asset management group

March 20, 2017

Via Electronic Submission: http://comments.cftc.gov
Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Recordkeeping; RIN 3038–AE36

Dear Mr. Kirkpatrick:

Managed Funds Association ("**MFA**"), the Investment Adviser Association ("**IAA**"), the Alternative Investment Management Association ("**AIMA**"), and the Securities Industry and Financial Markets Association's Asset Management Group ("**AMG**") (collectively, the "**Associations**")[1] appreciate the opportunity to provide comments to the Commodity Futures Trading Commission (the "**Commission**" or "**CFTC**") on its proposed amendments to CFTC

[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. IAA is a not-for-profit association that represents the interests of investment adviser firms that are registered with the U.S. Securities and Exchange Commission ("**SEC**"). Founded in 1937, the IAA's membership consists of over 600 firms that collectively manage $20 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. AIMA is the trade body for the hedge fund industry globally; AIMA's membership represents all constituencies within the sector – including hedge fund managers, fund of hedge funds managers, prime brokers, fund administrators, accountants and lawyers – and comprises over 1,800 corporate bodies in more than 50 countries.

Regulation 1.31 ("**Proposed Rule**"),[2] which sets forth recordkeeping obligations for records required to be kept under the Commodity Exchange Act ("**Act**") and the Commission's regulations thereunder.

The Associations collectively represent a broad segment of the domestic and global investment management industry, advising funds and separate accounts. Our members include investment managers and sub-advisers that are: registered with the SEC as investment advisers; registered with the Commission as commodity pool operators ("**CPOs**") and/or commodity trading advisors ("**CTAs**"); subject to an exclusion or exemption from registration as CPOs or CTAs; and/or registered with a regulator outside of the United States. Our members engage in varying levels of trading in commodity interests and, thus, are subject to compliance with applicable provisions of the Act and Commission regulations thereunder. As such, the Associations' members have a keen interest in, and express their general support for, the Commission's efforts to modernize and make technology-neutral the form and manner in which regulatory records are kept under CFTC Regulation 1.31, subject to the recommendations outlined below.

At the outset, the Associations strongly commend the Commission for its willingness to respond to industry concerns about a rule that has become unworkable and obsolete, and to propose a new rule that strives to modernize the Commission's recordkeeping requirements. Although this letter outlines particular concerns with the Proposed Rule, we wish to reiterate our support for the Commission's thoughtful efforts to modernize its recordkeeping rule so that CPOs and CTAs may keep records using modern and evolving technology.

I. BACKGROUND

The Commission adopted the most recent substantive revisions of CFTC Regulation 1.31 in 1999, which included electronic recordkeeping provisions.[3] When it did so, the Commission 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."[4]

Accordingly, on July 21, 2014, the Associations submitted a rulemaking petition ("**Petition**") to the Commission, which requested that the Commission amend CFTC Regulation 1.31 in light of the technological changes that have occurred since 1999 and update the provisions relating to certain electronic recordkeeping requirements applicable to CPOs and CTAs, including

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[2] *Recordkeeping*, 82 Fed. Reg. 6356 (Jan. 19, 2017).

[3] *Recordkeeping*, 64 Fed. Reg. 28735 (May 27, 1999).

[4] *See Recordkeeping*, 64 Fed. Reg. 28735, *supra* note 3, at 28736 (stating further that "[t]he 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").

the requirement to use a third-party technical consultant.[5] In addition, the Associations requested 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 the responsibility for maintaining and producing required records pursuant to the Commission's regulations.

II. EXECUTIVE SUMMARY

Acting Commission Chairman J. Christopher Giancarlo, consistent with the Trump Administration's policy pronouncements,[6] has expressed a strong desire to reduce the costs and burdens of government regulation. The Associations strongly support the Commission's goals underlying the Proposed Rule and appreciate the Commission's efforts to modernize CFTC Regulation 1.31 by endeavoring to amend it in a technology-neutral manner, which we believe are consistent with the Acting Chairman Giancarlo's public statements and in the spirit of the Trump Administration's directives.

We offer several recommendations for further revisions to CFTC Regulation 1.31 that would preserve the Commission's objectives in a manner that would be less burdensome and less costly for CPOs, CTAs, and other entities subject to regulation by the Commission, while imposing only those requirements that create substantial additional benefits. We have also recommended specific revisions to the text of the Proposed Rule, which are shown in Appendix A to this letter.

In general, in amending a rule that applies to a broad range of registrant categories with different business models and operational sizes, the Commission should adopt a more flexible, principles-based approach to applicable recordkeeping requirements. We appreciate that the Commission has endeavored to do so, but remain concerned with a few aspects of the Proposed Rule. A modestly revised approach will make CFTC Regulation 1.31 more effective, reduce the need for the Commission to amend it in the future, and minimize the cost and compliance burden imposed, on Commission registrants and others subject to the Proposed Rule, including on our members. In particular, the Associations recommend that the Commission:

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[5] Petition for Rulemaking to Amend CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33, Managed Funds Association, Investment Adviser Association, and Alternative Investment Management Association (Jul. 21, 2014), *available at* https://www.managedfunds.org/wp-content/uploads/2014/07/Final-Petition.pdf.

[6] The Trump Administration has issued two executive orders aimed at alleviating unnecessary costs and burdens of government regulations. *See* Exec. Order, Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling*; see also* Exec. Order, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda; *see also* "CFTC: A New Direction Forward," Acting Chairman J. Christopher Giancarlo, U.S. Commodity Futures Trading Commission (Mar. 15, 2017), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20 (announcing the launch of Project KISS, representing an agency-wide review of Commission rules, regulations and practices to make them simpler, less burdensome, and less costly).

- Recognize that key business and operational differences exist among Commission registrants and ensure that the provisions of CFTC Regulation 1.31 are flexible and principles-based to accommodate new technology as it develops and not to be unduly burdensome for any records entity.

- Adopt a substituted compliance regime such that CPOs and CTAs that are registered with the SEC as investment advisers under the Investment Advisers Act of 1940 ("**Advisers Act**"), or are affiliated with a registered investment adviser, should be deemed to be in compliance with CFTC Regulation 1.31 if they comply with the recordkeeping requirements under the Advisers Act.

- Clarify the definitions of records entity and regulatory records. In particular, we strongly believe it is neither necessary nor advisable for the Commission to explicitly refer to or encompass the term "metadata" in connection with the concept of regulatory records so that the CFTC Regulation 1.31 is focused on achieving recordkeeping objectives instead of prescribing how those objectives should be achieved.

- Eliminate the duplicative mandate for specific training requirements and allow records entities to use systems documentation in lieu of requiring additional written policies and procedures.

- Permit records entities to maintain records at locations other than their main business office and to engage third parties or cloud-based applications, or enter into any other effective recordkeeping arrangements with third parties.

III. GENERAL COMMENTS

A. Adoption of a Principles-Based Approach That Recognizes Key Differences Among Registrants and Remains Flexible as Technology Evolves

We strongly support the Proposed Rule and appreciate that the Commission has worked to modernize CFTC Regulation 1.31. However, we have some concerns that certain aspects of the Proposed Rule would require our members to adopt, develop and purchase additional technological solutions to ensure compliance with the proposed recordkeeping requirements, which would impose higher costs on all registrants without providing significant additional benefits.

As demonstrated by the Petition, the Associations have long been in favor of amending and modernizing CFTC Regulation 1.31 to make the rule more practicable. As part of this process, however, we believe it is important for the Commission to recognize that, as an initial matter, substantial differences exist among Commission registrants' business structures and operational sizes. While terms of the Proposed Rule, as drafted, may be appropriate for certain entities, such as designated contract markets, futures commission merchants ("**FCMs**"), clearing member FCMs, and swap dealers, the Associations are concerned that certain provisions of the Proposed

Rule may be overly burdensome and costly as applied to CPOs and CTAs. CPOs and CTAs range greatly in business size, assets under management, and business models. Further, entities such as FCMs engage in different business activities (such as recording and monitoring customer order flows, receiving and segregating customer funds, and complying with minimum financial and related reporting requirements) than do CPOs and CTAs.

As a result, we respectfully urge the Commission to recognize these important differences among these types of Commission registrants by modifying the Proposed Rule to allow a registrant more flexibility in determining the most efficient way for it to comply, as described in more detail below. Doing so would help to ensure that CFTC Regulation 1.31 does not impose a disproportionate burden on CPOs and CTAs as compared to other registrants and would minimize the need for the Commission to provide interpretive guidance on an ongoing basis or to engage in additional rulemaking in this area in the future. Our suggestions to this end are described in sub-section B and in Section IV below.

B. Adoption of a Substituted Compliance Regime for SEC-Registered Advisers and their Affiliates

Many of the Associations' members are dually registered both under the Act and with the SEC as investment advisers under the Advisers Act. Because many Commission records entities are also required to keep records in accordance with applicable SEC requirements, the regulations of the two agencies with respect to recordkeeping should be made as consistent as possible. Accordingly, and in keeping with Acting Chairman Giancarlo's statements, and consistent with the Trump Administration's directives, regarding reducing undue regulatory burdens, we are recommending that the Commission deem CPOs and CTAs that are registered with the SEC as investment advisers under the Advisers Act, or are affiliated with a registered investment adviser, to be in compliance with CFTC Regulation 1.31 if they comply with the recordkeeping requirements under the Advisers Act.[7]

Hundreds of members of the Associations only became required to register under the Act as CPOs and/or CTAs in the last five years as a result of changes to the conditions for exemption from registration in those categories adopted by the CFTC in 2012.[8] Subsequent to the adoption of those regulatory changes, the Commission adopted a substituted compliance regime for CPOs

[7] *See Electronic Recordkeeping by Investment Companies and Investment Advisers*, Securities and Exchange Commission, Advisers Act Release No. IA-1945 (May 24, 2001) (Adopting Release) (permitting registered investment advisers to preserve required records using electronic storage media). In general, the SEC permits advisers to maintain records electronically pursuant to Rule 204-2(g) under the Advisers Act if they establish and maintain procedures: (i) to safeguard the records from loss, alteration, or destruction, (ii) to limit access to the records to authorized personnel and the SEC, and (iii) to ensure that electronic copies of non-electronic originals are complete, true, and legible. Further, the SEC may request that advisers promptly provide (A) legible, true, and complete copies of records in the medium and format in which they are stored, and printouts of such records; and (B) means to access, view, and print the records.

[8] *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012). While not addressed in this letter, we continue to have concerns about aspects of this 2012 rulemaking.

that operate registered investment companies ("**RICs**") that are also classified as commodity pools, largely premised upon such entities' adherence to the compliance obligations under the Investment Company Act of 1940, the Advisers Act, and the regulations thereunder. The Commission stated an intention to provide substituted compliance to RIC CPOs in the areas of disclosure, reporting, and recordkeeping,[9] but the rules adopted by the Commission in 2013 did not fully achieve this goal.

The Associations believe that it is appropriate to extend this principle generally to the provisions for maintenance of electronic regulatory records under CFTC Regulation 1.31. Indeed, when the CFTC adopted the electronic recordkeeping requirements in 1999 that it now recognizes are out-of-date, it noted that it was "harmonizing procedures for those firms regulated by both the Commission and the Securities and Exchange Commission [as broker-dealers]."[10] In fact, 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, and it did not take into account the SEC's different electronic recordkeeping requirements applicable to investment advisers. Accordingly, we recommend that CPOs and CTAs that are registered with the SEC as investment advisers under the Advisers Act, or are affiliated with a registered investment adviser,[11] are deemed to be in compliance with CFTC Regulation 1.31 if they comply with the recordkeeping requirements under the Advisers Act. Further, we suggest that the Commission provide expressly that it will retain access to relevant electronic records maintained by SEC-registered CPOs and CTAs under the Advisers Act. We have made specific revisions regarding this suggestion in Appendix A by adding subsection (f) to the Proposed Rule.

We believe that a substituted compliance regime for electronic recordkeeping requirements will continue to achieve the Commission's goals without imposing undue additional costs. By contrast, divergence in such requirements between the Commission and the SEC would require dually-registered firms to adopt multiple record retention procedures and update them as either the Commission or the SEC changes their requirements. In many cases, firms will either apply the most demanding standard across all their operations or, if a comprehensive approach were too costly, develop a tailored policy for Commission-only records.

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[9] *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 78 Fed. Reg. 52308, 52310 (Aug. 22, 2013).

[10] *See Recordkeeping*, 64 Fed. Reg. 28735, *supra* note 3, at 28735 and 28737 (noting that the Commission's final rule was intended to "track closely the SEC's recordkeeping requirements" and "recognize[d] the value of maintaining consistency, where possible, between the Commission's approach to recordkeeping and that of the SEC").

[11] The Associations note that certain SEC-registered investment advisers may have affiliates that are not themselves required to be registered with the SEC and that may also claim exemption from registration under the Act. *See generally ABA Subcommittee on Private Investment Entities*, SEC No-Action Letter (Dec. 8, 2005) and *American Bar Association Section of Business Law*, SEC No-Action Letter (Jan. 18, 2012). In these letters, the SEC staff has permitted special purpose entities ("SPVs") that act as general partners or managing members of private funds not to register under the Advisers Act if, among other conditions, the private funds are advised by a registered investment adviser and the SPVs are subject to the Advisers Act and the rules thereunder and subject to examination by the SEC. Accordingly, we believe such entities should also be able to comply with such SEC recordkeeping requirements via substituted compliance with the Commission's amended recordkeeping requirements.

In the alternative, if the Commission declines to pursue the approach outlined above, the Associations recommend that, as originally requested in the Petition, the Commission amend CFTC Regulation 1.31 to incorporate provisions substantially similar to Rule 204-2(g) under the Advisers Act, which would apply to all CPOs and CTAs registered under the Act.[12] As noted in the Petition, Rule 204-2(g) does not tether advisers to any particular electronic format, but instead sets forth general principles that advisers must follow when arranging, accessing, and reproducing their electronic records. We believe that this approach would achieve the goals of CFTC Regulation 1.31 and permit compliance through a more flexible, principles-based method. We have provided alternative language to address this approach in Appendix A, by adding an alternate subsection (f) to the Proposed Rule. We do, however, prefer the substituted compliance approach suggested in the first alternative, as it would eliminate the need to update this aspect of Proposed CFTC Regulation 1.31 should the SEC amend its electronic recordkeeping rule in the future.

IV. SPECIFIC COMMENTS

Our specific comments on the Proposed Rule follow:

A. Revisions to Certain Definitions

Records Entity. The Associations are concerned that the definition of "records entity"[13] contained in the Proposed Rule will include entities that are exempt or excluded from registration with the Commission and who, by virtue of their exempt or excluded registration status, will not expect to have regulatory obligations beyond complying with the terms of their exemptions or exclusions and market regulations. Accordingly, we recommend that the Commission limit the definition of records entity to Commission registrants.

As a policy matter, the Commission and Congress have determined — as reflected in CFTC Regulations 4.5, 4.13(a)(3), and/or 4.14(a)(8), and under various statutory exemptions — that persons who engage in a *de minimis* level of commodity interest trading should not have to register as CPOs and/or CTAs. Such non-registrants are required to maintain records, but such exemptions and exclusions do not specify how non-registrants must maintain their records. Given the expansive definition of "records entity" in the Proposed Rule, we believe that the Proposed Rule would create a trap for the unwary; due to their unregistered status, non-registrants would not reasonably expect to be subject to prescriptive recordkeeping requirements under the Proposed Rule. Further, including non-registrants within the definition of records entity would impose a significant, additional cost burden on entities that the Commission itself and Congress have already determined to be excluded or exempt from the registration requirements.

Rather, the Associations believe that non-registrants should be allowed to maintain records in the manner required by their primary regulator, such as the SEC in the U.S. or, for non-U.S. entities, their primary regulator (*e.g.*, the Financial Conduct Authority for UK-domiciled entities).

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[12] *See* Petition for Rulemaking to Amend CFTC Regulations 1.31, 4.7(b) and (c), 4.23 and 4.33, *supra* note 5, at 8.

[13] *See Recordkeeping*, 82 Fed. Reg. 6356, *supra* note 2, at 6365.

This approach would be consistent with the Commission's treatment of unregistered members of designated contract markets and swap execution facilities, which are exempted from the requirements to keep records in a particular form and manner.[14] Again, to require otherwise would be unduly burdensome and costly for non-registrants, and would largely negate the relief provided by the exclusions or exemptions from registration noted above. Thus, we recommend that the Commission ensure that the definition of records entity encompasses only Commission registrants.

Regulatory Records. In the release accompanying the Proposed Rule, the Commission stated: "[E]lectronically stored regulatory records are not limited to the data within a particular database or application, for example, but includes the electronic information that identifies the manner in which any regulatory record is altered.[15] The Commission understands that this information is more commonly known as 'metadata,' and, at its core, is data about data." The Commission did not define the term "metadata" for purposes of the Proposed Rule. In response to the Commission's specific request for comment, the Associations do not believe it is necessary or advisable to refer to or provide a definition for the term "metadata" in connection with amendments to CFTC Regulation 1.31.

Rather, we believe the definition of regulatory records should not explicitly refer to metadata or attempt to encompass such term so that CFTC Regulation 1.31 is focused on achieving recordkeeping objectives instead of prescribing how those objectives should be achieved. In fact, the Associations have strong concerns that Proposed Rule 1.31(a)(i),[16] which is drafted very broadly, could require our members to pursue, develop, and purchase additional technological solutions to ensure compliance with this provision, even though technology will undoubtedly continue to change and evolve indefinitely. Consistent with Acting Chairman Giancarlo's Project KISS goals, we think the Proposed Rule would be clearer and much simpler without the description of metadata in Proposed Rule 1.31(a)(i).[17]

We contend that it would be preferable for the Commission, similar to Rule 204-2(g)(2)(ii)(A) under the Advisers Act, to require registrants to provide promptly, upon request, a "legible, true, and complete copy of the record in the medium and format in which it is stored." This would facilitate adaptable recordkeeping requirements designed to withstand evolutions in technology and software over time and would serve the Commission's expressed intent to ensure that CFTC Regulation 1.31 remains technology-neutral. We also believe such an approach would be simpler, less burdensome and less costly, consistent with the objectives expressed by Acting

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[14] *Records of Commodity Interest and Related Cash or Forward Transactions*, 80 Fed. Reg. 80247 (Dec. 24, 2015).

[15] *See Recordkeeping*, 82 Fed. Reg. 6356, *supra* note 2, at 6359.

[16] Proposed Rule 1.31(a)(i) provides that regulatory records shall also include: "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."

[17] *See* "CFTC: A New Direction Forward," *supra* note 6 (summarizing the Acting Chairman's order to "review all [Commission] rules in our quest to reduce regulatory burdens and costs for participants in the markets we oversee").

Chairman Giancarlo.[18] We have made specific revisions regarding this suggestion in Appendix A.

We believe that the statement regarding the requirement to maintain "the electronic information that identifies the manner in which any regulatory record is altered" as an electronically stored regulatory record should encompass only such data as is actually produced in the course of creating such regulatory record electronically. Amendments to CFTC Regulation 1.31 should not require a records entity to generate and maintain additional data that is not an intrinsic part of the electronic copy of the regulatory record when it is created or modified. We request that the Commission clarify that such data should only be considered relevant for purposes of CFTC Regulation 1.31 if and to the extent that it is a required record under the Act or the rules thereunder.

B. Training; Regulatory Records Policies and Procedures

The Proposed Rule would require records entities to establish, maintain, and implement policies and procedures designed to ensure compliance, which would include, among other things, "appropriate training of officers and personnel of the records entity regarding their responsibility for ensuring compliance with the obligations of the records entity under this section, and regular monitoring for such compliance."[19] Consistent with the Acting Chairman's statements, we believe that a Commission registrant should be able to determine how to implement training and monitoring based on its own assessment of the regulatory and other risks inherent in its business. As a result, in response to the Commission's specific request for comment on the question of whether the training requirement should be scaled down, phased-in, or eliminated depending on the number of employees or on the nature of the entity's business, we recommend that the training requirement be deleted in its entirety, and, failing that, it should not be required of registered CPOs or CTAs.[20]

Importantly, we believe these concepts are adequately addressed in existing rules, and thus the proposed language is duplicative. CFTC Regulation 166.3 already requires that Commission registrants diligently supervise their officers, employees, and agents with respect to their business as Commission registrants. As the frontline regulator of registered CPOs and CTAs, the National Futures Association ("**NFA**") has noted that "given the differences in the size of and complexity of the operations of [firms], there must be some degree of flexibility in determining what constitutes 'diligent supervision' for each firm" and that each firm should have "flexibility to design procedures that are tailored to the [firm's] own situation."[21] One element of such

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[18] *See* "CFTC: A New Direction Forward," *supra* note 6 (summarizing the Acting Chairman's order to "review all [Commission] rules in our quest to reduce regulatory burdens and costs for participants in the markets we oversee").

[19] *See Recordkeeping*, 82 Fed. Reg. 6356, *supra* note 2, at 6366.

[20] *See Recordkeeping*, 82 Fed. Reg. 6356, *supra* note 2, at 6360.

[21] *Interpretive Notice, Compliance Rule 2-9: Supervision Of Branch Offices And Guaranteed IBs*, National Futures Association Manual ¶ 9019 (Board of Directors, Oct. 6, 1992; rev. Jul. 24, 2000).

supervision is that employees are properly trained to perform their duties, but "[t]he formality of a training program will depend on the size of the firm and the nature of its business." In keeping with these principles, the Associations believe that the standards for training and monitoring related to records maintenance should be left to the firms themselves to determine based upon their own businesses.[22]

Separately, in response to the Commission's specific request for comment, the Associations do not support extending the current five-year record retention period. We believe that advances in information technology should not be a driver for extending the standard five-year record retention period, which we note is generally consistent with the record retention period under the Advisers Act. Increased capabilities of electronic storage media do not constitute a valid regulatory basis to impose the costs and burdens that would result from a longer records retention period, in the absence of demonstrated additional benefits. Further, increasing retention periods and storage of sensitive information in electronic forms could also put our members, and their third-party service providers, at greater risk in the event of a data breach.

Finally, the Associations request that the Commission clarify that the requirements relating to the maintenance of electronically stored regulatory records may be kept in whatever systems documentation records entities (or third parties with whom they have contracted for these purposes) normally maintain. In our view, it would be inefficient, costly, and unduly burdensome to require, in effect, that formal policies and procedures be created and then updated periodically in order to keep them consistent with relevant systems documentation maintained by a records entity or, if applicable, a third party.

C. Form and Manner of Retention

The Associations believe that, in complying with the requirements of the Proposed Rule, all records entities should be permitted to maintain records at locations other than their main business office and should be permitted to engage third parties, use certain facilities or cloud-based applications, or enter into any other effective recordkeeping arrangements with third parties as long as such third-party systems are reasonably designed to seek to ensure the authenticity, reliability, and availability of regulatory records. In this respect, amendments to CFTC Regulation 1.31 should provide flexibility to registrants by allowing them to determine how best to comply with recordkeeping requirements, including whether to engage in private contractual agreements with vendors to meet their recordkeeping obligations. In doing so, CFTC Regulation 1.31 would continue to maintain a high standard for the retention and production of records, while allowing for greater business and technological efficiency and evolution. Such amendments would also reduce the burden on the Commission and its staff with respect to issuing recordkeeping relief and on individual registrants with respect to requesting such relief. We have made specific revisions regarding this suggestion in Appendix A.[23]

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[22] *Id*.

[23] For instance, we have proposed to remove from Proposed Rule 1.31(d)(2)(i) the reference to "chain of custody elements" as this is a concept from evidence and is addressed elsewhere in the Proposed Rule. We have also proposed

Currently, all Commission registrants, other than CTAs, may maintain records other than at their main business office and/or with third parties, and CPOs may only do so subject to certain conditions.[24] The Associations appreciate that the Commission's Division of Swap Dealer and Intermediary Oversight staff has provided exemptive relief to CPOs, allowing them to use any third-party recordkeeper, provided that CPOs have timely access to records, are able to satisfy the applicable regulatory obligations, and file a statement with the Commission.[25] In granting the exemptive relief, the Commission's staff recognized, as it has in prior staff letters, that it has become part of efficient management practice for entities to maintain their books and records with a third party vendor, or other such recordkeeper.[26] The same is true for CTAs; however, because neither the Commission nor its staff has granted recordkeeping relief to CTAs, CTAs are required to maintain records at their main office.

The Commission allows FCMs, introducing brokers and swap dealers, among others, to use any third-party recordkeeper without restrictions. Given the continuing evolution of the investment management business, and the use of third parties with respect to recordkeeping, we believe it makes practical and logistical sense for the Commission to allow a CTA or a CPO to use any third-party recordkeeper without restriction as well.

Prevailing technologies and current market practices enable Commission registrants that use third parties to retain complete visibility, security, and access to all their business records, regardless of format or location, often at a cost lower than maintaining the books and records themselves. Under Proposed Rule 1.31(d)(2)(iii), records entities would likely have a list of third-party recordkeepers as part of their recordkeeping inventory.[27] To the extent the Commission determines it needs additional information, the Commission could also require CPOs and CTAs to notify the NFA if records are kept other than at the main business office and/or with a third party, including the name and address of any third party, in a manner similar to Item 1.L of Part 1A of Form ADV, as long as no additional documentation or attestation is required from the third party. By permitting such use of third parties for all Commission registrants, the Commission would also be able to confirm the existence and accuracy of such records directly with third parties themselves, if necessary.

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to delete "and to monitor compliance with the Act and Commission regulations in this Chapter" from Proposed Rule 1.31(2)(2)(i) as the obligation to comply would not normally be embodied in a recordkeeping system.

[24] *Exemptive Relief to Use Additional Third-Party Recordkeepers in Commission Regulations 4.7(b)(4) and 4.23(c),* CFTC Letter No. 14-114, Division of Swap Dealer and Intermediary Oversight (Sept. 8, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-114.pdf [hereinafter, "**Staff Letter 14-114**"].

[25] *Id.*

[26] *Id.*

[27] We have, however, suggested some technical amendments to Proposed Rule 1.31(d)(2)(iii) to clarify that a registrant need only maintain an inventory of the systems that maintain electronic records. The other items included by this subsection, which we recommend be deleted in Appendix A, are already addressed in the definition of regulatory records.

Accordingly, the Associations request that the Commission allow CPOs and CTAs to use any third-party recordkeeper without restrictions, provided that the registrant remains the party ultimately responsible for compliance with CFTC Regulation 1.31 and for maintaining and producing electronic regulatory records. In conjunction with amendments to CFTC Regulation 1.31, and in response to the Commission's specific request for comment at the conclusion of Section II of the Proposed Rule, we recommend that the Commission amend CFTC Regulations 4.23 and 4.33 relating to CPO and CTA recordkeeping in the manner set forth in Appendix A.

In the alternative, the Associations respectfully urge that the Commission codify Staff Letter 14-114 so that it is easily accessible by all registered CPOs. Such relief is important to our members and, as a result, the Associations recommend that it be incorporated in an appropriate amendment to the introductory paragraph of CFTC Regulation 4.23. Such an amendment would codify the previous staff exemptive relief and would provide administrative certainty without disadvantaging a legitimate need to examine regulatory records. Accordingly, we recommend that such a codifying amendment be adopted when the Commission adopts amendments to CFTC Regulation 1.31. The Associations do not believe that any further notice and comment on that subject is required by the Administrative Procedures Act.[28]

Further, the Associations recommend that the Commission extend the same relief to CTAs and allow CTAs to keep records other than at their main business office and use the services of any third-party recordkeeper in a manner similar to CPOs by amending CFTC Regulation 4.33.[29]

V. CONCLUSION

The Associations generally support the Proposed Rule, as drafted. However, we believe that the incorporation of the general principles and specific recommendations outlined above would reduce the costs and burdens of CFTC Regulation 1.31, while still satisfying its underlying goals.

[28] The Commission recently adopted amendments to CPO financial reporting regulations to codify prior staff relief letters. *See Commodity Pool Operator Financial Reports*, 81 Fed. Reg. 85147 (Nov. 25, 2016).

[29] The conditions include filing a notice with National Futures Association identifying the recordkeeper, the recordkeeper's contact information, which records shall be so kept, and representations regarding the continued and proper keeping of those records. *See* CFTC Regulation 4.23(c); Staff Letter 14-114, *supra* note 26, at 4 and n.11.

We appreciate the opportunity to offer comments to the Proposed Rule. We would be happy to discuss our comments or any of the issues raised by the Proposed Rule at greater length with the Commission or its staff. If the staff has any questions, please do not hesitate to call Jennifer Han at 202.730.2943, Monique Botkin at 202.293.4222, Jennifer Wood at +44.207.822 8401, and Laura Martin at 212.313.1176.

Respectfully Submitted,

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cc: The Honorable Acting Chairman J. Christopher Giancarlo
The Honorable Commissioner Sharon Bowen
Eileen T. Flaherty, Director
Frank Fisanich, Chief Counsel
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Commodity Futures Trading Commission

APPENDIX A

Text of Proposed Rule Amendments

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

§ 1.31 Regulatory records: retention and production.

(a) *Definitions*. For purposes of this section:
Electronic regulatory records means all regulatory records other than regulatory records ~~exclusively~~ created and maintained by a records entity on paper.

Records entity means any person ***registered with the Commission and*** required by the Act or Commission regulations in this chapter to keep regulatory records.
Regulatory records means all books and records required to be kept by the Act or Commission regulations in this chapter, including any record of any correction or other amendment to such books and records ***as long as that corrected or amended record remains a regulatory record***, provided that, with respect to such books and records stored electronically, regulatory records shall also include:

- ***(i)*** ***Legible, true, and complete copy of the regulatory record in the medium and format in which it is stored; and*** ~~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 ***electronic regulatory record*** ~~books and records~~.

(b) *Regulatory records policies and procedures*. Each records entity shall establish, maintain, and implement written policies and procedures ***(which may include systems documentation)*** reasonably designed to ensure that the records entity complies with its obligations under this section. ~~Such policies and procedures shall provide for, without limitation, appropriate training of officers and personnel of the records entity regarding their responsibility for ensuring compliance with the obligations of the records entity under this section, and regular monitoring for such compliance.~~

(c) *Duration of retention*. Unless specified elsewhere in the Act or Commission regulations in this chapter:

(1) A records entity shall keep regulatory records of any swap or related cash or forward transaction (as defined in Sec. 23.200(i) of this chapter), other than regulatory records of oral communications, from the date the regulatory record was created until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of not less than five years after such date.
(2) A records entity that is required to retain oral communications, shall keep regulatory records of oral communications for a period of not less than one year from the date of such communication.

(3) A records entity shall keep each regulatory record other than the records described in paragraph (c)(1) or (2) of this section for a period of not less than five years from the date on which the record was created.

(4) A records entity shall keep regulatory records ~~exclusively~~ created and maintained on paper readily accessible for no less than two years. A records entity shall keep electronic regulatory records readily accessible for the duration of the required record keeping period.

(d) *Form and manner of retention*. Unless specified elsewhere in the Act or Commission regulations in this chapter, all regulatory records must be created and retained by a records entity in accordance with the following requirements:

(1) *Generally*. Each records entity shall retain regulatory records in a form and manner that ensures the authenticity and reliability of such regulatory records in accordance with the Act and Commission regulations in this chapter.

(2) *Electronic regulatory records*. Each records entity maintaining electronic regulatory records shall establish appropriate systems and controls that ensure the authenticity and reliability of electronic regulatory records, including, without limitation:

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

(ii) Systems that ensure the records entity is able to produce electronic regulatory records in accordance with this section, and ensure the availability of such regulatory records in the event of an emergency or other disruption of the records entity's electronic record retention systems; and

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

(e) *Inspection and production of regulatory records*. Unless specified elsewhere in the Act or Commission regulations in this chapter, a records entity, at its own expense, must produce or make accessible for inspection all regulatory records in accordance with the following requirements:

(1) *Inspection.* All regulatory records shall be open to inspection by any representative of the Commission or the United States Department of Justice.

(2) *Production of paper regulatory records.* A records entity must produce regulatory records exclusively created and maintained on paper promptly upon request of a Commission representative.

(3) *Production of electronic regulatory records.*

(i) A request from a Commission representative for electronic regulatory records will specify a reasonable form and medium in which a records entity must produce such regulatory records.

(ii) A records entity must produce such regulatory records in the form and medium requested promptly, upon request, unless otherwise directed by the Commission representative.

(4) *Production of original regulatory records*. A records entity may provide an original regulatory record for reproduction, which a Commission representative may temporarily remove from such entity's premises for this purpose. Upon request of the records entity,

the Commission representative shall issue a receipt for any original regulatory record received. At the request of a Commission representative, a records entity shall, upon the return thereof, issue a receipt for the original regulatory record returned by such representative.

(f) Notwithstanding the foregoing, commodity pool operators and/or commodity trading advisors that are registered as investment advisers under the Investment Advisers Act of 1940, or are affiliated with a registered investment adviser, shall be deemed to be in compliance with Section 1.31 if they comply with the recordkeeping requirements under the Investment Advisers Act of 1940; Provided, that such books and records are made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice.

In the alternative, a separate proposed sub-section (f) is as follows:

(f)(1) Any commodity pool operator registered under the Act or any commodity trading advisor registered under the Act may comply with this paragraph (f) in lieu of Section 1.31(a) through (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; Provided, that such books and records are made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice.

(2) To comply with this paragraph (f), the commodity pool operator registered under the Act or the commodity trading advisor 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.

3. In Section 1.35, revise paragraph (a)(5) to read as follows:

Section 1.35 Records of commodity interest and related cash or forward transactions.
(a) * * *
(5) *Form and manner*. All records required to be kept pursuant to paragraphs (a)(1), (2), (3), and (4) of this section, other than pre-trade communications, shall be kept in a form and manner that allows for the identification of a particular transaction.

* * * * *

§ 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 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.~~ 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.

(a) ***

(b) ***

~~(c) If the pool operator does not maintain its books and records at its main business office, the pool operator shall:~~

~~(1) At the time it registers with the Commission or delegates its recordkeeping obligations, 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 pool operator;~~

~~(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;~~

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

~~(iv) Contains representations from the pool operator 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;~~

~~(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~~

~~(D) 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. If ***such books and records are*** ~~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.

* * * * *