

**MEMO# 30718**

May 25, 2017

# CFTC Adopts Amendments to Recordkeeping Rule to Reflect Technological Changes

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May 25, 2017 TO: ICI Members  
Investment Company Directors  
ICI Global Members  
Derivatives Markets Advisory Committee  
Registered Fund CPO Advisory Committee SUBJECTS: Compliance  
Derivatives  
Investment Advisers  
Recordkeeping  
Technology & Business Continuity  
Trading and Markets RE: CFTC Adopts Amendments to Recordkeeping Rule to Reflect Technological Changes

The Commodity Futures Trading Commission (“CFTC” or “Commission”) recently adopted amendments<sup>[1]</sup> to Regulation 1.31 under the Commodity Exchange Act (“CEA”), which governs recordkeeping requirements under the CEA and Commission rules. The amendments are intended to modernize and make technology neutral the form and manner in which regulatory records must be maintained under the CEA, as well as make clarifying changes to the text of Regulation 1.31.<sup>[2]</sup> The effective date for the final rule will be 90 days after its publication in the *Federal Register*. The amendments are described briefly below.

The Commission adopted the amendments largely as proposed. ICI, consistent with its 2014 rulemaking petition to the CFTC, had recommended that the Commission permit investment advisers that are registered with the Securities and Exchange Commission (“SEC”) and advise SEC-registered investment companies, to satisfy their CFTC recordkeeping obligations through substituted compliance, by complying with the comprehensive SEC recordkeeping obligations to which they already are subject.<sup>[3]</sup> The Commission rejected these comments, noting that the Proposal did not address amendments to Part 4 of the Commission’s regulations and therefore such amendments were outside the scope of this rulemaking.<sup>[4]</sup>

The Commission did, however, make several notable changes from the Proposal in

response to comments. First, the Commission revised the rule's definition of "regulatory records" to clarify that the term, consistent with current requirements under the rule, only requires retention of the regulatory record and any subsequent version of the record, but not prior versions of a regulatory record before it becomes a regulatory record (e.g., prior drafts of an agreement before execution).<sup>[5]</sup> In response to comments, the Commission also declined to adopt a definition of "metadata" as part of the definition of "regulatory records," concluding that the term "metadata" may be "generally understood by practitioners notwithstanding a lack of universal agreement on an exact definition."

Second, the Commission deleted the proposed requirement for a records entity to establish, maintain, and implement written policies and procedures designed to ensure compliance with its obligations under Regulation 1.31. The Commission agreed with commenters that, given the clearly defined obligations under the rule, an explicit requirement for written policies and procedures is unnecessary. The Commission emphasized, however, that records entities nonetheless have a duty to ensure accurate and reliable records.

Third, in response to comments, the Commission shortened current regulatory retention requirements for electronic records of pre-execution communications for swap dealers and major swap participants.<sup>[6]</sup>

Fourth, in response to comments, the Commission deleted the "chain of custody" requirement it had proposed to include in Regulation 1.31(d)(2)(i). The Commission noted, however, that deletion of the term "chain of custody" does not change the obligation of records entities under the rule to maintain a comprehensive audit trail for all electronic regulatory records.

The Commission noted that the requirements adopted in the final rule apply to existing records. The Commission believes many records entities may benefit from retaining existing records in a more efficient and less burdensome manner under amended Regulation 1.31 – for example, by maintaining existing records in a manner other than native file format and not being required to retain a third-party technical consultant.

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#### **endnotes**

<sup>[1]</sup> Available at <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister052317.pdf>. ("Adopting Release").

<sup>[2]</sup> For a description of the proposed amendments ("Proposal"), please see ICI Memorandum 30539 (Jan. 25, 2017), available at [https://www.ici.org/my\\_ici/memorandum/memo30539](https://www.ici.org/my_ici/memorandum/memo30539).

<sup>[3]</sup> Letter to Mr. Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, from David W. Blass, General Counsel, Investment Company Institute, dated March 20, 2017, available at <https://www.ici.org/pdf/30649a.pdf>.

[4] The Proposal did, however, specifically request comment on whether it would “resolve all outstanding issues regarding compliance with part 4 of the Commission’s regulations identified” by ICI and the other trade associations in their rulemaking petitions. As ICI explained in our comment letter, it did not.

[5] The final definition of “regulatory records” is:

[A]ll books and records required to be kept by the Act or Commission regulations, including any record of any correction or other amendment to such books and records, provided that, with respect to such books and records stored electronically, regulatory records shall also include: (i) any data necessary to access, search, or display any such books and records; and (ii) all data produced and stored electronically describing how and when such books and records were created, formatted, or modified.

[6] The Commission shortened the retention period under Regulation 1.31 for electronic communications governed by § 23.202(a)(1) and § 23.202(b)(1)-(3) to five years from the date of creation of the required record, instead of five years *after* the termination, maturity, expiration, transfer, assignment, or novation date of the transaction for a swap or related cash or forward transaction.