

CLIENT MEMORANDUM

CFTC Modernizes Recordkeeping Rules

June 2, 2017

AUTHORS

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

The Commodity Futures Trading Commission has adopted amendments to the recordkeeping obligations in Rule 1.31.¹ The amendments modernize and make technology neutral the form and manner in which regulatory records otherwise required by CFTC regulations must be maintained. Among other changes, amended Rule 1.31 eliminates the native file format and third-party technical consultant requirements for records maintained electronically. The CFTC believes that the amended rule provides sufficient flexibility for recordkeeping requirements to keep pace with the evolving technological environment.

The rule will become effective on August 28, 2017.

New Terms

Amended Rule 1.31 contains several new terms. Generally, a “records entity” is any person required by the Commodity Exchange Act or CFTC regulations to keep regulatory records. The adopting release states that the final rule does not create any new categories of records entities or impose any new recordkeeping requirements on any records entity. A

¹ *Recordkeeping*, 82 Fed. Reg. 24479 (May 30, 2017). For more information on the CFTC's proposal to amend its recordkeeping rules, please see our client memorandum entitled “CFTC to Modernize Recordkeeping Rules” (Feb. 6, 2017), available [here](#).

CFTC Modernizes Recordkeeping Rules

Continued

records entity may continue to maintain records in accordance with its current practices if permitted by existing relief or regulatory guidance.²

The final rule replaces references to “books and records” with the defined term “regulatory records” and differentiates between electronic regulatory records and paper regulatory records. The term “regulatory records” includes “all books and records required to be kept” by the Commodity Exchange Act or CFTC regulations, including data regarding corrections or alterations to such records. The term “electronic regulatory records” includes all regulatory records, other than those created and maintained exclusively on paper by a records entity, as well as any data necessary to access, search or display such records. Notably, the CFTC will require a records entity to maintain data about a regulatory record only *after* it is created.

The CFTC specifically opted not to define metadata, reiterating its goal of developing less-prescriptive recordkeeping obligations.

Form and Manner of Retention

Regulatory records must be maintained in a form and manner that will ensure the authenticity and reliability of the records and recordkeeping systems. While the final rule removes archaic technical requirements applicable to electronic regulatory records, it also imposes additional controls with respect to the retention of such records. A records entity must establish systems and controls that:

- i. ensure the authenticity of electronic regulatory records and monitor compliance with CFTC requirements;
- ii. ensure that electronic regulatory records can be produced including in the event of a disruption to the entity’s record retention systems; and
- iii. maintain an inventory of all information maintenance systems.

Duration of Retention

The CFTC’s general record retention period is five years. The retention period for records of swaps and related cash/forward transactions is the life of each such transaction plus five years. The final rule requires that electronic regulatory records be readily accessible for the entire five year retention period rather than for only the first two years of the retention period, as previously required. Paper regulatory records will continue to be required to be readily available for the first two years of the retention period.

² For example, CFTC Rule 1.35 contains recordkeeping requirements applicable to members of a contract market that are not otherwise registered with the CFTC.

CFTC Modernizes Recordkeeping Rules

Continued

The retention period for records of execution and post-execution swap and related cash/forward transactions remains the life of each such transaction plus five years. With respect to *pre-execution* communications for such transactions, the retention period under the final rule is five years from the date the record is created.

The CFTC noted that it will continue to monitor changes in information technology, consistent with its emphasis on a less-prescriptive, principles-based approach, and consider whether recordkeeping regulations should be further adjusted to reflect technological developments.

Production of Regulatory Records

Regulatory records remain subject to inspection by representatives of the CFTC or the Department of Justice and must be produced at the records entity's own expense. Records must be promptly produced upon request and in the case of electronic records, in the form and medium requested.

Other Matters

The CFTC opted to forgo the proposed requirement to adopt written policies and procedures designed to ensure regulatory compliance. The CFTC noted that the decision not to mandate written policies and procedures does not create an explicit or implicit defense against recordkeeping violations or failure to supervise violations.

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.

June 2, 2017

Copyright © 2017 Willkie Farr & Gallagher LLP.

This memorandum is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum may be considered advertising under applicable state laws.

WILLKIE FARR & GALLAGHER_{LLP}