

March 20, 2017

**VIA ELECTRONIC SUBMISSION**

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

***Re: Recordkeeping, Proposed Rule (RIN 3038-AE36)***

Dear Secretary Kirkpatrick:

**I. INTRODUCTION.**

On behalf of The Commercial Energy Working Group (“**Working Group**”), Eversheds Sutherland (US) LLP submits these comments in response to the Commodity Futures Trading Commission’s (“**CFTC**” or “**Commission**”) Proposed Rule, *Recordkeeping* (“**Proposed Rule**”),<sup>1</sup> which proposes to amend the recordkeeping requirements set forth in CFTC regulation 1.31.

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. Among the members of the Working Group are some of the largest users of energy derivatives in the United States and globally. The Working Group considers and responds to requests for comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

The Working Group appreciates the opportunity to provide these comments. As a general matter, the Working Group believes the Commission’s recordkeeping requirements should be reviewed and simplified to eliminate any unnecessary regulatory burdens on market participants. In this regard, the Working Group supports the Commission’s efforts in this

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<sup>1</sup> See *Recordkeeping*, Proposed Rule, 82 Fed. Reg. 6,356 (Jan. 19, 2017).

proceeding to amend its recordkeeping requirements to reflect changes in technology.

## II. COMMENTS.

### A. The Commission's Recordkeeping Requirements Should Be Streamlined.

As an initial matter, the Working Group believes the Commission's recordkeeping requirements are unnecessarily complex and burdensome. Under the Commission's regulations, market participants are subject to several different recordkeeping standards, which vary based on different factors, such as a market participant's regulatory entity status (*e.g.*, swap dealer or end-user), transaction type (*e.g.*, futures, swap, or cash transaction), or record medium (*e.g.*, oral communication or e-mail). By way of example, end-users could be subject to the following recordkeeping requirements, among others:

- General recordkeeping under CFTC regulation 1.31;
- Swaps recordkeeping under Parts 20, 43, 45, and 46 of the CFTC's regulations;
- Futures (and related cash commodity transactions) recordkeeping under Parts 18 and 150 of the CFTC's regulations; and
- Recordkeeping of commodity interests and related cash and forward transactions under CFTC regulation 1.35.

Under these regulations, end-users are required to comply with several different recordkeeping standards, such as different document retention periods or production timeframes. The Working Group submits that complying with several different recordkeeping standards is not only overly burdensome but also is contrary to the Commission's new agenda to "right-size" its regulatory footprint.<sup>2</sup> As part of this agenda, through its recently launched "Project KISS" initiative, the CFTC is required to review its rules and regulations to make them "simpler, less burdensome and less costly."<sup>3</sup>

Accordingly, the Working Group recommends that the Commission review all of its recordkeeping requirements and streamline them, such that the recordkeeping standards (*e.g.*, for the retention period, retrievability and production, and form and manner) for all regulatory records, including swaps and futures, are the same and cost-effective, ensuring the integrity of records in the least burdensome manner. The Commission should accomplish this request through a Notice of Proposed Rulemaking, wherein Working Group and other market participants could offer more detailed comments to assist the Commission in ensuring its recordkeeping requirements are appropriately streamlined. Additionally, in the Notice of Proposed Rulemaking, the Commission should confirm that recordkeeping requirements

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<sup>2</sup> See *CFTC: A New Direction Forward*, Remarks of Acting Chairman J. Christopher Giancarlo Before the 42nd Annual International Futures Industry Conference in Boca Raton, FL (Mar. 15, 2017), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20>.

<sup>3</sup> See *id.*

imposed upon registered entities do not apply to unregistered entities as a result of any modifications to CFTC regulation 1.31 or other recordkeeping regulations.

**B. The Working Group Supports the Elimination of Outdated Recordkeeping Requirements.**

As the Commission notes in the Proposed Rule, technology has evolved substantially since the Commission's last major revision to CFTC regulation 1.31, which was almost two decades ago.<sup>4</sup> In connection with technological innovation, the recordkeeping practices and systems of market participants, including Working Group members, have improved and resulted in most records being created and stored electronically rather than in paper format. Consequently, as more thoroughly described in industry participant petitions,<sup>5</sup> the Working Group submits that requirements under CFTC regulation 1.31 have become outdated and unnecessarily burdensome, including:

- The requirement to keep electronic records in the format in which the records were originally created (*i.e.*, native file format);<sup>6</sup>
- The requirement to preserve electronic records exclusively in a non-rewritable, non-erasable format;<sup>7</sup>
- The requirement to enter into an agreement with a third-party technical consultant, which allows the technical consultant to provide promptly upon Commission request any of the market participant's information stored electronically;<sup>8</sup>
- The requirement to provide before a market participant utilizes an electronic storage media, a written representation to the Commission that such system complies with all the recordkeeping requirements under CFTC regulation 1.3;<sup>9</sup> and
- The requirement to retain in hard copy certain paper records, including trading cards and paper copies of electronically filed certified forms.<sup>10</sup>

In this light, the Working Group supports the Commission's proposal to eliminate these and any other outdated recordkeeping requirements under regulation 1.31 in favor of a more flexible recordkeeping standard that requires regulatory records to be kept in a form and manner

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<sup>4</sup> See Proposed Rule at 6,357.

<sup>5</sup> See *id.* at n.6 (citing industry petitions). The Working Group defers to these industry petitions for further explanation of the outdated requirements under existing CFTC regulation 1.31.

<sup>6</sup> See existing CFTC regulation 1.31(a).

<sup>7</sup> See existing CFTC regulation 1.31(b).

<sup>8</sup> See existing CFTC regulation 1.31(b).

<sup>9</sup> See existing CFTC regulation 1.31(c).

<sup>10</sup> See existing CFTC regulation 1.31(d).

that generally ensures the records' authenticity and reliability.<sup>11</sup> The Working Group believes this proposed form and manner requirement will continue to ensure that the integrity of regulatory records is preserved while reducing market participants' burdens associated with keeping records in an outdated manner solely for the purpose of complying with existing regulation 1.31.

Additionally, because these proposed amendments reduce burdens on a records entity, the Working Group submits that they should become effective immediately and apply to existing and new records. In this regard, a records entity should not be required to maintain in native file format an electronic record in existence before the effective date of the proposed amendments.

**C. The Commission Should Provide Records Entities with Sufficient Flexibility in Maintaining and Producing Required Records.**

Consistent with the Proposed Rule, the Working Group believes record entities should be given sufficient flexibility in retaining and producing regulatory records.<sup>12</sup> Yet proposed CFTC regulation 1.31(d)(2)(i) requires records entities<sup>13</sup> with electronic records to establish additional systems and controls to maintain the "security, signature, chain of custody elements, and data" as necessary to ensure the authenticity of the required electronic records. The Working Group submits that such requirement is vague and creates uncertainty, as the Proposed Rule fails to explain what it means to maintain "signature" and "chain of custody" elements. Additionally, the requirement is redundant and unnecessarily prescriptive given records entities are required under proposed CFTC regulation 1.31(d)(1) to keep regulatory records in a form and manner that ensures the authenticity and reliability of such records.

For the foregoing reasons, the Working Group recommends that the Commission eliminate from any final rule adopted in this proceeding proposed CFTC regulation 1.3(d)(2)(i), which would reflect the Commission's new agenda to reduce unnecessary burdens on market participants.

**D. Records Entities Should Be Given Adequate Time to Come Into Compliance.**

The Proposed Rule requires records entities to establish and implement (i) written policies and procedures reasonably designed to ensure compliance with CFTC regulation 1.31<sup>14</sup> and (ii) for electronic records, additional systems and controls to ensure their authenticity and reliability.<sup>15</sup> Notwithstanding the Commission's belief that these proposed requirements generally are consistent with existing regulations and industry practices, certain existing record

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<sup>11</sup> See proposed CFTC regulation 1.31(d).

<sup>12</sup> See Proposed Rule at 6,356, 6,363 (noting the Proposed Rule provides recordkeepers with greater flexibility in document retention and production).

<sup>13</sup> The Proposed Rule defines "records entity" as any person required by the Commodity Exchange Act or Commission regulations to keep records.

<sup>14</sup> See proposed CFTC regulation 1.31(b).

<sup>15</sup> See proposed CFTC regulation 1.31(d)(2).

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entities and market participants that will become records entities at a future date may not have the appropriate policies, procedures, systems, and controls to comply with CFTC regulation 1.31, especially if the Commission adopts prescriptive requirements under regulation 1.31. The Working Group therefore submits that existing record entities and any market participants that become records entities at a future date need adequate time to come into compliance with the recordkeeping requirements under CFTC regulation 1.31.

Accordingly, the Working Group requests that the Commission provide market participants that are record entities upon the effective date of any final rule adopted in this proceeding 3 months after the effective date of a final rule to come into compliance. For market participants that become record entities after the effective date of any final rule, the Working Group requests that they be given 3 months after the date they become a records entity to come into compliance.

### **III. CONCLUSION.**

The Working Group requests the Commission's consideration of the comments set forth above. Please contact the undersigned with any questions.

Respectfully submitted,

/s/ David T. McIndoe

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