MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

January 13, 2015

Via Electronic Submission: http://comments.cftc.gov

Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Notice of Proposed Rulemaking on Records of Commodity Interest and Related Cash or Forward Transactions (RIN 3038-AE23)

Dear Mr. Kirkpatrick:

Managed Funds Association[1] ("**MFA**") is pleased to have the opportunity to submit comments to the Commodity Futures Trading Commission (the "**CFTC**" or the "**Commission**") in response to its notice of proposed rulemaking on "Records of Commodity Interest and Related Cash or Forward Transactions" (the "**Proposed Rule 1.35 Amendments**").[2] MFA appreciates the CFTC's issuing the proposed amendments to Rule 1.35(a). In particular, we welcome and strongly support the proposed exclusion of registered commodity trading advisors ("**CTAs**") from the oral recordkeeping requirement. If finalized as proposed, this exclusion, together with the other proposed amendments, would achieve a more sensible scope for imposing recordkeeping obligations on many MFA members that are CTAs and commodity pool operators ("**CPOs**") that meet the Commodity Exchange Act ("**CEA**") definition of "member" of a swap execution facilities ("**SEF**") or a designated contract market ("**DCM**").[3] However, as we discuss below, we are very concerned that the proposed amendments to clarify the "identifiable" and

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[1] Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

[2] 79 Fed. Reg. 68140 (November 14, 2014) (the "**Proposing Release**"), available at: http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2014-26983a.pdf.

[3] *See* 7 U.S.C. 1a(34) (defining "member" as an individual, association, partnership, corporation, or trust – (i) owning or holding membership in, or admitted to membership representation on, the registered entity or derivatives transaction execution facility; or (ii) having trading privileges on the registered entity or derivatives transaction execution facility).

"searchable" requirements do not address the problematic intersection with Rule 1.31's requirements for electronic recordkeeping and third-party recordkeepers. MFA believes that the Commission should adopt an interim solution to address this intersection for registered entities until such time that the CFTC updates and amends Rule 1.31.

I. MFA Strongly Supports the Proposed Exclusion of Registered CTAs That Are Members of SEFs or DCMs from Rule 1.35(a)'s Oral Recordkeeping Requirement

The Proposed Rule 1.35 Amendments would exclude all CTAs that are members of a SEF or DCM from the obligation to record all oral communications that lead to the execution of a transaction in a commodity interest.[4] During the pendency of this proposed exclusion, MFA greatly appreciates the CFTC staff's recent issuance of extended and expanded no-action relief that covers all required oral communications under Rule 1.35(a).[5]

MFA welcomes and strongly supports this proposed exclusion for two main reasons: (1) there would be duplicative recording by swap dealers and futures commission merchants ("**FCMs**"); and (2) registered CTAs are functionally distinguishable from dealers and executing brokers. We explain both reasons below.

1. There is Duplicative Recording by Swap Dealers and FCMs.

Imposing the taping obligation on registered CTAs is unnecessary because the recordings will be duplicative. Substantially all conversations seeking futures or swap quotes or providing futures or swap trading instructions on DCMs or SEFs are currently recorded by swap dealers and FCMs under the CFTC's recordkeeping requirements, including Rule 1.35(a). CTAs do not take orders from customers, so there is no customer call that CTAs record that is not recorded by the dealer. The CFTC's Proposing Release also correctly notes that many CTAs that are members of DCMs or SEFs have discretionary trading authority over their customers' accounts and therefore, those CTAs would not be having routine telephone conversations with customers that lead to the execution of an order on a DCM or SEF.[6] While we acknowledge that the CFTC's Division of Enforcement needs tools to enhance its responsibilities, we do not believe its capabilities will be enhanced by duplicate recordings.

For central limit order book ("**CLOB**") execution on SEFs, we note that CLOB trading does not involve any communications, whether oral or written. Nor should there be: anonymous order book trade execution should remain anonymous throughout the trade cycle for all participants on SEFs. Given CLOB trading anonymity, the achievement of the CFTC's policies and justifications for imposing the taping obligation on registered CTAs will diminish with an increase in CLOB trading.

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4 *See* Proposed Rule 1.35(a)(4)(vi) at 68146.

5 *See* CFTC Staff No-Action Letter No. 14-147, "No-Action Relief from Certain Recordkeeping Requirements under Commission Regulation 1.35(a)", issued Dec. 16, 2014.

6 *See* Proposing Release at 68143.

2. Registered CTAs are Functionally Distinguishable from Dealers and Executing Brokers.

In MFA's view, the following factors distinguish CTAs from the other entities subject to Rule 1.35(a)'s oral recordkeeping requirement:

- As we noted previously, CTAs do not take orders from customers in connection with trade execution.

- CTAs are not paid transaction-based compensation. Instead, CTAs are compensated based on the value of customer assets under management and the profits generated on those assets. Thus, registered CTAs have an economic incentive to obtain the best prices for orders entered on behalf of their customers. By virtue of their aligned economic incentives with their customers, registered CTAs would not be incentivized to make fraudulent or misleading communications to their customers regarding swap and futures trades, or to trade ahead of customer orders.

- In addition, CTAs are not dealers. CTAs do not hold themselves out as dealers or make a market in swaps or futures. CTAs do not provide two-sided markets. But the scope of existing Rule 1.35(a) does not address the functional differences of CTAs from dealers. Specifically, Rule 1.35(a) currently requires members of SEFs or DCMs to keep records that have been prepared "in the course of its business of dealing" in commodity interest transactions. As explained above, CTAs do not register with the CFTC for their dealing activities; they register based on their advisory role to their customers.

Based on these reasons, MFA strongly believes that the costs of compliance by registered CTAs with Rule 1.35(a)'s oral recordkeeping requirement will outweigh the benefits to the CFTC's enforcement and market oversight responsibilities. The compliance costs of the taping obligation alone would involve a large infrastructure investment for registered CTAs. They would also need to make further technology investments to comply with the requirements to collect and retain such recordings so that they are in a searchable format and kept in a form and manner that allows for identification of a particular transaction.

Accordingly, without this CTA exclusion in Rule 1.35(a), registered CTAs will be incentivized to trade through an agent to avoid the oral recordkeeping requirement. If these firms trade on an agency basis, they are not SEF or DCM members and therefore, are not subject to Rule 1.35(a). MFA believes that this outcome is not in the interests of either the CFTC or such CPOs and CTAs. Not only are the costs of trading on an agency basis higher than trading directly on SEFs or DCMs, but the CFTC could lose some important transparency for its regulatory oversight purposes, as the trading data it would receive will be complicated by the interposition of the agency relationship. Increased use of agents would also potentially contribute to increased systemic risk over time should one or more agents become bankrupt or insolvent. For these reasons, increased use of agents serves only the agents' interests since they would reap the agency fees. For registered CTAs that prefer direct participation as members of SEFs for their trading strategies, Rule 1.35(a)'s unduly burdensome oral recordkeeping

requirement acts as an impediment to their direct access. As a result, application of Rule 1.35(a) to such firms would arguably undermine the statutory reform goals of Section 733 of the Dodd-Frank Act to promote SEF trading and pre-trade transparency in the swaps market.

II. MFA has Remaining Concerns with the Intersection Between Rule 1.35(a) and Rule 1.31

The Proposed Rule 1.35 Amendments would clarify that all required records must be searchable, but not searchable by transaction.[7] We generally support this clarification, as it would relieve CTAs and CPOs that are members of SEFs or DCMs from the current compliance burden to track and search records on a transaction-by-transaction basis, particularly given that the scope of the required records would remain the same as the existing rule. Such records include: "all pertinent data and memoranda, of all transactions relating to its business in dealing in commodity interests and related cash or forward transactions"; all orders (filled, unfilled, or cancelled), among other listed records; and "all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest and related cash or forward transactions".[8] In addition, registered CTAs and CPOs would have to keep all such records in a form and manner that allows for identification of a particular transaction, except for records of oral and written communications that lead to the execution of a transaction in a commodity interest or related cash or forward transaction.[9] While we appreciate the proposed exception for pre-execution records, we remain concerned that registered CTAs and CPOs that are members of SEFs or DCMs will be burdened with having the technological infrastructure to track and identify all other records on a transaction-by-transaction basis.

Although we acknowledge and appreciate that the Proposed Rule 1.35 Amendments to clarify the "identifiable" and "searchable" requirements of Rule 1.35(a) generally are helpful and respond to many market participants' compliance challenges, we remain concerned that they do not go far enough to address the heavy compliance burdens imposed on CPOs, CTAs and other buy-side firms that meet the CEA definition of "member" of a SEF or DCM.[10] The main source of our concern is that Rule 1.35(a)(6) would still require registered CTAs and CPOs that are members of SEFs or DCMs to comply with Rule 1.31. Registered CPOs and CTAs find compliance with Rule 1.31's incorporation of outdated technology and incongruity with standard market practices overly burdensome, infeasible and costly. MFA strongly believes that there is a need for the CFTC to revise Rule 1.31 given advancements in technology and current business practices, and ideally to do so in conjunction with the revisions to Rule 1.35(a).

More specifically, MFA respectfully urges the CFTC to take into consideration the technical limitations of Rule 1.31's recordkeeping requirements for purposes of compliance with Rule 1.35(a)'s "searchable" and "identifiable" requirements. The CFTC's Proposing Release states that the Proposed Rule 1.35 Amendments do not modify, limit, restrict or reduce the

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7 Proposing Release at 68143.

8 *See* Proposed Rule 1.35(a)(1) at 68146.

9 Proposing Release at 68146.

10 *See supra* n. 3.

obligations under Rule 1.31 to produce required records in native file format, and to produce records in such a manner as to preserve the full functionality that may be available in native file format.[11] The practical result of the intersection of Rule 1.35(a) and Rule 1.31 would require market participants with paper records and electronic records in native file formats that have limited or no functionality for searching or identifying such records by transaction to make substantial technology and infrastructure investments to obtain such functionality.

In particular, Rule 1.31 requires that electronic records be kept in their native (or original) format; be preserved in a "non-rewritable, non-erasable format" (similar to the "write once-read many" or "WORM" requirement that was state of the art in the late 1990s and early 2000s); and that firms that maintain electronic recordkeeping retain a third-party technical consultant who has access to, and the ability to download, the firm's electronic records. The CFTC adopted the relevant provisions in CFTC Regulation 1.31 in 1999,[12] at the cusp of the age of electronic records, and the regulation requires firms either to remain suspended in time by using obsolete technology or to duplicate recordkeeping efforts to meet modern business needs in addition to outdated recordkeeping requirements.

The Securities and Exchange Commission ("**SEC**") rejected a similar WORM requirement when considering amending its own recordkeeping requirements for registered investment advisers, because the costs associated with preserving records in that manner outweighed the benefits.[13] SEC Rule 204-2(g) under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"), does not tether advisers to any particular electronic format, nor does it require the use of third-party consultants.[14] Instead, Rule 204-2(g) sets forth general principles that advisers must follow when arranging, accessing and reproducing their records. A principles-based approach facilitates adaptable recordkeeping requirements that can withstand evolutions in technology and software. Many registered CPOs and CTAs that are members of SEFs or DCMs are also registered investment advisers with the SEC and thus, they are already complying with the SEC's electronic recordkeeping requirements under Rule 204-2(g).

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[11] Proposing Release at 68142, footnote 35.

[12] Recordkeeping: Storing Records: SEC & CFTC Harmonization, 64 Fed. Reg. 28735, at 28735 (May 27, 1999).

[13] In its adoption of electronic recordkeeping standards for funds and advisers, the SEC noted:

> We recognize that the standards for electronic recordkeeping we are adopting for funds and advisers are different from the rules that we have adopted for broker-dealers, which require brokerage records to be preserved in a WORM format [(*i.e.*, non-rewriteable, non-erasable or "write once, read many," format)]. We have not experienced any significant problems with funds or advisers altering stored records. Moreover, most advisory and mutual fund arrangements involve multiple parties (e.g., brokers, custodians, transfer agents), each with its own, often parallel, recordkeeping requirement. As a result, our compliance examiners typically have an alternative means to verify the accuracy of adviser and fund records. In light of these factors, the costs of requiring funds and advisers to invest in new electronic recordkeeping technologies may not be justified.

See "Electronic Records by Investment Companies and Investment Advisers", 66 Fed. Reg. 29224 (May 30, 2001), at 29224.

[14] The full text of Rule 204-2(g) is available at: http://www.law.cornell.edu/cfr/text/17/275.204-2.

On July 21, 2014, MFA, along with the Investment Adviser Association (IAA) and the Alternative Investment Management Association (AIMA), submitted a petition for rulemaking ("**Petition**") to the CFTC to amend Rule 1.31 to be more flexible with regard to permitted formats and to eliminate the requirement to retain extraneous, costly, third-party consultants.[15] We include the Petition as an attachment to this letter. In the Petition, MFA, IAA and AIMA appended their suggested language for new Rule 1.31(e), which would apply to all CPOs and CTAs registered or required to register with the CFTC, and would substantially mirror Rule 204-2(g) under the Advisers Act.[16] Until final Rule 1.31 is updated and amended, MFA, IAA and AIMA requested in the Petition that the CFTC grant temporary no-action relief with respect to the electronic recordkeeping and third-party recordkeeper requirements under Rule 1.31, provided that registrants maintain a legible, true and complete copy of all records.

To the extent that the Proposed Rule 1.35 Amendments are finalized prior to any proposed rulemaking issued by the CFTC to amend Rule 1.31 (as it appears will be the case), MFA believes that the CFTC should grant registered CPOs and CTAs that are members of SEFs or DCMs an interim compliance solution to address the problematic intersection between Rule 1.35(a) and Rule 1.31. Until the Commission amends Rule 1.31, MFA suggests that the CFTC provide interim relief from compliance with Rule 1.31. One possible interim solution is the CFTC's authorization of "substituted compliance" with the SEC's electronic recordkeeping requirements for those CFTC-registered CTAs and CPOs that are registered investment advisors. Under this interim relief, registrants would be required to maintain a legible, true and complete copy of all required records that will be available for inspection by the CFTC, the U.S. Department of Justice, and the National Futures Association (NFA), including its examiners and other representatives. Otherwise, registered CPOs and CTAs that are members of SEFs and DCMs will have to institute recordkeeping requirements that are obsolete and unworkable.

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15 Available at: https://www.managedfunds.org/wp-content/uploads/2014/07/Final-Petition.pdf.

16 *See* Petition, Appendix A at A-1 and A-2.

We thank the Commission for issuing the Proposed Rule 1.35 Amendments and the opportunity to provide comments on them. Please do not hesitate to contact the undersigned or Laura Harper Powell at (202) 730-2600 with any questions the Commission or its staff might have regarding this letter.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President, Managing Director &
General Counsel

cc:

The Hon. Timothy G. Massad, Chairman
The Hon. Mark P. Wetjen, Commissioner
The Hon. Sharon Y. Bowen, Commissioner
The Hon. J. Christopher Giancarlo, Commissioner

Tom Smith, Interim Director, Division of Swap Dealer and Intermediary Oversight
Vincent McGonagle, Director, Division of Market Oversight
Aitan Goelman, Director, Division of Enforcement

MANAGED FUNDS ASSOCIATION

July 21, 2014

Ms. Melissa D. Jurgens
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Petition for Rulemaking to Amend CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33

Dear Ms. Jurgens:

Managed Funds Association[1] ("MFA"), the Investment Adviser Association[2] ("IAA"), and the Alternative Investment Management Association[3] ("AIMA") (together, the "Associations" or the "Petitioners") respectfully petition the Commodity Futures Trading Commission (the "Commission" or the "CFTC") under CFTC Regulation 13.2 to amend (i) CFTC Regulation 1.31, which in part sets forth electronic recordkeeping and third-party

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[1] MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

[2] IAA is a not-for-profit association that represents the interests of investment adviser firms registered with the Securities and Exchange Commission (the "SEC"). Founded in 1937, the IAA's membership consists of more than 550 advisers that collectively manage approximately $14 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit its website: www.investmentadviser.org.

[3] AIMA is the trade body for the hedge fund industry globally; its membership represents all constituencies within the sector – including hedge fund managers, funds of hedge fund managers, prime brokers, fund administrators, accountants and lawyers. Its membership comprises over 1,300 corporate bodies in over 50 countries.

technical consultant requirements; (ii) CFTC Regulations 4.7(b) and (c), which in part set forth recordkeeping requirements applicable to those registrants relying upon such exemptions; (iii) CFTC Regulation 4.23, which sets forth recordkeeping requirements generally applicable to commodity pool operators ("CPOs"); and (iv) CFTC Regulation 4.33, which sets forth recordkeeping requirements generally applicable to commodity trading advisors ("CTAs").

In particular, the Petitioners request that the Commission amend CFTC Regulation 1.31 to provide relief relating to certain electronic recordkeeping requirements applicable to CPOs and CTAs, including the requirement to use a third-party technical consultant. In addition, the Petitioners request that the Commission expand the list of permissible entities that may maintain records in CFTC Regulations 4.7(b) and (c), 4.23, and 4.33 to permit a CPO or CTA to retain any third party as a recordkeeper, as long as the CPO or CTA, as applicable, bears all responsibility for maintaining and producing required records pursuant to the Commission's regulations.

For the reasons set forth below, the Petitioners also respectfully request temporary time-limited no-action relief on an expedited basis to last until the Commission adopts final rules relating to this petition and such rules become effective.

The text of the requested rule amendments is set forth in Appendix A to this letter.

I. Nature of Petitioners' Interest

The Petitioners collectively represent a broad segment of the global investment management industry. For purposes of this petition, the Petitioners represent managers, investment advisers, and sub-advisers to many types of pooled investment vehicles and separate accounts, many of which trade commodity interests. As a result of the changes to the Part 4 regulations adopted by the CFTC in 2012[4] and the adoption of a broad definition of the types of swaps subject to CFTC regulation,[5] many of these managers, investment advisers, and sub-advisers registered as CPOs and/or CTAs as of January 1, 2013, and thus are subject to compliance with the applicable provisions of the Commodity Exchange Act (the "CEA"), and the Commission's regulations thereunder. Many of these CPOs and CTAs are finding compliance with the CFTC's recordkeeping regulations unduly burdensome, indeed infeasible, and costly, due to the regulations' incorporation of outdated technology and incongruity with standard market practices, particularly with respect to electronic recordkeeping and third-party recordkeepers. The Petitioners therefore are requesting, on behalf of their members, that the Commission amend CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33 and provide the temporary no-action relief as requested herein.

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[4] See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012), amended by *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 17328 (Mar. 26, 2012).

[5] *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48208 (Aug. 13, 2012).

II. Electronic Recordkeeping Requirements

The Petitioners fully support the need to ensure that CPOs and CTAs maintain records in a secure, retrievable, and auditable electronic format. We also acknowledge that it is essential to the integrity of the supervisory system to be able to reproduce records, even years after the CPO or CTA created the record, in an "as of" condition (in other words, to be able to retrieve a record with the same content and in the same condition as it existed on the date that the CPO or CTA originally created and/or saved the record to an electronic recordkeeping system).

The Petitioners, however, understand that CPOs and CTAs face technical compliance issues resulting from requirements that were reasonable and prudent when adopted but that have become outdated and irrelevant due to the passage of time and changing technical standards.

A. Background

CFTC Regulation 4.23 sets forth the recordkeeping requirements generally applicable to CPOs registered or required to register under the CEA and CFTC Regulation 4.33 sets forth the recordkeeping requirements generally applicable to CTAs registered or required to register under the CEA. Each of CFTC Regulation 4.23 and 4.33 requires books and records to be maintained in accordance with CFTC Regulation 1.31, which permits electronic recordkeeping subject to certain conditions set forth in CFTC Regulations 1.31(a), (b) and (c).

As a result of the changes to the Part 4 regulations adopted by the CFTC in 2012[6] and the adoption of a broad definition of the types of swaps subject to CFTC regulation,[7] many additional firms are newly subject to compliance with the CPO recordkeeping requirements in Regulation 1.31.

However, Regulation 1.31, as it applies to electronic recordkeeping, is quite outdated. Its obsolete concepts force CPOs and CTAs to choose between accepted electronic distributed storage systems (which are essential for disaster recovery and privacy protection) and compliance with the letter of the law. Indeed, when the Commission adopted the relevant electronic recordkeeping provisions of Regulation 1.31, it noted that "the pace of technological changes will require the Commission continually to review the standards articulated in this rule to ensure that the recordkeeping requirements reflect to the extent possible the reality of established technological innovation."[8] The outmoded requirements embedded in Regulation 1.31 include the following:

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6 *See supra*, note 4.

7 *See supra*, note 5.

8 *Recordkeeping: Storing Records: SEC & CFTC Harmonization*, 64 Fed. Reg. 28735, at 28736 (May 27, 1999) (hereinafter "1999 Recordkeeping Release"). The 1999 Recordkeeping Release went on to state that "The Commission therefore welcomes consultation with industry participants and specific proposals regarding how the regulations might be amended in the future to permit the futures industry to use available technology and to respond to the Commission's legitimate need to have access to complete and accurate records when necessary."

- CFTC Regulation 1.31(a) requires that electronic records be kept in their native (or original) format. Given that programs sometimes become obsolete and are no longer supported by their manufacturers (for example, WordPerfect, Lotus Notes), we strongly feel that it is counterproductive to specify the "format" of the electronic record, as long as there is demonstrable (and auditable) integrity and fidelity in the preservation of the underlying data and contents.

- CFTC Regulation 1.31(b) requires that electronic records be preserved in a "non-rewritable, non-erasable format," a concept that repeats in CFTC Regulation 1.31(c)'s requirement to represent whether electronic storage records use media other than "optical disk or CD-ROM technology." This requirement mirrors the broader "WORM" ("write once-read many") requirement that was state of the art in the late 1990s and early 2000s. However, the use of optical disks is now a relic of the past and would be indicative of a poorly–managed infrastructure in today's world.[9] Instead, state-of-the-art storage systems rely on storage that is subject to restricted access and include secure logs that reflect any and all changes to a file (often in addition to electronic archived copies).

- In addition, CFTC Regulation 1.31(b) requires firms that use only electronic recordkeeping with respect to some or all of their required records to incur the cost of retaining a third-party technical consultant who has access to, and the ability to download, the firm's electronic records. This third-party technical consultant must file with the Commission an undertaking that, upon request, it will furnish or provide access to information to any representative of the Commission or the U.S. Department of Justice. The purpose of requiring a technical consultant was to ensure that the Commission or other law enforcement had the technical ability to access the records in the event that the recordkeeper was unable or unwilling to provide records.[10] This also is a relic of another age and is simply unworkable; it is not needed in an age where both internal and external technical expertise is common. In addition, CPOs and CTAs are sharing data and access to data with administrators, counterparties, custodians and other service providers, and this dynamic environment ensures that current safeguard systems are broadly adopted and reinforced. Parties in this environment generally are either registered with a governmental entity or are subject to subpoena and preservation orders, which should also ameliorate access and alteration concerns.[11]

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[9] Imagine if the Commission (and its predecessors) over time had required regulated entities to employ wax cylinders, Bakelite records, "78s," "LPs," Dictaphone belts, wire recorders, "45s," 8 track cassettes, audio cassettes, 1960s era hard drives (roughly the size of a home washing machine), RCA video discs, beta tapes, VHS tapes, IBM 360 SXs, Apple Macintoshes, Palm Pilots, or any other specific technology.

[10] *See supra*, note 8. In response to concerns with respect to the costs related to retaining a technical consultant, the Commission stated that registrants could avoid the need for a technical consultant "by maintaining backup copies of electronically stored records in either a hard copy or micrographic version." *Id.* at 28739.

[11] Further, we note that when the Commission adopted these requirements, electronic recordkeeping was considered relatively exotic and the Commission adopted the rules noted to permit electronic recordkeeping but with

Accordingly, as described in further detail below, we respectfully request that the Commission update its electronic recordkeeping regulations applicable to CPOs and CTAs, among other things, to provide more flexibility with regard to permitted formats (both now existing and as yet to be developed) and to eliminate the requirement to retain extraneous, costly, third-party technical consultants.[12]

B. Supporting Arguments

Investment management firms have created and maintained electronic records for years, perhaps approaching two decades for some firms. The relevant provisions in CFTC Regulation 1.31(b) were adopted in 1999,[13] at the cusp of the age of electronic records, and the regulation requires firms either to remain suspended in time by using obsolete technology or to duplicate recordkeeping efforts to meet modern business needs in addition to outdated recordkeeping requirements. As the Investment Company Institute also noted in its letter requesting relief from various provisions of the CFTC's electronic recordkeeping requirements, converting existing systems (or creating parallel systems) to use non-erasable, non-rewriteable media would require these firms to incur significant costs for new hardware and software, migration of document repositories and staff training.[14] These media and equipment requirements become less available by the day: consumer electronics are now based on solid state memory and cloud storage support and DVD drives are "special order" items.

A reversion to easily misplaced, lost, or stolen physical media is simply out of step with the industry and presents significant challenges to a firm trying to maintain a robust disaster recovery/BCP plan program. Strict adherence to CFTC Regulation 1.31 now links a firm's survival of a disaster to physical access to the storage location housing the physical back-up media – this is a model that a series of natural disasters, utility grid failures, and terroristic attacks have demonstrated is flawed. The new focus on hacking and cybersecurity only further demonstrates the need to be able to remotely restore files and functionality – sometimes (unfortunately) in real time in an active trading environment.

In addition, firms must incur the wholly unnecessary cost to retain and train a third-party technical consultant, rather than relying upon existing staff who already have familiarity with

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an abundance of caution. Today, it is inconceivable that any business would keep records by any means other than electronic media. Indeed, a CPO or CTA that uses paper ledgers, typewriters, and carbon paper would be unlikely to maintain accurate records and probably would be more able to falsify and alter records than is possible with the modern means of electronic recordkeeping noted above.

[12] One of the Commission's goals in the 1999 Recordkeeping Release was "maximize[ing] the cost-reduction and time-savings arising from technological developments in the area of electronic storage media." 1999 Recordkeeping Release at 28735, *supra* note 8.

[13] *Id.*

[14] *See* Petition for Rulemaking to Amend CFTC Regulations 4.12(c)(3), 4.23 and 4.33 from Dorothy M. Donohue, Acting General Counsel, Investment Company Institute, to Ms. Melissa D. Jurgens, Secretary, Commodity Futures Trading Commission, dated March 11, 2014.

and access to required records. In the "new world" of electronic storage of the 1990s and 2000s, when technical expertise was not common, this requirement may have made sense. However, in today's world, with sophisticated National Futures Association (the "NFA"), CFTC, and even SEC examination personnel and programs, robust retention systems, and very extensive investor due diligence, such an expense would be wasteful and of little value. Moreover, with the rise of cybersecurity threats, providing additional third parties with access to sensitive, confidential and proprietary information greatly increases cybersecurity intrusions.

Alternatively, if firms determine that they cannot comply with these requirements, such firms must take the time-consuming, costly and old-fashioned step of preserving records in hard copies or micrographics, solely for purposes of compliance with CFTC Regulation 1.31(b).[15] This is simply not possible to do in any way that would enable the variable-based searching that any regulatory inquiry or legal process requires.[16]

These issues could be resolved if CFTC Regulation 1.31 provided a more adaptable approach toward technology and permitted various types of recordkeeping formats (whether now existing or as yet to be developed).

For example, the SEC took the approach of providing flexibility when it tailored its recordkeeping rule applicable to investment advisers by adopting Rule 204-2(g) under the Investment Advisers Act of 1940, as amended (the "Advisers Act").[17] By adopting different recordkeeping requirements for advisers, as compared to those applicable to broker-dealers,[18] the

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[15] The 1999 Recordkeeping Release, *supra* note 8, provides that:

> Recordkeepers are only required to enter an arrangement with a Technical Consultant if they choose to store all required records or all of a particular class of required records solely on electronic storage media. As a result, recordkeepers may protect themselves from costs related to retaining a Technical Consultant by maintaining backup copies of electronically stored records in either a hard copy or micrographic version.

[16] *See, e.g.,* CFTC Regulation 1.35(a), records of commodity interest and related cash or forward transactions, which requires records to "be kept in a form and manner identifiable and searchable by transaction."

[17] Ironically, one of the reasons the Commission indicated that it was adopting provisions similar to the SEC's recordkeeping provisions was because of the significant number of dual registrants. *See* 1999 Recordkeeping Release, *supra* note 13. The SEC's recordkeeping requirements for investment advisers were adopted subsequent to the 1999 Recordkeeping Release.

[18] Current CFTC Regulation 1.31(b) was modeled on Rule 17a-4(f) under the Securities Exchange Act of 1934, as amended, the SEC's electronic recordkeeping rule for broker-dealers. *Recordkeeping*, 64 Fed. Reg. 28735, at 28735 (May 27, 1999) ("In light of the significant number of Commission registrants that are subject to the recordkeeping requirements of the [SEC], the Proposal included many provisions similar to those adopted by the SEC in 1997.") The SEC later adopted a separate electronic recordkeeping rule for investment advisers, which differs significantly from Rule 17a-4(f), as discussed below. *See Electronic Recordkeeping by Investment Companies and Investment Advisers*, 66 Fed. Reg. 29224 (May 30, 2001) ("Electronic Records Adopting Release"), which announced amendments to SEC Regulation 275.204-2(g). However, the Commission applied Regulation 1.31(b) to all registrants, rather than only to futures commission merchants and introducing brokers (whose business models are somewhat similar to broker-dealers).

SEC explicitly stated that the cost of requiring advisers to adopt non-rewriteable, non-erasable formats of electronic records may not be justified.[19] Rule 204-2(g) does not tether advisers to any particular electronic format, nor does it require the use of third-party consultants. Instead, Rule 204-2(g) sets forth general principles that advisers must follow when arranging, accessing and reproducing their records. A principles-based approach facilitates adaptable recordkeeping requirements that can withstand evolutions in technology and software. In contrast, specifying the format of an electronic record inevitably will lead to obstacles to compliance at some point in the future when that format becomes obsolete and is no longer supported by its manufacturer (again, for example, Word Perfect).

Further, the burden of maintaining and producing required records under Rule 204-2(g) logically falls on the registered adviser itself, rather than any third parties who likely would charge a premium to subject themselves to such regulatory obligations. The current requirements of CFTC Regulation 1.31 to utilize native format and a third-party technical consultant appear to be intended both to preserve records without alteration and to ensure access to such records. However, technology has evolved, and today there are other safeguards to ensure the integrity and availability of data. Technological expertise is much more widely available today than it was fifteen years ago. Experts can readily determine whether and how records have been altered, and these experts are well-equipped to obtain access to various computer systems. The need for a third-party technical consultant has fallen away as technological expertise has become woven into our everyday lives.

As the Commission acknowledged in its release regarding harmonization of compliance obligations for operators of registered investment companies that also must register as CPOs, there are certain advantages to crafting regulations that "allow the Commission to fulfill its regulatory mandate while, at the same time, avoiding unnecessary regulatory burdens on dually-regulated [entities] with respect to ... Commission recordkeeping requirements."[20] We believe that the Commission's objectives with respect to electronic recordkeeping requirements by CPOs and CTAs can be satisfied with provisions substantially similar to Rule 204-2(g). Moreover, structuring a CFTC recordkeeping rule to be consistent with the SEC's recordkeeping rule for investment advisers would be consistent with the Commission's original goal in the 1999

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19 In its adoption of electronic recordkeeping standards for funds and advisers, the SEC noted:

> We recognize that the standards for electronic recordkeeping we are adopting for funds and advisers are different from the rules that we have adopted for broker-dealers, which require brokerage records to be preserved in a WORM format [(*i.e.*, non-rewriteable, non-erasable or "write once, read many," format)]. We have not experienced any significant problems with funds or advisers altering stored records. Moreover, most advisory and mutual fund arrangements involve multiple parties (e.g., brokers, custodians, transfer agents), each with its own, often parallel, recordkeeping requirement. As a result, our compliance examiners typically have an alternative means to verify the accuracy of adviser and fund records. In light of these factors, the costs of requiring funds and advisers to invest in new electronic recordkeeping technologies may not be justified.

Electronic Records Adopting Release, *supra* note 18, at 29224.

20 *See Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 78 Fed. Reg. 52308 at 52309 (Aug. 22, 2013).

Recordkeeping Release to align with similar SEC changes and "thereby harmonizing procedures for those firms regulated by both the Commission and the [SEC]." To the Petitioners' knowledge, the SEC has not experienced difficulties in obtaining the electronic records of investment advisers since the rule's adoption in 2001.

C. Requested Relief

The Petitioners hereby respectfully request that the Commission adopt new Regulation 1.31(e) (the full text of which can be found in Appendix A), which would apply to all CPOs and CTAs registered or required to register under the CEA (in lieu of Regulations 1.31(b) and (c)) and would substantially mirror Rule 204-2(g) under the Advisers Act. Regulation 1.31(e) would permit a CPO or CTA to maintain records on (i) micrographic media, including microfilm, microfiche or any similar medium; or (ii) electronic media, including any electronic medium or system or cloud technology that otherwise meets applicable recordkeeping requirements. Generally, the CPO or CTA must (i) arrange and index the records in a way that permits easy location, access and retrieval of any particular record; (ii) promptly provide a legible, true and complete copy of any record either in the medium and format in which it is stored (or a printout), as well as the means to access, view and print the record; and (iii) separately store a duplicate copy of the records in any permitted medium for the required length of time.

Additionally, with respect to electronic media, the CPO or CTA must establish and maintain procedures to: (i) maintain and preserve the records, so as to reasonably safeguard them from loss, alteration or destruction; (ii) limit access to the records to properly authorized personnel and the Commission (including its examiners and other representatives); and (iii) reasonably ensure that any reproduction of a non-electronic original record on electronic media is complete, true and legible when retrieved. Regulation 1.31(a) will continue to apply to CPOs and CTAs and require, among other things, that such records be open to inspection by the Commission or the U.S. Department of Justice and that such records will be produced to a CFTC representative upon request. The records will also be available for inspection by representatives of the NFA.

III. Expansion of Third-Party Recordkeeping for All CPOs

A. Background

Current CFTC Regulations permit delegation of recordkeeping by CPOs only to certain third parties and further require such third-party recordkeepers to comply with Regulation 1.31. Specifically, Regulation 4.23 permits CPOs to utilize only third-party recordkeepers that serve as the pool's administrator, distributor or custodian, or a bank or registered broker-dealer acting in a similar capacity with respect to the pool. In addition, Regulation 4.23(c)(2) requires such third-party recordkeeper to certify that it will keep and maintain the records in compliance with CFTC Regulation 1.31. Regulation 4.7(b) sets forth identical third-party recordkeeping requirements for CPOs who rely upon the limited regulatory relief therein.

As a result of the changes to the Part 4 regulations adopted by the CFTC in 2012[21] and the adoption of a broad definition of the types of swaps subject to CFTC regulation,[22] many additional firms are newly subject to compliance with the CPO recordkeeping requirements in Regulations 4.23 or 4.7(b). The requirement to renegotiate contracts with existing recordkeepers or to find new recordkeepers that fall within the categories of permitted recordkeepers and that are willing to subject themselves to compliance with Regulation 1.31 is a significant, expensive burden. Accordingly, as described in further detail below, we respectfully request that the Commission expand third-party recordkeeping requirements to permit a CPO or CTA to use any third-party to retain such records and to eliminate the duplicative requirement that a third-party recordkeeper (in addition to the registered CPO or CTA) certify that they keep and maintain records in accordance with Regulation 1.31.

B. Supporting Arguments

The Petitioners understand that many of their members are having difficulty finding recordkeepers that fall within the permitted categories and that are willing to subject themselves to compliance with Regulation 1.31 (as discussed below). Many of these firms have existing relationships with third-party recordkeepers, some of whom do not fall within the categories of permitted recordkeepers under Regulations 4.23 or 4.7(b), such as CTAs and sub-advisers, futures commission merchants and professional records maintenance and storage companies. In addition, the process of changing a recordkeeper is labor-intensive and costly, since often many physical records must be manually moved to the new recordkeeper's recordkeeping infrastructure. We note that the CFTC places no restrictions on who may act as a recordkeeper for a futures commission merchant or introducing broker, and we are unaware of any issues that the CFTC or NFA has experienced as a result.

With respect to the requirement for currently permitted third-party recordkeepers to certify that they are maintaining records in compliance with Regulation 1.31, existing contracts with these recordkeepers, particularly professional records maintenance and storage companies, typically do not require such companies to maintain records in a manner other than that in which the records have been supplied. Renegotiating these contracts likely would result in significantly increased costs to compensate the companies for increased responsibilities and potential liabilities under CFTC Regulation 1.31; in fact, renegotiation may be impossible because these companies are reluctant to undertake these responsibilities and potential liabilities. Accordingly, even utilizing the narrow universe of permitted third-party recordkeepers under CFTC Regulations 4.23 or 4.7(b) is unduly burdensome and costly. The burden of complying with Regulation 1.31 logically should fall on the registered CPO itself, rather than any third parties, which likely would charge a premium to subject themselves to such regulatory obligations. By requiring the CPO to bear responsibility for maintaining and producing required records, we

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21 *See supra*, note 4.

22 *See supra*, note 5.

believe that the Commission's objectives can be satisfied while accommodating current appropriate market practices with respect to the use of third-party recordkeepers.[23]

C. Requested Relief

The Petitioners hereby respectfully request that the Commission revise Regulations 4.23 and 4.7(b)(4) to eliminate the requirement that records be maintained only with specified categories of third parties (the pool's administrator, distributor or custodian, or a bank or registered broker-dealer acting in a similar capacity with respect to the pool), instead permitting CPOs to utilize any third-party recordkeeper.[24] In addition, the Petitioners request that the Commission revise Regulations 4.23(c)(2) and 4.7(b)(5) to eliminate the requirement that third-party recordkeepers certify that they keep and maintain records in accordance with Regulation 1.31. In our proposal, the CPO will retain responsibility under Regulation 1.31 for compliance thereunder. The full text of the proposed revisions to Regulation 4.23 and Regulation 4.7(b) can be found in Appendix A attached hereto.

IV. Expansion of Third-Party Recordkeeping to CTAs

A. Background

Neither Regulation 4.33 nor Regulation 4.7(c) permits delegation of recordkeeping by CTAs to third parties. Many additional firms are newly subject to compliance with the CTA recordkeeping requirements in CFTC Regulations 4.33 or 4.7(c) as a result of the changes to the Part 4 regulations adopted by the CFTC in 2012[25] and the adoption of the broad definition of the types of swaps subject to CFTC regulation.[26] Many of these firms have existing relationships with third-party recordkeepers, including professional records maintenance and storage companies. Requiring these firms to terminate third-party recordkeeping arrangements and to manage all record-keeping internally would be a significant, expensive burden that simply may not be practicable for certain registrants. Accordingly, we respectfully request that the Commission revise third-party recordkeeping requirements to permit CTAs to use third-party recordkeepers, as described in further detail below.

B. Supporting Arguments

We believe that CTAs should be granted the same third-party recordkeeping relief described above with respect to CPOs. Currently, CTAs are not permitted to rely on third-party

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[23] Also, we note that this accommodates technological developments to enhance safeguards with respect to the recordkeeping process, such as the current trend to move to cloud computing.

[24] Contrast a third-party recordkeeper, as described above, with a third-party technical consultant, which is required by current CFTC Regulation 1.31(b)(4) to furnish the registrant's electronic records to the CFTC or the Department of Justice if the CPO is unwilling or able to do so.

[25] *See supra*, note 4.

[26] *See supra*, note 5.

recordkeepers at all. Many firms that are newly registered with the CFTC have existing relationships with third-party recordkeepers, including with professional records maintenance and storage companies and with affiliates. Rearranging internal operations and terminating these contracts is unduly burdensome and costly. In addition, we do not believe that there is any policy reason to treat CPOs and CTAs substantially differently with respect to the use of third-party recordkeepers. We believe that the Commission's objectives can be satisfied while expanding the use of third-party recordkeepers to CTAs in order to accommodate current market practices. As noted above, the CFTC places no restrictions on who may act as a recordkeeper for a futures commission merchant or introducing broker, and we are unaware of any issues that the CFTC or NFA has experienced as a result.

C. Requested Relief

The Petitioners hereby respectfully request that the Commission revise Regulation 4.33 to permit CTAs to utilize third-party recordkeepers, the relevant language of which would be substantially similar to Regulation 4.23 (including the revisions proposed above). The Petitioners also request that the Commission revise Regulation 4.7(c)(2) to permit CTAs in reliance upon such exemption to utilize third-party recordkeepers. The full text of the proposed revisions to Regulation 4.33 and Regulation 4.7(c)(2) can be found in Appendix A attached hereto.

V. Temporary No-Action Relief

The Petitioners acknowledge that it will take time for the Commission to give its full consideration to this request and to conduct a further rulemaking. For this reason, the Petitioners also request temporary no-action relief, which would allow the Commission adequate time to fully consider these requests while sparing CPOs and CTAs (and their third-party recordkeepers) from having to modify long-standing recordkeeping arrangements and systems. We request that this temporary no-action relief exempt all CPOs and CTAs from compliance with CFTC Regulation 1.31(b) and (c) as well as from compliance with provisions of CFTC Regulations 4.7(b) and (c), 4.23 and 4.33 relating only to third-party recordkeeping until the effective date of the further rulemaking; provided that CPOs and CTAs maintain the types of records required to be maintained under CFTC Regulation 4.23 or CFTC Regulation 4.33, as applicable, for the required length of time specified by CFTC Regulation 1.31(a) in a manner that preserves the text of the original record.

VI. Conclusion

The Commission's regulations concerning electronic recordkeeping were adopted nearly fifteen years ago, and there have been revolutionary changes in technology since such time. We respectfully request that the Commission adopt the amendments to CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33 as set forth in Appendix A. Specifically, we respectfully request that the Commission update its electronic recordkeeping regulations to eliminate outdated, unnecessary requirements. We respectfully submit that CPOs and CTAs have evolved with such changes in technology, in part by hiring knowledgeable employees who are already familiar with

and who already have access to their electronic recordkeeping systems. We urge the Commission to adopt a standards-based recordkeeping requirement that places the responsibility for maintaining accurate records on the CPO and CTA. Further we believe that specifying specific technology in a rule is ultimately self-defeating. Accordingly, we respectfully request that the Commission eliminate the requirement to retain extraneous, costly, third-party technical consultants. On a different but related note, we respectfully request that the Commission expand third-party recordkeeping requirements to permit a CPO or CTA to use any third-party to retain such records and to eliminate outdated requirements for such third parties. We respectfully submit that the Commission's objectives can be satisfied by requiring the CPO or CTA to bear all responsibility for maintaining and producing records pursuant to the Commission's regulations.

The Petitioners also respectfully request temporary expedited no-action relief in this regard, to last until final rules relating to this petition are adopted and effective.

* * * *

We sincerely appreciate the Commission's willingness to address the industry's concerns. If you have questions or require further information, please contact Jennifer Han or Stuart Kaswell of MFA at (202) 730-2600, Karen Barr of IAA at (202) 293-4222, and Jiří Król of AIMA at +44 (0)20 7822 8380, or our outside counsel at K&L Gates, Cary J. Meer at (202) 778-9107.

Respectfully submitted,

/s/ Stuart Kaswell

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Jonathan Marcus, General Counsel
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Vincent McGonagle, Director of the Division of Market Oversight
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APPENDIX A

Text of Proposed Rule Amendments

Additions to current regulations in *bold italics and underlined*. Deletions in ~~strikethrough~~.

§1.31 **Books and records; keeping and inspection.**

(a)(1) All books and records required to be kept by the Act or by these regulations shall be kept in their original form (for paper records) or ***such other media permitted under this section as long as the contents of the original record are preserved*** ~~native file format~~ (for electronic records) for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period; *Provided, however*, That records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of five years after such date. Records of oral communications kept pursuant to §§1.35(a) and 23.202(a)(1) and (b)(1) of this chapter shall be kept for a period of one year. All such books and records shall be open to inspection by any representative of the Commission, or the United States Department of Justice. ~~For purposes of this section, native file format means an electronic file that exists in the format in which it was originally created.~~

* * *

(b) Except as provided in paragraph***s*** (d) ***and (e)*** of this section, books and records required to be kept by the Act or by these regulations may be stored on either "micrographic media" (as defined in paragraph (b)(1)(i) of this section) or "electronic storage media" (as defined in paragraph (b)(1)(ii) of this section) for the required time period under the conditions set forth in this paragraph (b); Provided, however, For electronic records, such storage media must ***be*** preserve***d*** ~~the native file format of the electronic records~~ as required by paragraph (a)(1) of this section.

* * *

(c) ***Except as provided in paragraph (e) of this section,*** ~~P~~***p***ersons employing an electronic storage system shall provide a representation to the Commission prior to the initial use of the system. The representation shall be made by the person required to maintain the records, the storage system vendor, or another third party with appropriate expertise and shall state that the selected electronic storage system meets the requirements set forth in paragraph (b)(1)(ii) of this section. Persons employing an electronic storage system using media other than optical disk or CD-ROM technology shall so state. The representation shall be accompanied by the type of oath or affirmation described in §1.10(d)(4).

(d) * * *

(e)(1) In lieu of complying with paragraphs (b) and (c) of this section, any commodity pool operator registered or required to be registered under the Act or any commodity trading

advisor registered or required to be registered under the Act may comply with this paragraph (e). Any registered commodity pool operator or any registered commodity trading advisor may maintain and preserve books and records required to be kept by the Act or by these regulations (i) on paper, (ii) on micrographic media, including microfilm, microfiche, or any similar medium; or (iii) on electronic media, including any electronic medium or environment that meets the terms of this paragraph, as long as the contents of the original record are preserved.

(2) To comply with this paragraph (e), the commodity pool operator registered or required to be registered under the Act or the commodity trading advisor registered or required to be registered under the Act must:

(i) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;

(ii) Provide promptly any of the following that the Commission or a registered futures association (by its examiners or other representatives) may request:

(A) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(B) A legible, true, and complete printout of the record; and

(C) Means to access, view, and print the records; and

(iii) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this paragraph.

(3) In the case of records on electronic media, the commodity pool operator or commodity trading advisor must establish and maintain procedures to:

(i) Maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;

(ii) Limit access to the records to properly authorized personnel, the Commission or a registered futures association (including its examiners and other representatives) and other appropriate regulators and self-regulatory organizations; and

(iii) Reasonably ensure that any reproduction of a non-electronic original record on electronic media is complete, true, and legible when retrieved.

* * * * *

§4.7 **Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to qualified eligible persons.**

(a) * * *

(b) Relief available to commodity pool operators. * * *

(1) * * *

(2) * * *

(3) * * *

(4) *Recordkeeping relief.* Exemption from the specific requirements of §~~4,23~~ ***4.23***; Provided, That the commodity pool operator must maintain the reports referred to in paragraphs (b)(2) and (3) of this section and all books and records prepared in connection with his activities as the pool operator of the exempt pool (including, without limitation, records relating to the qualifications of qualified eligible persons and substantiating any performance representations). Books and records that are not maintained at the pool operator's main business office ~~shall~~ ***may*** be maintained by ~~one or more of the following: the pool's administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool~~ ***a third party***. Such books and records must be made available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of §1.31.

(5) If the pool operator does not maintain its books and records at its main business office, the pool operator shall~~: (i) A~~***, a***t the time it registers with the Commission or delegates its recordkeeping obligations ***or [insert 180 days after the change to this rule]***, whichever is later, file a statement that:

(~~A~~***i***) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the pool operator;

(~~B~~***ii***) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the pool operator;

(~~C~~***iii***) Specifies~~, by reference to the respective paragraph of this section,~~ the books and records that such person will be keeping; and

(~~D~~***iv***) Contains representations from the pool operator that:

(~~1~~***A***) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by this section changes, by identifying in such amendment the new location and any other information that has changed;

(~~2~~***B***) It remains responsible for ensuring that all books and records required by this section are kept in accordance with §1.31;

(~~3~~***C***) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the pool operator's main business office; Provided, however, that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator's main business office within 72 hours of such a request; and

(4***D***) It will disclose in the pool's Disclosure Document the location of its books and records that are required under this section.

~~(ii) The pool operator shall also file electronically with the National Futures Association a statement from each person who will be keeping required books and records in lieu of the pool operator wherein such person:~~

~~(A) Acknowledges that the pool operator intends that the person keep and maintain required pool books and records;~~

~~(B) Agrees to keep and maintain such records required in accordance with §1.31 of this chapter; and~~

~~(C) Agrees to keep such required books and records open to inspection by any representative of the Commission, the National Futures Association, or the United States Department of Justice in accordance with §1.31 of this chapter.~~

(c) *Relief available to commodity trading advisors.* * * *

(1) * * *

(2) *Recordkeeping relief.* Exemption from the specific requirements of §4.33; Provided, That the commodity trading advisor must maintain, at its main business office, all books and records prepared in connection with his activities as the commodity trading advisor of qualified eligible persons (including, without limitation, records relating to the qualifications of such qualified eligible persons and substantiating any performance representations). ***Books and records that are not maintained at the commodity trading advisor's main business office may be maintained by a third party***. ~~And must make s~~ ***S***uch books and records ***must be made*** available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of §1.31.

(3) If the commodity trading advisor does not maintain its books and records at its main business office, the commodity trading advisor shall, at the time it registers with the Commission or delegates its recordkeeping obligations or [insert 180 days after the change to this rule], whichever is later, file a statement that:

(i) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the commodity trading advisor;

(ii) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the commodity trading advisor;

(iii) Specifies the books and records that such person will be keeping; and

(iv) Contains representations from the commodity trading advisor that:

(A) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by this section changes, by identifying in such amendment the new location and any other information that has changed;

(B) It remains responsible for ensuring that all books and records required by this section are kept in accordance with §1.31; and

(C) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the commodity trading advisor's main business office; Provided, however, that, if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the commodity trading advisor will obtain and provide such original books and records for inspection at the commodity trading advisor's main business office within 72 hours of such a request.

(d) * * *

§4.23 **Recordkeeping.**

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner. Books and records that are not maintained at the pool operator's main business office ~~shall~~ ***may*** be maintained by ~~one or more of the following: the pool's administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool~~ ***a third party***. All books and records shall be maintained in accordance with §1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) must be made available to participants for inspection and copying during normal business hours. Upon request, copies must be sent by mail to any participant within five business days if reasonable reproduction and distribution costs are paid by the pool participant. If the books and records are maintained at the commodity pool operator's main business office that is outside the United States, its territories or possessions, then upon the request of a Commission representative, the pool operator must provide such books and records as requested at the place

in the United States, its territories or possessions designated by the representative within 72 hours after the pool operator receives the request.

* * *

(b) * * *

(c) If the pool operator does not maintain its books and records at its main business office, the pool operator shall~~: (1) A,~~ *a*t the time it registers with the Commission or delegates its recordkeeping obligations, whichever is later, file a statement that:

(~~i~~*1*) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the pool operator;

(~~ii~~*2*) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the pool operator;

(~~iii~~*3*) Specifies~~, by reference to the respective paragraph of this section,~~ the books and records that such person will be keeping; and

(~~iv~~*4*) Contains representations from the pool operator that:

(~~A~~*i*) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by this section changes, by identifying in such amendment the new location and any other information that has changed;

(~~B~~*ii*) It remains responsible for ensuring that all books and records required by this section are kept in accordance with §1.31;

(~~C~~*iii*) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the pool operator's main business office; Provided, however, that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator's main business office within 72 hours of such a request; and

(~~D~~*iv*) It will disclose in the pool's Disclosure Document the location of its books and records that are required under this section.

~~(2) The pool operator shall also file electronically with the National Futures Association a statement from each person who will be keeping required books and records in lieu of the pool operator wherein such person:~~

~~(i) Acknowledges that the pool operator intends that the person keep and maintain required pool books and records;~~

~~(ii) Agrees to keep and maintain such records required in accordance with §1.31 of this chapter; and~~

~~(iii) Agrees to keep such required books and records open to inspection by any representative of the Commission or the United States Department of Justice in accordance with §1.31 of this chapter and to make such required books and records available to pool participants in accordance with this section.~~

§4.33 **Recordkeeping.**

Each commodity trading advisor registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner ~~at its main business office and in accordance with §1.31~~. ***Books and records that are not maintained at the pool operator's main business office may be maintained by a third party. All books and records shall be maintained in accordance with §1.31.*** If the commodity trading advisor's main business office is located outside the United States, its territories or possessions, then upon the request of a Commission representative the trading advisor must provide such books and records as requested at the place designated by the representative in the United States, its territories or possessions within 72 hours after receipt of the request.

(a) * * *

(b) * * *

(c) If the commodity trading advisor does not maintain its books and records at its main business office, the commodity trading advisor shall, at the time it registers with the Commission or delegates its recordkeeping obligations or [insert 180 days after the change to this rule], whichever is later, file a statement that:

(1) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the commodity trading advisor;

(2) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the commodity trading advisor;

(3) Specifies the books and records that such person will be keeping; and

(4) Contains representations from the commodity trading advisor that:

(i) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by this section changes, by identifying in such amendment the new location and any other information that has changed;

(ii) It remains responsible for ensuring that all books and records required by this section are kept in accordance with §1.31; and

(iii) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the commodity trading advisor's main business office; Provided, however, that, if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the commodity trading advisor will obtain and provide such original books and records for inspection at the commodity trading advisor's main business office within 72 hours of such a request.