

March 20, 2017

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St. N.W.
Washington, DC 20581

Re: Recordkeeping Obligations; Proposed Rule: 17 CFR Parts 1 and 23 (“Proposed Regulation”)

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”)¹ appreciates the opportunity to submit these comments on the Commodity Futures Trading Commission’s (the “**Commission**”) proposed amendment to Commission Regulation §1.31 (“**Recordkeeping Rule**”).

We strongly support the Commission’s decision to re-examine its recordkeeping regulations to eliminate costly and unworkable requirements to comply with outdated technology. We appreciate the Commission’s efforts to promote cost-effective use of resources and allow market participants to benefit from advancements in information technology, while at the same time, maintaining prompt access to books and records required to be kept pursuant to the Commodity Exchange Act (“**CEA**”) and Commission regulations. Moreover, we enthusiastically welcome the Commission’s expressed desire to ensure that their rules do not hinder the market’s adoption of innovations from financial technology.

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, clearing houses and repositories, as well as law firms, accounting firms and other service providers.

Information about ISDA and its activities is available on the Association’s web site: www.isda.org.

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We endorse the Commission's stated objective of adopting a technology neutral approach that allows the recordkeeping regulation to withstand technological developments. Specifically, we fully support the proposed removal of references to specific media formats and elimination of the current requirements to retain records in their "native file format", store electronic records in WORM format, and to retain third-party technical consultants. We believe the Commission's proposal strikes an appropriate balance between the scope of the regulatory records that must be maintained², namely preservation of all prior versions of a regulatory record despite subsequent modifications and, at the same time, allowing market participants the necessary flexibility regarding the use of technology or media storage.

We are concerned, however, that the proposed revision of the definition of "records entity" may impose recordkeeping requirements on entities that do not currently have such obligations. The Commission proposes to amend the definition of "records entity" to mean "any person required by the Act or Commission regulations to keep regulatory records", which it acknowledges would not only include those currently subject to the regulatory requirements as CFTC registrants and those listed in the definition of "registered entities" under CEA Section 1a(40)³, but also "...certain persons that are neither a registered entity nor a registrant."⁴

The proposed expansion of the recordkeeping obligations to all persons required to keep any books and records under CFTC regulations – even if such persons are not CFTC registrants or registered entities – would impose costly obligations on potentially unaware market participants. We ask that the Commission revise the definition to only include persons that are currently subject to the Commission's regulatory oversight.

Moreover, the proposed expansion of the recordkeeping obligations to entities that are neither registered entities nor registrants would subject them to the time and expense of developing and implementing policies and procedures for compliance with the regulatory requirement. As noted in the petition letter from several industry associations to the Commission, as referenced in the Proposed Regulation⁵, since the last substantive amendments to §1.31 in 2009 and 2012 there already have been many additional firms made subject to recordkeeping requirements in this space

² We also agree with the Commission's carve-out of source code and manner of production of source code from the definition of "electronic regulatory records," which as stated in the Proposed Regulation, are separately addressed in proposed Regulation Automated Trading. See *Supplemental notice of proposed rulemaking, Regulation Automated Trading*, 81 FR 85334 (Nov. 25, 2016).

³ Registered entities include derivatives clearing organizations, designated contract markets, swap execution facilities, and swap data repositories, while CFTC registrants include futures commission merchants, introducing brokers, CPOs, CTAs, floor brokers, floor traders, retail foreign exchange dealers, swap dealers, and major swap participants.

⁴ Recordkeeping, 82 Fed. Reg. 6356 (Jan. 19, 2017)

⁵ Recordkeeping, 82 Fed. Reg. 6356 (Jan. 19, 2017), note 6.

after the Commission's adoption of a broad definition of the types of swaps subject to its regulation⁶ and as a result of the changes to the Part 4 regulations adopted by the Commission in 2012⁷. We, thus, caution the Commission against imposing additional requirements that could deter market participants from trading swaps and derivatives products in order to avoid additional regulations.

We support the Commission's objective of ensuring the integrity and availability of all regulatory records in the Proposal's revisions to the manner and form in which regulatory records are retained by records entities. Nevertheless, we believe that additional clarification regarding the scope of the proposed authenticity and reliability controls is needed for the Proposal to clearly achieve this goal. The proposed inclusion of the term "chain of custody" in §1.31(d)(2) is potentially misleading, as this is a legal concept of evidence that does not properly translate into the realm of technological requirements for recordkeeping. On the other hand, the proposed definition of "regulatory records" in §1.31(a)(1) already includes a requirement to retain "...data that describes how, when, and, if relevant, by whom such electronically stored information was collected, created, accessed, modified, or formatted...". This provision in the "regulatory records" definition more clearly accomplishes the Commission's objective than by instead introducing the "chain of custody" concept in the Proposal. We, therefore, suggest that proposed §1.31(d)(2)(i) be modified as follows:

"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;"

We would also like to express our concern with regard to the proposed recordkeeping retention periods. The proposed 1-year retention period for oral communications under §1.31(c)(2) is sufficient. However, we believe that the Commission's proposed requirement in §1.31(c)(1) that a records entity retain regulatory records (other than those pertaining to oral communications) for a period of not less than five years after the "termination, maturity, expiration, transfer, assignment, or novation date of the transaction" would impose too lengthy a retention period on certain swaps transactions. We are concerned that, for example, a long term interest swap with a 15-year maturity date that is executed over email would require the records entity to retain the emails and other electronic communications related to the swap for a period of at least 20 years, but possibly much longer depending on the date the email or other electronic communication was sent or

⁶ *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).

⁷ 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).



received. Given the space constraints and retention capabilities of email servers and other electronic storage systems, this poses a burdensome and potentially unworkable requirement for many entities conducting transactions over email. We, therefore, urge the Commission to exempt emails and other electronic communications from this requirement and instead require such electronic records to be retained for a period of five years from the date of creation of the transaction.

* * *

ISDA appreciates the opportunity to comment on the Proposed Regulation and would welcome the opportunity to answer any questions you may have. If ISDA can be of any help in this process, we hope that you will not hesitate to contact ISDA's Head of U.S. Public Policy, Christopher Young, at telephone number (202) 683-9339.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Kennedy". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Steven Kennedy

Global Head of Public Policy