

CLIENT MEMORANDUM

CFTC to Modernize Recordkeeping Rules

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AUTHORS

Rita M. Molesworth | Deborah A. Tuchman | James E. Lippert | Neal E. Kumar

The Commodity Futures Trading Commission has proposed amendments to its rules governing the form and manner in which books and records must be maintained.¹ The Proposal would revise CFTC Rule 1.31 to reflect an ever-evolving technological environment. Notably, the Proposal would remove the requirement for electronic records to be kept in native file format and the requirement to engage a third-party technical consultant for records maintained electronically. References to microfiche and WORM would also be eliminated.

Comments on the Proposal must be submitted to the CFTC on or before March 20, 2017.

Form and Manner of Retention

The Proposal introduces several new terms. Generally, a “records entity” would be any person required by the CFTC to keep regulatory records. The Proposal would replace any reference to “books and records” with the defined term “regulatory records” and would differentiate between electronic regulatory records and paper regulatory records. “Regulatory records” would include “all books and records required to be kept by” the CFTC, while “electronic regulatory

¹ Recordkeeping, 82 Fed. Reg. 6356 (Jan. 19, 2017) (the “Proposal”).

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records” would include “all regulatory records other than paper regulatory records exclusively created and maintained by a records entity on paper.”

The Proposal would require a records entity to retain all regulatory records in a form and manner necessary to ensure the authenticity and reliability of the records and recordkeeping systems. In this respect, there would be no distinction between paper and non-paper regulatory records. As noted above, the Proposal would remove outdated technical requirements applicable to electronic records. The Proposal would, however, impose additional controls with respect to the retention of electronic regulatory records. For such records, a records entity would be required to:

- i. have systems that maintain security, signature, chain of custody elements and data as necessary to ensure the authenticity of the information contained in regulatory records and to monitor compliance with CFTC requirements;
- ii. have systems that ensure electronic regulatory records can be produced and that such records are available in the event of an emergency or other disruption of the entity’s record retention systems; and
- iii. create and maintain an up-to-date inventory that identifies and describes each system that maintains information necessary for accessing or producing electronic regulatory records.

The Proposal also provides that recordkeepers must maintain all prior versions of any regulatory record, no matter how modified, and that the recordkeeping obligations extend to “metadata” (generally referring to any hidden text and/or other information associated with an electronic file or data).

Policies and Procedures

Each records entity would be required to adopt written policies and procedures reasonably designed to ensure that it complies with Rule 1.31. In addition, the Proposal would require each records entity to provide appropriate training for employees regarding the entity’s recordkeeping obligations.

Duration of Retention

Generally, CFTC Rule 1.31 currently provides that all required “books and records” must be kept for a minimum of five years and must be readily accessible for the first two years.² As proposed, the retention period for regulatory records would generally remain unchanged, although electronic regulatory records would have to be readily accessible for the entire retention period. In addition, the Proposal clarifies that regulatory records of any swap or related cash or forward transaction must be kept *from the date the regulatory record was created* until termination and for a period of five years thereafter.

² Records of oral communications are required to be maintained for only one year.

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Production of Regulatory Records

The Proposal would require the CFTC or the Department of Justice to specify a reasonable form and medium in which a records entity must produce electronic regulatory records. The Proposal would require a records entity, at its own expense, to produce such records promptly. If a records entity is unable to produce electronic regulatory records in the requested form and medium, the Proposal provides flexibility for the entity to produce the records in an alternative manner sufficient for their adequate inspection by the CFTC and/or the DOJ.

Modernization is Timely

Rule 1.31 has presented challenges for CFTC registrants, especially in recent years. The Proposal represents an attempt by the CFTC to address recordkeeping issues in an electronic trading environment (e.g., trading cards will no longer have to be kept in hard copy). The Proposal also attempts to make CFTC Rule 1.31 technology-neutral in order to avoid dated references to old technology in the CFTC's regulations. The CFTC last undertook a holistic review of the recordkeeping requirements in 1999. Thus, market participants should carefully consider the Proposal to determine whether their current recordkeeping systems are consistent with the proposed requirements.

If you have any questions regarding this memorandum, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Deborah A. Tuchman (212-728-8491, dtuchman@willkie.com), James E. Lippert (212-728-8945, jlippert@willkie.com), Neal E. Kumar (202-303-1143, nkumar@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

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