

June 8, 2017

CFTC Issues Final Recordkeeping Rules

CFTC Finalizes Rule to Modernize Recordkeeping Obligations

SUMMARY

On May 23, 2017, the Commodity Futures Trading Commission (the “CFTC” or the “Commission”) adopted final rules (the “Final Rule”) to amend and update Regulation 1.31, governing the recordkeeping obligations for those persons required to maintain records pursuant to the Commodity Exchange Act (the “CEA” or “Act”) and CFTC regulations (each a “Records Entity”).¹ The Final Rule is intended to modernize and make technology-neutral the form and manner in which regulatory records must be kept; it is not intended to alter any existing requirements regarding the type of regulatory records that must be maintained. The Final Rule largely follows the proposed amendments to existing recordkeeping obligations issued by the Commission on January 19, 2017 (the “Proposed Rule”)² subject to certain changes highlighted below. The Final Rule:

- defines the term “regulatory records”;
- eliminates the requirement to establish, maintain and implement written policies and procedures designed to ensure compliance with recordkeeping obligations under Regulation 1.31 from the Proposed Rule;
- shortens the retention period for pre-trade communications to five years from the date the communication was created; and
- eliminates the requirement to maintain the “chain of custody elements” of any electronic regulatory records.

The effective date for the Final Rule is August 28, 2017.

I. BACKGROUND

Regulation 1.31, which sets forth requirements for records required to be kept under the CEA and CFTC regulations, has largely been unchanged since its adoption in 1999. Due to the change in available

technology since the adoption of the CFTC's recordkeeping rules, many provisions of Regulation 1.31 have created unnecessary expenses for market participants, such as the requirement that records be kept in their native file format (*i.e.*, the format they were originally created in) and the requirement to engage a third-party technical consultant, or rely on outdated technology such as the requirement to retain any electronic record in a non-rewritable, non-erasable format (the "write once, read many" or "WORM requirement"). The Proposed Rule aimed to eliminate some of the unnecessary costs imposed by Regulation 1.31 as well as remove technology-specific references from Regulation 1.31 in order to allow Records Entities the flexibility to adopt new recordkeeping technologies.

II. DEFINITION OF "REGULATORY RECORDS"

In the Final Rule, "Regulatory Records" is defined as all 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. The definition from the Final Rule differs slightly from the definition in the Proposed Rule, which would have required, with respect to electronically stored records, all data produced and stored electronically that describes, directly or indirectly, the characteristics of such books and records, including, without limitation, data that describes how, when, and, if relevant, by whom such electronically stored information was collected, created, accessed, modified, or formatted. The Final Rule changed this provision in order to clarify that the Commission did not intend to require versions of a regulatory record prior to its becoming a regulatory record.

Importantly for Records Entities, the definition of Regulatory Records in the Final Rule is technology-neutral – it does not specify a format for the records to be stored and submitted in – which eliminates the WORM requirement and allows flexibility in the future, as current recordkeeping formats become obsolete.

III. ELIMINATION OF WRITTEN POLICIES AND PROCEDURES REQUIREMENT

The Proposed Rule contained a requirement that Records Entities establish, maintain and implement written policies and procedures reasonably designed to ensure that a Records Entity complied with its obligations under Regulation 1.31, including training officers and personnel and monitoring for compliance. This requirement was removed from the Final Rule, as it was deemed unnecessary in light of the ultimate duty and responsibility of a Records Entity to ensure accurate and reliable records and inconsistent with the Commission's emphasis on a less prescriptive, principles-based approach.

IV. RETENTION PERIOD

The Final Rule shortens the retention period for pre-execution electronic communications required to be kept by swap dealers to a period of five years from the date of creation of the record, a reduction from the current retention period of the duration of the swap plus five years. The Commission acknowledged the increased burden and risk of a longer retention period imposed on swap dealers, while acknowledging that the more limited time period for maintaining pre-execution communications was useful for regulatory oversight purposes. This also brings the retention period for pre-execution communications for swap dealers closer to the retention requirements for broker-dealers under the Securities and Exchange Commission (“SEC”) regime.³

The retention period for records of any swap or related cash or forward transaction remains from the date the regulatory record was created until the termination, maturity, expiration, transfer, assignment or novation date of the transaction and for a period of not less than five years after such date. Oral communications must be kept for a period of not less than one year from the date of the communication. All other regulatory records must be kept for a period of five years from the date of creation. The Final Rule distinguishes between records exclusively created and maintained on paper, which must be readily accessible for no less than two years, and electronic regulatory records, which must be readily accessible for the duration of the required recordkeeping period. The Commission notes that this standard is consistent with the SEC’s standard for certain intermediaries.

V. ELIMINATION OF “CHAIN OF CUSTODY” REQUIREMENT

The Proposed Rule contained a requirement that Records Entities 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 the Act and Commission regulations. This requirement has been removed from the Final Rule, as it was deemed confusing given that “chain of custody” currently exists as a legal evidentiary standard and is adequately covered under the definition of “regulatory records.”

VI. EFFECTIVE DATE

The effective date for the Final Rule is August 28, 2017.

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- ¹ See CFTC, “Recordkeeping,” 82 Fed. Reg. 24479 (May 30, 2017).
- ² See CFTC, “Recordkeeping,” 82 Fed. Reg. 6356 (January 19, 2017).
- ³ See SEC Rule 17a-4(f).

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