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CLIENT ALERT: CFTC FINALIZES RECORDKEEPING REQUIREMENTS FOR CERTAIN TRANSACTIONS BY MEMBERS OF DESIGNATED CONTRACT MARKETS AND SWAP EXECUTION FACILITIES

The Commodity Futures Trading Commission (“CFTC”) recently released¹ a final rule under which entities that are not registered or required to register with the CFTC as Swap Dealers, Major Swap Participants, brokers or other types of futures professionals, but that are members of designated contract markets (“DCM”) or swap execution facilities (“SEF”), are excluded from certain recordkeeping requirements. The exclusion thus can assist commercial end-users of commodities that are also members of a DCM or SEF. For your convenience, this memorandum briefly summarizes key points from this rule.

Background

CFTC Regulation 1.35(a)² contains requirements regarding records of commodity interest and related cash or forward transactions. Prior to the enactment of the final rule, these requirements applied to, among others, members of DCMs and SEFs. Such entities were required to keep records of written communications that led to the execution of a commodity interest transaction and related cash or forward transactions, where “written communications” included fax, instant messaging, chat rooms, email, and text messages. The records were required to be searchable by transaction.³ CFTC Staff, however, issued a temporary no-action letter⁴ relieving “Unregistered Members” (i.e. members of a DCM or SEF⁵ that are not registered or required to register in any capacity with the CFTC) from the

¹ Records of Commodity Interest and Related Cash or Forward Transactions, 80 Fed. Reg. 80,247 (Dec. 24, 2015) (to be codified at 17 C.F.R. pt. 1) (“Final Rule”).

² 17 C.F.R. § 1.35(a).

³ *Id.*

⁴ See Final Rule at 80,248.

⁵ While many Spiegel clients may not choose to be members of a DCM or SEF, this rule is important for those who find that such membership is the most cost-efficient way to hedge commercial risks, or that such membership is a prerequisite for entering into transactions offered on a particular DCM or SEF.

requirements to (a) retain text messages⁶ and (b) retain records in a form and manner identifiable and searchable by transaction.⁷ In late 2014, the CFTC proposed to revise Regulation 1.35(a) to, among other things, make the CFTC Staff no-action letter regarding Unregistered Members part of the regulation itself.

The CFTC adopts the final rule largely as proposed, with some exceptions, including that in addition to the exemptions described above for Unregistered Members, such entities are also excluded from the requirement to keep written communications that lead to the execution of a commodity interest transaction and related cash or forward transactions.

There remain some issues that the American Public Power Association and National Rural Electric Cooperative Association had flagged as in need of clarification, however. In their January 13, 2015 comments on the proposed rule,⁸ APPA and NRECA asked the CFTC to clarify, among others, that (1) an Unregistered Member's recordkeeping obligations under Regulation 1.35(a) are limited to that entity's transactions in commodity interests on the DCM or SEF of which it is a member and cash or forward transactions related to such commodity interest transactions (i.e., the recordkeeping requirements do not spill out to an Unregistered Member's entire commodity interest trading or nonfinancial business) and (2) an Unregistered Member can voluntarily record oral conversations related to commodity interest transactions without creating a regulatory obligation to maintain the recordings under CFTC rules. The CFTC did not address these issues in the final rule.

The rule is effective as of December 24, 2015.

We note that the information contained in this memorandum is highly simplified for general reading and is not intended as legal advice for any specific situation. Please do not hesitate to contact one of the attorneys listed below if you would like advice or additional information.

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⁶ The final rule clarifies that "text messages" are written communications sent from one telephone number to one or more telephone numbers by SMS or MMS; they do not include communications exchanged by "proprietary messaging services," which are Internet-based, and thus easier to store. Final Rule at 80,250-51.

⁷ *Id.* at 80,248.

⁸ Comment Letter on Proposed Rule Records of Commodity Interest and Related Cash or Forward Transactions (Jan. 13, 2015), <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=60232&SearchText=>.