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Submitted Via Agency Website http://comments.cftc.gov

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

Re: Comment on RIN No. 3038-AE36, Recordkeeping

Dear Mr. Kirkpatrick:

CME Group Inc. ("CME Group"), on behalf of its U.S. Commodity Futures Trading Commission ("CFTC") registered derivatives clearing organization ("DCO"); four designated contract markets (DCMs); swap execution facility ("SEF"); and swap data repository ("SDR"), welcomes the opportunity to comment on the Commission's proposed rulemaking regarding recordkeeping requirements (the "proposal").

CME Group is the parent of four U.S.-based derivative exchanges: Chicago Mercantile Exchange Inc. ("CME"), Board of Trade of the City of Chicago, Inc. ("CBOT"), New York Mercantile Exchange, Inc. ("NYMEX") and the Commodity Exchange, Inc. ("COMEX"). These Exchanges offer a wide range of products available across all major asset classes, including: futures and options based on interest rates, equity indexes, foreign exchange, energy, metals, and agricultural commodities. CME Group's exchanges serve the hedging, risk management and trading needs of our global customer base by facilitating transactions through the CME Globex® electronic trading platform, our open outcry trading facilities in Chicago, as well as through privately negotiated transactions. CME Group operates a SEF, in addition to our current exchanges and trading platforms. Through its subsidiary CME, CME Group operates a provisionally registered SDR for the interest rate, credit, foreign exchange and other commodity asset classes and is responsible for the acceptance and maintenance of swap data as well as the dissemination of publicly reportable swaps. CME Group also includes CME Clearing, which provides clearing and settlement services for exchange-traded contracts as well as for over-the-counter derivatives transactions.

We appreciate the Commission recognizing the need to address the outdated recordkeeping requirements of CFTC regulation § 1.31. The Commission's proposal seeks to grant industry petitions to update the § 1.31 requirements, and focuses on three requested amendments: 1) amending § 1.31 to no longer require electronic records to be kept in their native file format;[1] 2) eliminating the read once write many (WORM) requirement for electronic records;[2] and 3) amending § 1.31 to eliminate the requirement to enter into an agreement with a technical consultant.[3] CME Group agrees with and supports these proposed amendments, and requests that the Commission provide some immediate relief to the industry by adopting them.

We also appreciate the Commission's efforts to update and "provide greater flexibility when it comes to how records must be retained and produced."[4] CME Group supports the Commission adopting a less burdensome and more adaptive approach. Some of the Commission's proposals, however, would result in less flexibility, are unnecessarily redundant to existing requirements, otherwise inconsistent with other proposals, or are counter to the overall goal of creating a recordkeeping requirement best able to evolve with advances in technology. Further, the proposal fails to take a comprehensive approach at reviewing § 1.31 and addressing the challenges the retention and production requirements of the rule place on the industry. CME Group agrees with the Commission that it is time to address the regulatory requirements with respect to the retention and production of records. We respectfully request the Commission withdraws its proposals, with the exception of the three specific requests for relief discussed above, and engage in an open dialogue regarding how best to adopt a recordkeeping requirement that better serves its regulatory purpose without imposing undue and unfair burdens on the industry.

Definitions

Commission regulations that define the scope of regulatory records lack clarity. The Commission's proposal recognizes that its regulations for "registered entities"[5] and for "registrants"[6] set forth particular recordkeeping requirements. Similarly, others that

[1] 17 CFR 1.31(a) (2017).

[2] 17 CFR 1.31(b)(1) (2017).

[3] 17 CFR 1.31 (b)(4) (2017).

[4] 82 FR 6367 (Jan. 19, 2017).

[5] *See* 82 FR 6358-6359 (defining registered entities as DCOs, DCMs, SEFs and SDRs.)

[6] *See* id. (defining registrants as futures commission merchants (FCMs), introducing brokers (IBs), commodity pool operators (CPOs), commodity trading advisers (CTAs), floor brokers, floor traders, retail foreign exchange dealers (RFEDs), swap dealers (SDs) and major swap participants (MSPs)).

are subject to the Commission's regulations, like Part 18 traders and Part 45 non-SD/MSP counterparties, must also keep certain records. Commission regulation § 1.31 ties its requirements to those records "required to be kept by the Act or Commission regulations." This definition is ambiguous, and its lack of clarity has historically been subject to inconsistent interpretation by Commission staff. The ambiguity in this definition is one example of an opportunity for the Commission to work with the industry to better define the scope of the records covered by § 1.31.

Instead of addressing the already existing ambiguity regarding the scope of § 1.31, the Commission extends the § 1.31 obligations to all associated electronic data, resulting in a less clear, more burdensome requirement. The Commission proposes to expand the term "regulatory records" by adding descriptive language to 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" (emphasis added). The Commission suggests "data about data" is generally considered "metadata", but acknowledges that there is a "lack of universal agreement" on what it constitutes. The Commission's definition unfortunately does not add clarity and potentially greatly increases the amount of data required to be stored. This imposes an unnecessary burden and, as explained further below, creates a myriad of potential issues with respect to existing § 1.31 production requirements.

Further, the proposal is duplicative with the production requirements of § 1.31. The proposal discusses the Commission's general need to understand the information associated with an electronic file or data, and what it represents, so that "readily understandable" reports can be formatted and assembled. The § 1.31 production requirements, however, already require production of records in a form prescribed by a representative of the Commission. Record holders already must retain enough information to comply with production requirements, including the information necessary to format and assemble data. As a result, the proposed expanded definition of regulatory records is at best duplicative to the production requirement of § 1.31. Attempting to list what might constitute metadata elements is also likely to result in a rule, like the current outdated § 1.31 requirements, that is not as adaptive and capable of evolving with technology. This is another example where engaging the industry would result in the adoption a requirement better suited than the current proposal to meet the regulatory needs of the Commission without imposing an undue burden on industry.

Regulatory Records Policies & Procedures

Adopting a general requirement that records entities must maintain policies and procedures designed to promote the integrity, reliability and availability of regulatory records is preferable to the less adaptive approach of dictating the form and manner in which a record must be kept. For example, a general requirement that records entities adopt policies and procedures designed to ensure production should result in the maintenance of appropriate records inventories, and is preferable to adopting a specific requirement that may become obsolete as the discipline of recordkeeping and technology evolve. Similarly, maintaining security, emergency and disaster recovery controls are all keeping with current best practices, but are unnecessarily duplicative with current Commission record keeping production and system safeguards requirements. Further, a general requirement to establish, maintain and implement policies and procedures regarding recordkeeping obligations renders a specific training and compliance monitoring requirement, "without limitation" for officers and personnel, at best redundant and likely unnecessarily burdensome.

A policies and procedures requirement that might reasonably result in an expectation that records entities create and maintain an audit system is preferable to an inflexible, inefficient one that requires records entities to maintain every version of a regulatory record. The Commission currently recognizes the value of an "audit system" for electronic records, and we agree that an audit system is capable of providing accountability, for example, over an initial entry and any changes made to an original or duplicate record on the electronic storage media. Implementing an audit system negates the value of maintaining a copy of every version of each individual record. Not every modification to a regulatory record will produce a change that warrants maintaining that particular version, and § 1.31 currently only requires maintenance of the "original source copy", not all copies that may be logged at various points in a system or might be converted from one format to another. Imposing an obligation to maintain every version of a record creates interplay between this and other recordkeeping obligations that will complicate implementation and obfuscate the obligations of certain entities.[7] Requiring the maintenance of every version of a record is redundant, and creates additional opportunities for data theft or loss. It will also mean that some records will have to be kept past their reasonable usefulness and far longer

[7] *See* e.g. 17 CFR §45.2(g) (2017) (governs recordkeeping by SDRs and utilizes the "final termination of the swap" as the event from which the retention period is calculated. The addition of an obligation to maintain every version of a swap would require an SDR to implement a means to retain swap data based on the greater of the final termination of the swap plus 5 years or the date of the most recent amendment to the record plus 5 years. A similar logic would need to be implemented for calculating archival storage (i.e., the greater of the final termination of the swap plus 15 years or the date of the most recent amendment to the record plus 15 years). In order to ensure consistent application across SDRs and to enable an SDR to implement its obligations systematically the Commission would need to provide a list of every event that "terminates" a swap (i.e., maturity, expiration, novation, transfer etc.)).

than the § 1.31 retention periods. Maintaining all prior versions of a regulatory record, no matter how modified, is inefficient and counter to the Commission's stated goal of adopting a more flexible, technology neutral standard.

Inspection and Production of Regulatory Records

The Commission's proposed and current recordkeeping requirements require that regulatory records be open to inspection. We appreciate the Commission's efforts to work with records entities to determine how regulatory records can reasonably be produced, and allowing the opportunity to produce records in an alternative manner sufficient for the Commission to adequately inspect the records.[8]

We respectfully request, though, that the Commission engage in a dialogue with industry to address challenges presented by the production requirements of § 1.31. While not exhaustive, some of the issues the Commission should consider, outlined here, focus on the scope of what is subject to a production request and who may make such a request. The ambiguity regarding the scope of regulatory records coupled with the broad production requirement of § 1.31 results in records entities being subject to onerous production requests without any defined avenues of relief or other protections typically provided a producing party. The Commission should consider whether certain requests, like for source code, only be produced pursuant to a subpoena instead of upon request by any Commission representative. The treatment of source code in the Commission's current proposal and the re-proposal of Regulation AT recognizes that some information should not be subject to the broad production requirements of § 1.31 without additional protections. Similarly, § 1.31 should recognize the long standing protections of attorney-client privilege and expressly exclude such information from the rule's production requirements.

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CME Group thanks the Commission for the opportunity to comment on the proposal and we look forward to a continued dialogue on the topic. Should you have any comments or questions regarding this submission, please contact Adrianne Joves by telephone at (312) 648-3891 or by e-mail at Adrianne.Joves@cmegroup.com.

Sincerely,

Kathleen M. Cronin

[8] *See* 82 FR 6362 (Jan. 19, 2017).