



September 28, 2017

VIA: www.cftc.gov/projectkiss

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Center
1155 21st St. NW
Washington, DC 20581

**Re: Commodity Futures Trading Commission Request for Information: Project
KISS - Recordkeeping (RIN 3038-AE55)**

Dear Mr. Kirkpatrick:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Request for Information (“RFI”) issued by the Commodity Futures Trading Commission (“CFTC” or “Commission”) as a part of the Project KISS initiative.² SIFMA supports the Commission’s effort to review its rules, regulations, and practices and to identify those areas that can be simplified, thereby reducing burdens and costs.³ As further outlined below, certain recordkeeping requirements implemented pursuant to Title VII under the Dodd-Frank Act should be included in this review and changed accordingly.

We note that amending Rule 1.31 in May 2017 was an important first step in modernizing and simplifying the CFTC recordkeeping requirements. We believe, however, that additional changes could be made that would further simplify recordkeeping requirements without harming investors. We have outlined a summary of each suggestion below along with an appendix for your reference.

A. Voice Recording

In the wake of Dodd-Frank implementation, the CFTC adopted rules requiring swap dealers and major swap participants (“MSPs”) to retain voice recordings that lead to the execution of swap or related cash or forward transaction for a period of one year from the date of

¹ SIFMA represents these broker-dealers, banks and asset managers whose nearly one million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$20 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² Project KISS, 82 Fed. Reg. 21,494 (May 9, 2017).

³ See Press Release, available at: <http://www.cftc.gov/PressRoom/PressReleases/pr7555-17>.

creation.⁴ To comply with these rules, many firms implemented complex vendor systems for recording landlines and some mobile phones at great expense. SIFMA believes that the costs and many compliance challenges of this rule outweigh the benefits. Such challenges include privacy restrictions, data exporting, cross border transfer issues, and state and foreign legal requirements to notify all individuals on the call.

SIFMA recommends that the Commission issue no-action relief that clearly states that registered swap dealers and MSPs do not have an affirmative obligation to record telephone conversations; however, if voice communications are recorded pursuant to other U.S. rules or requirements, then Rule 23.202 retention requirements would apply.⁵ Such a standard would comply with the language in Section 4s(g)(1) of the Commodity Exchange Act (“CEA”) and would align with the Securities and Exchange Commission’s (“SEC”) voice recording retention requirements.⁶

B. Identifiability and Searchability

Commission rules require firms to maintain transaction records that are identifiable and searchable by transaction and counterparty.⁷ Firms continue to face compliance challenges with this rule, particularly with voice records. Although firms can use phone numbers to identify transaction counterparties, systems cannot process numbers that are blocked or shared.

SIFMA recommends that the Commission amend Rule 23.201(a)(1) by removing the “identifiable and searchable” requirement, which would harmonize part 23 with the recent amendments to Rule 1.31. The Commission would still be able to compel firms to produce information under the production requirements in Rule 1.31.

C. Retention

Commission regulations require firms to keep all records at their principal place of business for the life of the trade plus five years.⁸ These regulations create two compliance challenges for firms: (1) record retention duration; and (2) storage location.

1. Record Retention Duration

Firms are required to retain various records for different durations depending on the type of

⁴ 17 CFR §§ 1.35, 23.202(a), & 23.202(b).

⁶ 17 CFR § 240.17a-4(b)(4) (“Rule 17a-4(b)(4)”); *see also* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers, 79 Fed. Reg. 25,194, 25,214 (May 2, 2014), <https://www.gpo.gov/fdsys/pkg/FR-2014-05-02/pdf/2014-09108.pdf> (“[Though the SEC] has not previously interpreted the term *communications* to include telephonic communication...this proposed requirement...[would require a broker-dealer] to preserve for three years telephone calls that it chooses to record to the extent the calls are required to be maintained pursuant to section 15F(g)(1) of the Exchange Act.”) (emphasis in original) (citations omitted).

⁷ 17 CFR §§ 1.31, 23.201(a)(1) & 23.202(a)-(b).

⁸ 17 CFR §§ 23.203(a)(1) & 23.203(b).

record. For instance, records of any swap or related cash or forward transaction are retained for the life of the trade plus five years.⁹ In some instances, records are retained for 20 or more years due to the nature of the swap (*i.e.*, pre- and post-trade information). We note that, per the recent amendments to Rule 1.31, pre-execution trade records are now required to be retained for five years from the date of creation. We now urge the Commission to apply this retention period to other records for consistency.

SIFMA recommends the Commission limit the retention period to five years from the *creation of the record* with the following exceptions: (1) swap agreements (and any amendments, termination, or novations), which would continue to be retained for the life of the swap plus five years; and (2) voice communications, which would continue to have a one-year retention period from the date of creation.

2. Storage Location

CFTC Rule 23.203(a)(1) requires swap dealers and major swap participants to keep all records at the principal place of business of the swap dealer or a location designated as the principal place of business.¹⁰ Rule 1.31, however, allows for the electronic storage of other required records of the Commission so long as (1) records are stored in a system that ensures authenticity and reliability; and (2) records are readily available for inspection upon request.¹¹

SIFMA recommends that the Commission rescind the redundancy of Rule 23.203(a)(1) and allow for the electronic storage of records by swap dealers and major swap participants per Rule 1.31.

D. Pre-Execution Trade Information

Swap dealers and major swap participants are required to make and keep daily trading records of all swaps and related cash and forward transactions that it executes, including pre-execution trade information.¹² This rule requires that each record include all necessary information to allow the swap dealer or major swap participant to conduct a comprehensive and accurate trade reconstruction of each swap.¹³ The scope of the requirement is overly broad and potentially includes a wide range of information including emails, chats, instant messages, text messages, and voice files.

SIFMA recommends that the Commission issue clear guidance for trade reconstruction requirements for applicable swap or related cash or forward transactions. Firms should only be required to provide the following records (in each case, if applicable): (1) the acknowledgment; (2) the confirmation; (3) the master agreement; and (4) any amendments, terminations, or novations of the relevant transaction. SIFMA believes that these records are most relevant to trade reconstruction. Further, any executed confirmation should continue

⁹ 17 CFR § 1.31(b)(1).

¹⁰ 17 CFR § 23.203(a)(1)

¹¹ 17 CFR §§ 1.31(c)-(d).

¹² 17 § 23.202(a)(1).

¹³ *Id.*

to supersede any pre-trade communication under applicable law, and would allow firms to forego either resource-intensive, manual review of potentially thousands of emails, chats, instant messages, text messages, and voice files, *or* purchasing expensive third-party trade reconstruction software.

E. Related Cash and Forwards

CFTC Rule 23.202(b) extends the swap trading records requirements to related cash and forward transactions.¹⁴ The analogous CFTC Rule 1.35(a)(1)(iii) applies to records of commodity interest and related cash or forward transactions of a futures commission merchant, retail foreign exchange dealer, introducing broker, or member of a designated contract market or swap execution facility. In that rule, the CFTC clearly states that the requirement to keep oral pre-trade communications does not apply to oral communications that lead solely to the execution of a related cash or forward transaction.

SIFMA recommends that the Commission issue guidance clarifying that CFTC Rule 23.202(b)(1) does not apply to oral communications that lead solely to the execution of a related cash or forward transaction.

* * *

SIFMA strongly believes that simplifying these existing recordkeeping requirements will protect customers while giving firms greater flexibility and reducing the overall cost of compliance. If you have any questions or need any additional information, please contact me at 202-962-7385 or mmacgregor@sifma.org.

Sincerely,

/Melissa MacGregor/

Melissa MacGregor
Managing Director and Associate General Counsel

Attachment

cc: Hon. J. Christopher Giancarlo, Chair
Hon. Rostin Behnam, Commissioner
Hon. Susan Y. Bowen, Commissioner
Hon. Brian D. Quintenz, Commissioner
Matthew B. Kulkin, Director, Division of Swap Dealer & Intermediary Oversight

¹⁴ 17 CFR § 23.202(b).



Regulatory Requirement	CFTC Rule Reference	Rationale/Comments	Previous SIFMA Comments
Voice Recording	17 CFR §§ 1.35; 23.202(a); 23.202(b)	Issue no-action guidance clearly stating that this rule does not impose an affirmative obligation to record telephone conversations, but only to retain recordings required to be created by other U.S. rules and requirements. This change would reduce the challenge of recording mobile phones and complying with state and foreign notification requirements. Such a change would also align the CFTC rules with SEC recordkeeping requirements.	2012 NAL Request 2013 NAL Request
Identifiability and Searchability	17 CFR §§ 23.201(a)(1); 23.202(a) - (b)	Amend rule to eliminate the “identifiable and searchable” requirement. The current requirement to maintain transaction records that are identifiable and searchable by transaction and counterparty is technologically challenging to comply with. The covered records include full and complete swap transaction information, including all documents that originally contained such information, which is overly broad.	2012 NAL Request 2013 NAL Request
Record Retention Period	17 CFR §§ 1.31, 23.203(a)(1), & 23.203(b)	Amend rule to require all records to be retained for a period of 5 years from the creation of the record with the following exceptions: (1) swap agreements (and any amendments, terminations or novations thereof), which would continue to be retained for the life of the swap plus 5 years; (2) voice records, which would continue to be retained for one year from the date of creation.	2012 NAL Request
Record Retention Location	17 CFR §§ 1.31, 23.203(a)(1), & 23.203(b)	Amend rule to remove requirement to retain records at a “principal place of business.” This requirement and the recently amended Rule 1.31—which governs the location of all firm records—are redundant.	2012 NAL Request

Pre-Execution Trade Information	17 CFR § 23.202	Issue staff guidance allowing firms to meet the trade reconstruction requirement by producing the following records for a swap or related cash or forward transaction (in each case, if applicable): the acknowledgment, the confirmation, the master agreement, and any amendments, terminations or novations of the relevant transaction. These records are most relevant to trade reconstruction (<i>i.e.</i> , determining the specific agreed upon terms of a particular transaction). Bids, offers, pre-trade banter and the like may be relevant in the event of a dispute prior to the execution of a confirmation, but the executed confirmation will always supersede any pre-trade communication under applicable law. This interpretation would allow firms to avoid purchasing incredibly expensive, and at times imprecise, trade reconstruction software. Furthermore, the CFTC would still be able to request phone recordings or pre-trade emails, chats, and instant messages when relevant and necessary, as such information would remain subject to the Commission's recordkeeping and production requirements under Rule 1.31.	
Related Cash and Forward Transactions – Oral Communications	17 CFR § 23.202(b)	Clarify that 23.202(b)(1) does not include oral communications that lead solely to the execution of a related cash or forward transaction.	