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CFTC Staff Advisory Concerning Recordkeeping Requirements

The Commodity Futures Trading Commission (the "CFTC")'s Division of Market Oversight recently issued a Staff Advisory concerning the CFTC's recordkeeping requirements applicable to futures commission merchants ("FCMs"), introducing brokers ("IBs"), and members of a designated contract market (*i.e.*, a CFTC-approved domestic futures exchange) (hereinafter, the "Advisory").[1] The Advisory explains that the recordkeeping and retention requirements of CFTC Rules 1.31 and 1.35 are applicable generally to records that are created or retained in an electronic format, including email, instant messaging, and other forms of communication that are created or transmitted electronically. The Advisory expresses the view that it is the content of the information, not the means of communication, which is determinative for recordkeeping and retention purposes.

Discussion

CFTC Rule 1.35(a) requires each FCM, IB, and contract market member to maintain certain specified items, as well as "all other records, data and memoranda, which have been prepared in the course of its business of dealing in commodity futures, commodity options and cash commodities." The specified items include all orders (filled, unfilled, or canceled), trading cards, signature cards, journals, ledgers, canceled checks, and copies of confirmations and of purchase and sale statements. An FCM, an IB, or a contract market member must keep required records, data, and memoranda in accordance with Rule 1.31(a). Under that rule, records must be kept for five years and be readily accessible during the first two years of the five year period.

It is generally accepted that it is the content of communications, not the form, which determines whether the recordkeeping requirements apply. For example, if an FCM uses electronic media to capture and store customer orders, such records must be kept pursuant to Rules 1.35 and 1.31.

[1] *See* http://www.cftc.gov/stellent/groups/public/@industryoversight/documents/file/recordkeepingdmoadvisory0209.pdf.

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It is also accepted that Rules 1.35 and 1.31 are not generally applicable to tape recordings of telephone conversations of personnel on sales or trading desks generated in the ordinary course of an FCM's business, without regard to the catch-all language in Rule 1.35(a) quoted above. The CFTC itself rejected any such interpretation in the past in that context in favor of a

> more pragmatic approach that views the catch-all language within the context of the specific list it supplements. None of the items specifically listed in the rule are even roughly analogous to the tape recordings at issue in this case. Moreover, nothing in the regulatory history of the rule suggests that the [CFTC] intended to mandate retention of such recordings.[2]

This position is consistent with the view taken by the Securities and Exchange Commission (the "SEC") and the Financial Industry Regulatory Authority, Inc. (the "FINRA") and with market practice. SEC Rule 17a-4 requires that broker-dealers maintain records of all communications sent and received (including inter-office memoranda and communications) "relating to its business as such." In interpreting this rule to be applicable to electronic communications, including emails, the SEC has recognized that the substance rather than the form of the communication is determinative. In this regard, FINRA has explicitly recognized that instant messaging falls within this requirement. However, tape recordings of telephone conversations have not been thought to be subject to this rule and, in fact, FINRA specifically requires tape recording and maintenance of records of such recordings only in the case of registered representatives who have serious disciplinary histories or who have been associated with broker-dealers who have such histories. *See* Rule 3010(b)(2).

Despite its stated purpose to clarify the scope of the recordkeeping and retention requirements of Rules 1.35 and 1.31, the Advisory may introduce an element of ambiguity in this area because some of its phrasing may be interpreted to imply that all electronic records must be maintained. Given the CFTC's decision in Gilbert v. Lind-Waldock, supra, however, it is reasonable to believe that the Advisory is not intended to signify any fundamental shift in policy, at least absent further guidance from the CFTC.

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[2] Gilbert v. Lind-Waldock, CFTC Docket No. 91-R194 (CFTC 1996).

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