

## §5.18

## 17 CFR Ch. I (4-1-16 Edition)

the retail foreign exchange dealer, futures commission merchant, introducing broker or any of their associated persons to effect the transaction. A transaction is “specifically authorized” if the customer or person designated by the customer to control the account specifies:

- (a) The precise retail forex transaction to be effected;
- (b) The exact amount of the foreign currency to be purchased or sold; and
- (c) In the case of an option, the identity of the foreign currency or contract that underlies the option.

### §5.18 Trading and operational standards.

(a) For purposes of this section:

(1) The term *retail forex counterparty* includes, as appropriate:

- (i) A retail foreign exchange dealer as defined in §5.1 of this part;
- (ii) A futures commission merchant as defined in section 1a(28) of the Act; and
- (iii) An affiliated person of a futures commission merchant as defined in §5.1 of this part.

(2) The term *related person* when used in reference to a retail forex counterparty means any general partner, officer, director, owner of more than ten percent of the equity interest, associated person or employee of the retail forex counterparty, and any relative or spouse of any of the foregoing persons, or any relative of such spouse, who shares the same home as any of the foregoing persons.

(b) Prior to engaging in a retail forex transaction, each retail forex counterparty shall, at a minimum, establish and enforce internal rules, procedures and controls to:

(1) Ensure, to the extent possible, that each order received from a retail forex customer which order is executable at or near the price that the retail forex counterparty has quoted to the customer is entered for execution before any order in any retail forex transaction for any proprietary account, any other account in which a related person of the retail forex counterparty has an interest, or any account for which such a related person may originate orders without the prior specific consent of the account owner (if such

related person has gained knowledge of the retail forex customer’s order prior to the transmission of an order for a proprietary account), an account in which such a related person has an interest, or an account in which such a related person may originate orders without the prior specific consent of the account owner; and

(2) Prevent related persons of forex counterparties from placing orders, directly or indirectly, with another person in a manner designed to circumvent the provisions of paragraph (b)(1) of this section;

(3) Fairly and objectively establish settlement prices for retail forex transactions; and

(4) Record and maintain essential information regarding customer orders and account activity, and to provide such information to customers upon request. Such information shall include:

(i) Transaction records for the customer’s account, including:

(A) The date and time each order is received by the retail forex counterparty;

(B) The price at which each order is placed, or, in the case of an option, the premium paid

(C) If the transaction was entered into by means of a trading platform, the price quoted on the trading platform when the order was placed, or, in the case of an option, the premium quoted;

(D) The customer account identification information;

(E) The currency pair;

(F) The size of the transaction;

(G) Whether the order was a buy or sell order;

(H) The type of order, if the order was not a market order;

(I) If a trading platform is used, the date and time the order is transmitted to the trading platform;

(J) If a trading platform is used, the date and time the order is executed;

(K) The size and price at which the order is executed, or in the case of an option, the amount of the premium paid for each option purchased, or the amount credited for each option sold; and

(L) For options, whether the option is a put or call, the strike price, and expiration date.

(ii) Account records that contain the following information:

(A) The funds in the account, net of any commissions and fees;

(B) The net profits and losses on open trades; and

(C) The funds in the account plus or minus the net profits and losses on open trades. (In the case of open option positions, the account balance should be adjusted for the net option value);

(iii) If a trading platform is used, daily logs showing each price change on the platform, the time of the change to the nearest second, and the trading volume at that time and price; and

(iv) Any method or algorithm used to determine the bid or asked price for any retail forex transaction or the prices at which customer orders are executed, including, but not limited to, any markups, fees, commissions or other items which affect the profitability or risk of loss of a retail forex customer's transaction.

(c) No retail forex counterparty shall disclose that an order of another person is being held by the retail forex counterparty, unless such disclosure is necessary to the effective execution of such order or is made at the request of an authorized representative of the Commission, or a futures association registered with the Commission pursuant to section 17 of the Act.

(d) No retail forex counterparty shall knowingly handle the account of any related person of another retail forex counterparty unless it:

(1) Receives written authorization from a person designated by such other retail forex counterparty with responsibility for the surveillance over such account pursuant to paragraph (b)(2) of this section;

(2) Prepares immediately upon receipt of an order for such account a written record of such order, including the account identification and order number, and records thereon to the nearest minute, by time-stamp or other timing device, the date and time the order is received; and

(3) Transmits on a regular basis to such other retail forex counterparty copies of all statements for such account and of all written records prepared upon the receipt of orders for

such account pursuant to paragraph (b)(2) of this section.

(e) No related person of a retail forex counterparty shall have an account, directly or indirectly, with another retail forex counterparty unless:

(1) It receives written authorization to maintain such an account from a person designated by the retail forex counterparty of which it is a related person with responsibility for the surveillance over such account pursuant to paragraph (b)(2) of this section; and

(2) Copies of all statements for such account and of all written records prepared by such other retail forex counterparty upon receipt of orders for such account pursuant to paragraph (d)(2) of this section are transmitted on a regular basis to the retail forex counterparty of which it is a related person.

(f) No retail forex counterparty shall:

(1) Enter into a retail forex transaction, to be executed pursuant to a market or limit order at a price that is not at or near the price at which other retail forex customers, during that same time period, have executed retail forex transactions with the retail forex counterparty; *Provided, however*, that this paragraph (f)(1) shall not prohibit such practice if done in accordance with the rules of a registered futures association, and of which such retail foreign exchange dealer, futures commission merchant or affiliated person of a futures commission merchant is a member;

(2) Adjust or alter prices for a retail forex transaction after the transaction has been confirmed to the retail forex customer; *Provided, however*, that this paragraph (f)(2) shall not prohibit such practice if in accordance with the rules of a registered futures association, and of which such retail foreign exchange dealer, futures commission merchant or affiliated person of a futures commission merchant is a member;

(3)(i) Provide a retail forex customer a new bid price for a retail forex transaction that is higher than its previous bid without providing a new asked price that is also higher than its previous asked price by a similar amount;

(ii) Provide a retail forex customer a new bid price for a retail forex transaction that is lower than its previous

bid without providing a new asked price that is also lower than its previous asked price by a similar amount; or

(4) Establish a new position for a retail forex customer (except one that offsets an existing position for that retail forex customer) where the retail forex counterparty holds outstanding orders of other retail forex customers for the same currency pair at a comparable price.

(g)(1) Each retail forex counterparty and each CPO, CTA and IB subject to this part 5 shall maintain a record of all communications received by such person concerning facts giving rise to possible violations of the Act, rules, regulations or orders thereunder, related to their retail forex business. The record shall contain the name of the complainant, if provided, the date of the communication, the agreement, contract or transaction, the substance of the communication, and the name of the person who received the communication.

(2) Each retail forex counterparty and each CPO, CTA and IB subject to this part 5 shall provide to the Division of Enforcement of the Commission, electronically, a copy of the record of each communication received pursuant to paragraph (g)(1) of this section. Such copy shall be provided to the Division of Enforcement of the Commission no later than 30 calendar days after the communication is received: *Provided, however*, that in the case of a communication concerning facts giving rise to possible fraud under the Act or Commission regulations, such copy shall be provided to the Division of Enforcement of the Commission within three business days after the communication is received.

(h) An introducing broker as defined in §5.1(f)(1) of this part, applicant for registration as an introducing broker as defined in §5.1(f)(1) of this part, or person succeeding to and continuing the business of another introducing broker as defined in §5.1(f)(1) of this part must comply with all provisions applicable to an introducing broker under this chapter; *Provided, however*, that an introducing broker operating pursuant to, or an applicant for registration as an introducing broker who

has filed concurrently with its application for registration, a guarantee agreement meeting the requirements of §1.10(j) of this chapter is not subject to the minimum capital and related financial reporting requirements of §§1.10, 1.12 and 1.17 of this chapter.

(i)(1) Each retail forex counterparty shall prepare and maintain on a quarterly basis (calendar quarter) a calculation of the percentage of nondiscretionary retail forex customer accounts open for any period of time during the quarter that were profitable, and the percentage of such accounts that were not profitable. In calculating whether a retail forex account was profitable or not profitable during the quarter, the FCM or RFED must compute the realized and unrealized gains and/or losses on all retail forex transactions carried in the retail forex account at any time during the quarter, and subtract all fees, commissions, and any other charges posted to the retail forex account during the quarter, and add any interest income and other income or rebates credited to the retail forex account during the quarter. All deposits and/or withdrawals of funds made by a retail forex customer during the quarter must be excluded from the computation of whether the retail forex account was profitable or not profitable during the quarter. Computations that result in a zero or negative number shall be considered a retail forex account that was not profitable. Computations that result in a positive number shall be considered a retail forex account that was profitable. RFEDs and FCMs shall maintain such calculations along with data supporting such calculations for five years in accordance with §1.31.

(2) In calculating its percentages of nondiscretionary retail forex customer accounts that were profitable or not profitable, the retail forex counterparty may only use those retail forex accounts, as defined in §5.1(i) of this part, that are nondiscretionary accounts; provided, that the retail forex account is not a proprietary account, as defined in paragraph (i)(3) of this section.

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(3) Proprietary account for this section means a retail forex account carried on the books of a retail foreign exchange dealer or a futures commission merchant for one of the following persons, or of which ten percent or more is owned by one of the following persons, or of which an aggregate of ten percent or more of which is owned by more than one of the following persons:

(i) Such retail foreign exchange dealer or futures commission merchant itself;

(ii) If the retail foreign exchange dealer or futures commission merchant is a partnership, a general partner in such partnership;

(iii) If the retail foreign exchange dealer or futures commission merchant is a limited partnership, a limited or special partner in such partnership whose duties include:

(A) The management of the partnership business or any part thereof,

(B) The handling of retail forex transactions of such partnership,

(C) The keeping of records pertaining to retail forex transactions, or

(D) The signing or co-signing of checks or drafts on behalf of such partnership;

(iv) If the retail foreign exchange dealer or futures commission merchant is a corporation or association, an officer, director or owner of ten percent or more of the capital stock, of such organization;

(v) An employee of such retail foreign exchange dealer or futures commission merchant whose duties include:

(A) The management of the business of such retail foreign exchange dealer or futures commission merchant or any part thereof,

(B) The handling of retail forex transactions of such retail foreign exchange dealer or futures commission merchant,

(C) The keeping of records pertaining to retail forex transactions of such retail foreign exchange dealer or futures commission merchant, or

(D) The signing or co-signing of checks or drafts on behalf of such retail foreign exchange dealer or futures commission merchant;

(vi) A spouse or minor dependent living in the same household of any of the foregoing persons;

(vii) A business affiliate that directly or indirectly controls such retail foreign exchange dealer or futures commission merchant; or

(viii) A business affiliate that, directly or indirectly is controlled by or is under common control with, such retail foreign exchange dealer or futures commission merchant.

(j) Each retail forex counterparty shall designate one or more principals to serve as a chief compliance officer(s). The chief compliance officer(s) shall certify to the Commission and a registered national futures association annually that the retail forex counterparty has in place processes to establish, maintain, review, modify and test policies and procedures reasonably designed to achieve compliance with the Act, rules, regulations and orders thereunder. The certification shall include a statement that the counterparty has in place compliance processes, and that the chief compliance officer(s) has apprised the chief executive officer of the compliance efforts to date and identify and address significant compliance problems and plans to address those problems.

[75 FR 55432, Sept. 10, 2010, as amended at 76 FR 56106, Sept. 12, 2011]

### § 5.19 Pending legal proceedings.

(a) Every retail foreign exchange dealer or futures commission merchant and each CPO, CTA or IB subject to this part 5 shall submit to the Commission copies of any dispositive or partially dispositive decision for which a notice of appeal has been filed, the notice of appeal and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the retail foreign exchange dealer, futures commission merchant, CPO, CTA or IB is a party or to which its property or assets is subject with respect to retail forex transactions.

(b) Every retail foreign exchange dealer or futures commission merchant and each CPO, CTA or IB subject to this part 5 shall submit to the Commission copies of any dispositive or partially dispositive decision concerning which a notice of appeal has been filed, the notice of appeal, and such further documents as the Commission may