation and examination.

Asset Manager members of DCMs and SEFs that are registered with the Commission, like Unregistered Members, utilize text messages in connection with execution of swap transactions. These entities, like Unregistered Members, may utilize text messaging in connection with execution for swaps and other commodity interests, and technology does not yet exist to preserve these records. Like the Unregistered Members, excluding these members from the requirement that they maintain text messages should not impact the availability of important trade information because Asset Managers must also retain all other required written records and electronic communications in accordance with applicable Commission, SEC and state regulations. Compliance with the applicable recordkeeping standards is regularly examined by the examination staffs of applicable federal and state regulatory and self-regulatory authorities and the Asset Manager members are subject to sanction in the event of non-compliance.

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<sup>14</sup> Paragraph 3 of proposed Rule §1.35(a) excludes Unregistered Members from all provisions of paragraph (a)(2) of Rule §1.35(a). Paragraph 2 of Rule §1.35(a) provides: “(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.” (emphasis added). Although Unregistered Members are exempted under the proposed rule from both the “searchable” and the “identifiable” requirements of paragraph (2) of Rule §1.35(a), the extension AMG requests is solely from the “identifiable by transaction” requirement set forth in paragraph (2)(ii), as it applies to records other than those that lead to execution of a transaction in a commodity interest or a related transaction.

Asset Managers that are members of a DCM or SEF should also have the benefit of the exclusion proposed for Unregistered Members from the requirement that all records retained under Rule §1.35(a) be maintained in the form that is identifiable by transaction and not just those records relating to communications that “lead to the execution of a transaction” and related transactions. We agree with the Commission’s proposal to exclude records of oral and written communications leading to a transaction under Rule §1.35(a) and related cash or forward transactions from the general requirement that records be searchable on a transaction basis for all persons subject to Rule §1.35(a). However, we urge the Commission to expand this general exclusion to cover all Asset Managers that are members of a DCM or SEF and all written records required to be maintained or maintained under Rule §1.35(a) (and not just those involving communications that “lead to a transaction” or those involving related cash or forward transactions). Asset Managers presently keep records in accordance with requirements specified by the SEC and in a manner that permits examination by other regulators. Asset Managers are also regularly examined on their compliance with applicable recordkeeping requirements. Such requirements do not impose an obligation that records be maintained in a manner that is identifiable by transaction. In addition, as discussed in the Notice in relation to Unregistered Members, Asset Managers, whether or not they are registered with the Commission, manage assets on a portfolio basis and not on a transaction-by-transaction basis and, thus, are not easily able to identify the extent to which specific records must be kept for certain transactions. We would request that the Commission align its requirements with those of other regulators with which Asset Managers already have recordkeeping compliance policies and procedures. We believe that imposing a requirement on Asset Managers that are registered with the Commission to track records on a transaction by transaction basis would be cost prohibitive and would not serve a genuine regulatory need. As a result, we recommend that the Commission expand the proposed exclusion for all records retained under Rule §1.35(a) to all Asset Managers that are members of DCMs or SEFs, regardless of whether they are registered with the Commission. Granting such an exclusion to Asset Manager members generally would not create additional risk because records of Asset Managers are already subject to sufficient regulation and examination.

**C. The Commission Should Adopt the Recommendations set forth in the MFA/IAA/AIMA Letter and apply those Exclusions to all Asset Managers that are Members of a DCM or SEF**

AMG supports the recommendations made in the MFA/IAA/AIMA Letter to amend Commission Rules §§ 1.31, 4.7(b) and (c), 4.23 and 4.33 to streamline and update the recordkeeping requirements for CPOs and CTAs. We also request that the requested relief be extended to apply to all Asset Managers, to the extent applicable, as a result of their membership on a DCM or SEF.<sup>15</sup> As suggested in the MFA/IAA/AIMA Letter, it is both most cost efficient for Asset Managers and more effective for regulators and self-regulatory authorities (such as National Futures Association) for the recordkeeping rules to reflect current technology and best practices rather than to rely on outdated but expensive record-retention methodologies such as

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<sup>15</sup> Rules §§ 4.7(b) and (c), 4.23 and 4.33 are applicable solely to CPOs and CTAs. However, Rule §1.31 establishes record maintenance standards not only for the recordkeeping rules applicable solely to CPOs and CTAs but also to those under Rule §1.35(a), which are applicable to members of a DCM or SEF.

WORM. As a result, we urge the Commission to adopt the approach suggested in the MFA/IAA/AIMA Letter for all CPOs and CTAs and all Asset Managers that are members of a DCM or SEF, and amend the referenced rules accordingly.

During the time in which the Commission is evaluating this request, AMG respectfully requests that the staff grant temporary no-action relief to exclude all Asset Managers that are members of a DCM or SEF, in addition to all CPOs and CTAs (as requested in the MFA/IAA/AIMA Letter), from compliance with Rules §§1.31(b) and (c), 4.7(b) and (c), 4.23 and 4.33 (but solely with respect to third-party recordkeeping), to the extent applicable. As requested in the MFA/IAA/AIMA Letter, we believe that the requested no-action relief should extend until the effective date of further rulemaking by the Commission.

#### **D. Conclusion**

We commend the Commission for its thoughtful refinement of the recordkeeping rules applicable to members of DCMs and SEFs. In particular, we agree that CTAs should be excluded from the oral recordkeeping requirements under Rule § 1.35(a). We also support the proposed exclusions for Unregistered Members of DCMs and SEFs from: (i) the requirement to retain text messages and (ii) the requirement to maintain all written records in a manner that is identifiable by transaction; however, we urge the Commission to modify and extend the proposed exclusions to include, as well, all regulated Asset Managers that are members of DCMs or SEFs, including registered CPOs and CTAs. Finally, we recommend that the Commission adopt the changes to the Commission's recordkeeping rules set forth in the MFA/IAA/AIMA Letter, but extend the scope of the changes to include all Asset Managers that are members of a DCM or SEF, in addition to all CPOs and CTAs. During the time in which the Commission is evaluating this request, AMG respectfully requests that the staff grant the temporary no-action relief requested in the MFA/IAA/AIMA Letter, and extend the requested no-action relief to cover all Asset Managers that are members of a DCM or SEF.

These changes strike an appropriate balance between ensuring that communications regarding swap orders and trading activity in commodity interests are retained and encouraging SEF or DCM membership, thereby enhancing market liquidity in commodity interests, by providing sufficient flexibility to SEF and DCM members. In our view, the proposals, modified and extended as described above, as well as adoption by the Commission of the changes recommended in the MFA/IAA/AIMA Letter, will not only encourage participation in the markets by important liquidity providers by removing prohibitive costs to SEF and DCM membership, but will also ensure that records are retained and maintained by those participants in the most cost-effective manner, leveraging technology as it develops over time.

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Should you have any questions, please do not hesitate to contact Tim Cameron of AMG at 202-962-7447, Matt Nevins of AMG at 212-313-1176 or Georgia Bullitt of Willkie Farr & Gallagher LLP at 212-728-8250.

Sincerely,



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Securities Industry and Financial Markets Association

cc: Hon. Timothy G. Massad, Chairman, Commodity Futures Trading Commission  
Hon. Mark P. Wetjen, Commissioner, Commodity Futures Trading Commission  
Hon. Sharon Y. Bowen, Commissioner, Commodity Futures Trading Commission  
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