



March 16, 2017

VIA: <https://comments.cftc.gov>
Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st St. NW, Washington, DC 20581

Re: CFTC Proposed Rule – Recordkeeping (RIN 3038-AE36)

Dear Mr. Kirkpatrick:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the above-referenced rule proposal (“Proposal”). SIFMA fully supports the Proposal and urges the Commission to adopt the Proposal as quickly as possible. The Proposal seeks to amend Rule 1.31 of the Commodity Exchange Act (“CEA”) to do three main things: (1) remove the requirement to keep electronic records in their “native” format; (2) replace the “non-rewritable, non-erasable,” or “write once, read many” (“WORM”) electronic record storage requirement with a technology neutral, principles-based standard; and (3) eliminate the requirement to engage a third-party Technical Consultant. SIFMA has long held that Rule 1.31 is outmoded and should be amended to allow firms to use the most current technology, and appreciates the Commission’s efforts to update this rule.

SIFMA particularly supports the technology neutral principles espoused in the Proposal. In an age when technology makes daily advancements, it is critical that rules are flexible enough to ensure that financial institutions may use the most current technology available. The Proposal will almost certainly provide clear cost reductions for SIFMA members, particularly the elimination of the requirement to retain a Technical Consultant. Furthermore, SIFMA does not believe the Commission should narrowly define “metadata.” We believe the current usage is sufficiently flexible to encompass current and future technology standards.

Although SIFMA strongly supports the Proposal, we believe some minor changes would further clarify and strengthen the Proposal. We have outlined each in detail below.

¹ SIFMA represents these broker-dealers, banks and asset managers whose nearly one million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$20 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

A. Duration of Retention

Proposed Rule 1.31(c)(1) requires that the firms retain regulatory records (other than oral communications) for not less than five years after the “termination, maturity, expiration, transfer, assignment, or novation date of the transaction.” This requirement appears to impose a lengthy retention period on certain swaps records, including emails and other electronic communications related to a swaps transaction. For example, if a swap has a 20-year maturity date, an email related to the creation of that swap may have to be retained for at least 25 years from its creation and perhaps longer depending on when the email was originally sent or received. This requirement places an unnecessary retention burden on firms, which exceeds most statutes of limitations or utility with respect to underlying transactions. As such, we recommend that emails and other electronic communications be carved out of this requirement and permitted to be retained for a period of five-years from creation.

We continue to support the 1-year retention period for oral communications as proposed under Rule 1.31(c)(2), given the additional complexity we have previously raised regarding the retention of oral communications.²

B. Form and Manner of Retention

SIFMA appreciates the Commission’s efforts to propose new principles in Rule 1.31(d)(2) that are closer to those in Rule 204-2(g) under the Investment Advisers Act of 1940. We recommend the following technical edits to proposed Rule 1.31(d) for clarity:

1. Authenticity and Reliability Controls (Proposed Rule 1.31(d)(2)(i))

SIFMA requests additional clarification on the scope of the proposed authenticity and reliability controls. We understand and appreciate the Commission’s intention to require firms to retain the history of modifications to regulatory records to ensure authenticity, but as currently drafted, the Proposal is not clearly achieving this goal. We believe the use of the term “chain of custody” in this context is confusing. Chain of custody is a legal evidentiary standard which does not translate clearly to the technological requirements for recordkeeping. We suggest that the term be removed from the Proposal because the definition of “regulatory records” in proposed Rule 1.31(a)(i) already includes a requirement to retain “data that describes how, when, and, if relevant, by whom such electronically stored information was collected, created, accessed, modified, or formatted”. We believe this definition achieves the same goal as the “chain of custody” concept but in a clearer way.

As such, we suggest the following change to proposed Rule 1.31(d)(2)(i) as follows:

Systems that maintain the security, signature, ~~chain of custody~~
~~elements~~, and data as necessary to ensure the authenticity of the
information contained in electronic regulatory records and to monitor
compliance with the Act and Commission regulations in this chapter;

² See, e.g., SIFMA Request for No-Action Relief: Recordkeeping Requirements under the Internal Business Conduct Rules, submitted to the CFTC (August 10, 2012).

2. Disaster Recovery Requirements (Proposed Rule 1.31(d)(2)(ii))

The Proposal should be made consistent with the existing rules and guidance regarding business continuity planning (“BCP”). The existing robust BCP regulations are sufficient to cover electronic recordkeeping and additional provisions are not necessary in Rule 1.31.

We suggest the following changes to proposed Rule 1.31(d)(2)(ii):

Systems that ensure the records entity is able to produce electronic regulatory records in accordance with this section, and ensure the availability of such regulatory records consistent with the Records Entity’s business continuity obligations in the event of an emergency or other disruption of the records entity’s electronic record retention systems;

3. Records Inventory (Proposed Rule 1.31(d)(2)(iii))

Finally, SIFMA seeks clarity regarding the inventory requirement described in 1.31(d)(2)(iii). SIFMA agrees the maintenance of an inventory of systems used to maintain electronic regulatory records would provide benefits to member firms and the Commission, however introducing concepts related to access and production of records in this section is potentially confusing. Given the guidance on inspection and production in 1.31(e), 1.31(d)(2) should be revised to focus on the inventory requirement.

We suggest the following changes to proposed Rule 1.31(d)(2)(iii):

The creation and maintenance of an up-to-date inventory that identifies ~~and describes each system that maintains information necessary for accessing or producing~~ electronic regulatory records.

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SIFMA requests that the Commission continues to work with the Securities and Exchange Commission (“SEC”) towards regulatory consistency wherever possible. SIFMA hopes the SEC takes note of this Proposal and similarly starts the process of amending Rule 17a-4(f) under the Securities Exchange Act of 1934 (“Exchange Act”) to be consistent with this Proposal and the Investment Advisers Act. Without such SEC rule amendments, the Proposal will have limited benefit for many SIFMA member firms who are also required to comply with the Exchange Act rules.

If you have any questions or need any additional information, please contact me at 202-962-7385 or mmacgregor@sifma.org.

Sincerely,

/Melissa MacGregor/

Melissa MacGregor
Managing Director and Associate General Counsel

cc: CFTC:
Hon. J. Christopher Giancarlo, Acting Chair
Hon. Susan Y. Bowen, Commissioner
Eileen Flaherty, Director, Division of Swap Dealer & Intermediary Oversight

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Hon. Michael S. Piwowar, Acting Chair
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