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March 20, 2017

Mr. Christopher J. Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street NW
Washington DC 20581

**Re: RIN 3038-AE36: Proposed Amendments to Recordkeeping Requirements,
82 Fed. Reg. 6356 (January 19, 2017)**

Dear Mr. Kirkpatrick:

The Futures Industry Association (“**FIA**”)¹ is pleased to have the opportunity to submit these comments in support of the Commodity Futures Trading Commission’s (“**Commission**”) proposed amendments to its recordkeeping requirements set out in Commission Rules 1.31, 1.35 and 23.202(b). As the Commission notes in the Federal Register release accompanying the proposed amendments, industry associations have long asserted that the current Rule 1.31 recordkeeping requirements have become outdated and irrelevant, frequently placing registrants and others subject to its requirements in the untenable position of choosing between accepted electronic distributed storage systems essential for disaster recovery and privacy protection and compliance with the provisions of the rule. Particularly problematic are the requirements that: (i) electronic records be kept in their native file format²; (ii) records be stored on optical disks or CD-ROMs³; and (iii) any person using electronic storage media retain a Technical Consultant with authority to access such person’s electronic records.⁴

FIA agrees with the Commission that the appropriate focus of the recordkeeping requirements should be on “the scope of the required records, rather than on the specific storage medium.”⁵ We, therefore, welcome and strongly support the proposed amendments. We are especially

¹ FIA is the leading trade organization for the global futures, options and over-the-counter cleared derivatives markets. Its mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and promote high standards of professional conduct. FIA’s core constituency consists of futures commission merchants (“**FCMs**”), and the primary focus of the association is the global use of exchanges, trading systems and clearing organizations for derivatives transactions. FIA’s members also include leading derivatives exchanges and clearing organizations from more than 20 countries.

² Commission Rule 1.31(a)

³ Commission Rule 1.31(b)(1).

⁴ Commission Rule 1.31(b)(4).

⁵ 82 Fed. Reg. 6356, 6359 (Jan. 19, 2017).

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pleased that, as proposed to be amended, Rule 1.31 would be technology-neutral and principles-based, rather than prescriptive. As such, the rule should not inhibit registrants and other market participants from adopting new technologies as they evolve, while assuring the Commission continued access to the regulatory records necessary to fulfill its regulatory obligations. Indeed, because Rule 1.31 establishes standards for other Commission and exchange recordkeeping and audit trail requirements, we would welcome the opportunity to engage further with the Commission and staff on additional rules that could similarly benefit from modernization and streamlining.

Our comments below request clarification of certain aspects of the proposed amendments and suggest certain further revisions to the proposed amendments that are consistent with their underlying purpose.

Definition of electronic regulatory records. We understand that the term “electronic regulatory records” is meant to include “metadata,” which the Commission states “generally refers to any hidden text, formatting codes, formulae, history, tracking, and other information associated with an electronic file or data.”⁶ The Commission expressed its view that it is not necessary to further define this term, since this and other technical terms may change over time.⁷

We agree that it is not necessary to define “metadata” at this time. However, as the Commission notes, there is not “universal agreement” on what constitutes “metadata.” As registrants and the Commission gain experience with this rule, therefore, we may find it may necessary to undertake a separate initiative to define this term.

Record retention. We appreciate that, unless an agency specifically provides to the contrary in adopting rules, such rules are prospective in nature. With respect to this rulemaking, therefore, the provisions of revised Rule 1.31 would appear to apply only to those records created on and after its effective date, but not to records created before then. We believe the benefits of the proposed amendments should extend to all required records, whenever created. In this regard, we ask the Commission to confirm that, upon adoption of the proposed amendments to Rule 1.31, their provisions would apply to existing records as well as records created after the effective date of the amendments.⁸ In particular: (i) registrants would not be required to maintain electronic records created prior to the effective date of the amendments in their native format; and (ii) registrants would no longer be required to retain a Technical Consultant with authority to access such registrant’s electronic records.

Coordination with the Securities and Exchange Commission. We appreciate that the proposed amendments are intended, at least in part, to provide registrants with the same flexibility that the Securities and Exchange Commission (“SEC”) has provided under Rule 204-2(g). We note, however, that for FCMs, the relevant SEC rule is Rule 17a-4, imposing recordkeeping requirements on broker-dealers and certain exchange members. These rules do not provide the

⁶ Proposed Rule 1.31(a).

⁷ *Id.*

⁸ We also support the Commission’s proposal to amend Rule 23.203(b) to remove text that is duplicative to Rule 1.31(c). We suggest that the Commission may want to consider revising Rule 45.2 to remove similarly duplicative provisions.

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same flexibility as Rule 204-2(g). We encourage the Commission to work with the SEC to assure that the recordkeeping requirements applicable to broker-dealers are consistent with the revisions to Rule 1.31 that the Commission may adopt following the conclusion of this comment period.

Source code and other intellectual property. In the Federal Register release accompanying the proposed amendments, the Commission notes that it has separately proposed Regulation Automated Trading ("**Regulation AT**"), which includes certain requirements regarding source code and the production of source code. The Commission emphasizes that the current proposal is not intended to address these issues. Although this is not the forum for resolving the industry's concerns regarding the Commission's access to source code (and other proprietary intellectual property), we nonetheless remain concerned that the Commission or the Department of Justice may request this information under Rule 1.31, without affording affected market participants the opportunity to obtain a protective order.

Pending final action on Regulation AT and resolution of our concerns regarding the protection of source code and other proprietary intellectual property, we ask the Commission to take such action as it deems appropriate to confirm that the Commission will request all such intellectual property only after the Commission has authorized a subpoena in accordance with its procedures.

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FIA appreciates the opportunity to submit these comments in support of the proposed amendments to the Commission's recordkeeping rules, and we encourage the Commission to act promptly to adopt final rules. If the Commission has any questions or needs any additional information with respect to the matters discussed herein, please contact Allison Lurton, Senior Vice President and General Counsel, at 202.466.5460 or alurton@fia.org. And, as noted, we would welcome the opportunity to engage further on other recordkeeping and audit trail requirements that may also be ripe for Commission review and modernization.

Respectfully submitted,



Walt L. Lukken
President and Chief Executive Officer

cc: Honorable J. Christopher Giancarlo, Acting Chairman
Honorable Sharon Bowen, Commissioner

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