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CFTC Proposes Updated Recordkeeping Rules

The Commodity Futures Trading Commission (the “CFTC”) [recently proposed certain amendments to Regulation 1.31 \(“§1.31”\),](#)¹ which sets forth requirements for records required to be kept under the Commodity Exchange Act (the “CEA”) and CFTC regulations. The proposed amendments would affect all persons required to maintain records under CFTC rules, including asset managers registered as commodity pool operators and commodity trading advisors, as well as certain other persons who trade commodity interests on U.S. markets. The proposal grants welcome relief from outdated requirements of the current rule and aims to make recordkeeping requirements technology-neutral in order to accommodate future advances. The CFTC requested comments on many issues. Comments are due by March 20, 2017.

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As adopted in 1999, many provisions of §1.31 have become obsolete in light of technological advances. Compliance has become difficult, if not impossible, as the recordkeeping technology specified by the rule is no longer used or produced. Moreover, CFTC rules permitting commodity pool operators to keep records with third parties instead of at their main business office require certifications of compliance with §1.31, which many third-party recordkeepers are reluctant to provide. To rectify these problems, the CFTC has proposed the following amendments:

1. Definitions. The CFTC proposed to revise §1.31(a) by defining certain terms to provide more clarity. The rule defines the following terms:

- records entity means any person required by CEA or CFTC regulations to keep regulatory records;
- regulatory records means all books and records required to be kept under CEA or CFTC regulations, which includes 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) 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; and (ii) any data necessary to access, search or display any such books and records; and
- electronic regulatory records means all regulatory records other than regulatory records exclusively created and maintained by a records entity on paper.

Regulatory records will replace the term “books and records” as it is currently used. Other terms that have become obsolete are also struck, including “native file format,” “micrographic media” and “electronic storage media.” The definitional changes should allow the rule to be technology-neutral and, therefore, alleviate the burden of updating the rule to respond to future technological advances. The changes also clarify that both existing and prior versions of any record must be retained, no matter how modified. This means that metadata must be retained as part of required electronic recordkeeping.

2. Policies and Procedures. The rule proposal adds a new §1.31(b), which revises the ongoing compliance obligations regarding written regulatory records and procedures. If approved, §1.31(b) would require all records

¹ 17 CFR §1.31.

entities to establish, maintain and implement written policies and procedures reasonably designed to ensure that the records entity complies with its obligations under §1.31, including training officers and personnel and monitoring for compliance. Notably, the new rule does not prescribe specifics as to the frequency and format of any training. Rather, the CFTC views training as an ongoing responsibility, which a records entity “ignores at its peril.”

3. Duration of Retention. The proposal also would amend and restate §1.31(c) so that retention periods are determined based on the type of record and the underlying transactions to which the records relate. Under the proposal, the retention periods are as follows:

- regulatory records (other than regulatory records of oral communications) of any swap or related cash or forward transaction – five years from the date the transaction terminates, matures, expires, or is transferred, assigned or novated;
- all other regulatory records (other than regulatory records of oral communications) – five years from the date on which the record was created; and
- oral communications – one year from the date of the communication.

The limitation that records must be readily accessible for only two years remains in effect.

4. Form and Manner of Retention. In lieu of current §1.31’s specific statements about the form in which records must be kept, proposed §1.31(d) adopts only a general standard that records entities retain regulatory records “in a form and manner necessary to ensure the records’ and recordkeeping systems’ authenticity and reliability.” While it does not give specifics about the form in which records must be kept, the proposed rule does set forth the following requirements with respect to what records entities are required to do with respect to electronic regulatory records:

- have systems to maintain security, signature, chain of custody and data as necessary to ensure the authenticity of the information contained in regulatory records and to monitor compliance;
- have systems to ensure the records entity is able to produce regulatory records in accordance with the rule and ensure the availability of regulatory records in the event of an emergency or other disruption; and
- create and maintain up-to-date inventories that identify and describe each system that maintains information necessary for accessing or producing regulatory records.

The proposed rule would supersede the requirements of current §1.35(a)(5)(i), specifying the form and manner of record retention.

5. Inspection and Production of Regulatory Records. The proposed changes also specify that records inspections may be conducted by both the CFTC and the Department of Justice. Additionally, the proposal would amend current production requirements based on the form in which the record was kept. For paper records, new §1.31(e)(2) would require production promptly upon request by the CFTC in response to a request for the production of records. Production of electronic records under proposed §1.31(e)(3), however, must be produced promptly in the reasonable form and medium that the CFTC requests. Finally, new §1.31(e)(4) would preserve the existing right of a records entity to provide a representative of the CFTC with an original regulatory record for reproduction in lieu of a copy.

6. Removal of Certain Outdated Provisions. The proposal also would remove §1.31(b)(4)(i), requiring the hiring of and submission of reports by technical advisers; §1.31(c), requiring users of electronic storage media, including disks and CD-ROMs, to file a certification of the documents’ authenticity; and §1.31(d), requiring certain paper records such as trading cards and paper copies of electronically filed certified forms, to be retained in hard copy for the required period.

7. Request for Comments. The release includes requests for comments on each of the topics discussed above, as well as numerous related points, including whether the definitions should be revised or deleted, whether metadata should be specifically addressed, the scope and specificity of the training program requirements, whether the record retention requirements are appropriate and whether the CFTC should specifically address cloud storage and whether the CFTC should publish guidelines regarding technical standards for electronic regulatory records. Please note that comments are due by March 20, 2017.

Please contact [Deborah Monson](#), [Lindsey Jones](#) or the Ropes & Gray attorney who usually advises you with any questions you may have or if you would like additional information.