

Client Advisory

February 10, 2009

CFTC Staff Issues Advisory Regarding Recordkeeping Requirements

The staff of the Division of Market Oversight of the Commodity Futures Trading Commission (CFTC) has issued an Advisory to “clarify” that CFTC regulations require the retention of all trade-related electronic communications, including instant messages.

CFTC Rules 1.31 and 1.35 generally require futures commission merchants (FCMs), introducing brokers and exchange members to keep “full, complete and systematic” records of all transactions relating to their business of trading in futures, options on futures, options on commodities and underlying cash commodities for five years. These requirements extend to all documents on which trade information is originally recorded. The Advisory emphasizes that it is the content—not the form—of a communication that is determinative of whether the recordkeeping rules apply. Thus, emails, instant messages and other forms of communication that are created or transmitted electronically may be subject to the CFTC recordkeeping requirements if the content of any such communication is covered.

Although the Advisory is generally consistent with interpretations previously taken by the Financial Industry Regulatory Authority, Inc. (FINRA), the main regulatory body in the securities industry,* it contrasts with the more narrow position that the CFTC itself has taken in interpreting the scope of the CFTC recordkeeping requirements in the context of telephone tape recordings. For example, in *Gilbert v. Lind-Waldock* (CFTC 1996), the CFTC declined to accept staff arguments that interpreted telephone tape recordings as records required to be maintained under Rule 1.35. Rather, the CFTC opted for “a more pragmatic approach” that limited the scope of the Rule to those items specifically enumerated in its text or to items related to such documents.

<http://www.cftc.gov/stellent/groups/admin/documents/file/recordkeepingdmoadvisory.pdf>

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* FINRA requires member firms to evaluate their use of electronic communications, including instant messages, according to the “content and audience” of the communication rather than the means of communication. See NASD Notice to Members 03-33, Under Securities and Exchange Commission Rule 17a-4, records of all “communications” received and sent by a registered broker-dealer related to its business as such are required to be preserved for three years.

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