

DIVISION OF MARKET OVERSIGHT

Advisory for Futures Commission Merchants, Introducing Brokers, and Members of a Contract Market over Compliance with Recordkeeping Requirements

I. Introduction and Background

The Division of Market Oversight (“Division”) has become aware that there is an industry misunderstanding of the record retention requirements of Regulations 1.35 and 1.31 as it relates to electronically conveyed records. The Division is issuing this Advisory to address any industry misunderstanding of the Commission’s recordkeeping requirements applicable to futures commission merchants (“FCMs”), introducing brokers (“IBs”), and members of a designated contract market (“members”).ⁱ With the increased reliance in the futures industry on electronic media and the use of personal electronic devices and communications technology to facilitate the execution of transactions for both open outcry and electronic trading, the Division is issuing this Advisory to correct any misunderstandings and to make certain that the individuals and entities subject to the Commission’s recordkeeping requirements maintain all electronic forms of communications, including email, instant messages, and any other form of communication created or transmitted electronically for all trading.

On November 13, 2008, the New York Mercantile Exchange (“NYMEX” or “Exchange”) notified the Commission that it was self-certifying amendments to various NYMEX rules and adopting certain new NYMEX rule chapters to harmonize these rules with the CME Group rules,ⁱⁱ including rules that addressed record retention requirements under Commission Regulation 1.35. The original NYMEX rule addressing maintenance of reports and records by FCMs, IBs, and members generally required records to be kept in accordance with Commission Regulation 1.35.ⁱⁱⁱ The new rule was more detailed than the original rule and

explicitly required the retention of all trading floor transaction records, including electronically conveyed records, and stated that electronically conveyed records included, but was not limited to, instant messages and emails received from or originating from the trading floor. NYMEX twice filed amendments postponing the effective date of the rule change, making the rule effective on February 2, 2009. On January 27, 2009, NYMEX filed another amended rule certification removing the explicit requirement that members retain copies of electronically conveyed trading floor messages including instant messages and emails, which essentially restored the language from the original rule.

In conjunction with the NYMEX rule amendments concerning record retention, the Exchange also issued a Market Regulation Notice that stated that its modifications were removing the former requirement that instant messages and emails be retained. Division staff was concerned that the sequence of rule changes, as well as the language in the Market Regulation Notice, implied that Regulation 1.35 does not require the retention of electronic communications. In light of the Division's concerns, NYMEX agreed to issue a second Market Regulation Notice informing members that the previous Notice had been superseded and stating that all records are required to be maintained pursuant to Regulation 1.35, including any electronic communications that fall within the scope of the regulation.

II. Commission Recordkeeping Requirements

The Commodity Exchange Act ("Act") and Commission regulations pertaining to recordkeeping impose requirements for recording information and maintaining records relating to the business of all FCMs, IBs, and members.^{iv}

Commission Regulation 1.31 requires that all books and records that are required to be kept under the Act and Commission regulations must be kept for five years and shall be readily

accessible during the first two years of the five-year period. The rule also provides that documents can be stored in “micrographic media” (microfiche) or “electronic storage media” (digital storage or computer code) under conditions that ensure the accuracy and retrievability of the information.

Commission Regulation 1.35(a) requires FCMs, IBs, and members to keep full, complete, and systematic records, together with all pertinent data and memoranda, of all transactions relating to their business of dealing in commodity futures, commodity options and cash commodities. Each FCM, IB, and member is also required to retain such records, data, and memoranda in accordance with the requirements in Commission Regulation 1.31. Specifically included, without limitation, among the records to be retained are all orders (filled, unfilled, or canceled), trading cards, signature cards, street books, journals, ledgers, canceled checks, copies of confirmations, data and memoranda, that have been prepared in the course of a FCM’s, an IB’s, or a member’s business of dealing in commodity futures, commodity options, and cash commodities. Moreover, the Regulation provides that among the records that members 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 or the contract market. These documents are referred to by the Regulation as original source documents.

The Commission’s recordkeeping regulations, by their terms, do not distinguish between whatever medium is used to record the information covered by the regulations, including emails, instant messages, and any other form of communication created or transmitted electronically. The focus of Regulation 1.35 is the information that the Commission needs to carry out its oversight and enforcement responsibilities, regardless of the form that the “record” takes, and

regardless of whether the record relates to open outcry or electronic trading. The Division is issuing this Advisory to correct any misunderstanding whether the recordkeeping and retention requirements of Commission Regulations 1.31 and 1.35 are applicable to emails, instant messages, or similar forms of communication created or transmitted electronically for all trading.

III. Conclusion

The recordkeeping provisions of Commission regulations apply to records that are created or retained in an electronic format, including email, instant messages, and other forms of communication created or transmitted electronically for all trading. Accordingly, FCMs, IBs, and members of a designated contract market must maintain all such electronic records in accordance with Commission Regulations 1.31 and 1.35.

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Issued in Washington, D.C. on February 5, 2009, by the Division of Market Oversight.

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ⁱ 17 C.F.R. §§ 1.31 and 1.35.

ⁱⁱ CME Group is the parent company of the Chicago Mercantile Exchange, Chicago Board of Trade, and New York Mercantile Exchange.

ⁱⁱⁱ The original NYMEX rule addressing this issue was Rule 450, which read as follows:

“Members must keep full, complete and systematic records, together with all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity futures, options and cash transactions in accordance with CFTC Regulation 1.35.”

^{iv} Section 4(g)(a) of the Act, 7 U.S.C. § 6g(a) (2002), provides generally that FCMs, IBs, floor brokers, and floor traders shall make, keep, and hold open for inspection “...such reports as are required by the Commission regarding the transactions and positions of such person, and the transactions and positions of the customer thereof, in commodities for future delivery on any board of trade in the United States or elsewhere.”

Sections 4g(b) through (d) of the Act, 7 U.S.C. §§ 6g(b)-(d) (2002), further provide that: registered entities, including designated contract markets, are required to “maintain daily trading records”; floor brokers, IBs, and FCMs are required to “maintain daily trading records for each customer in such manner and form as to be identifiable with the trades referred to in subsection (b)...”; and “daily trading records shall be maintained in a form suitable to the Commission for such period as may be required by the Commission.”