

NIBA

National Introducing Brokers Association
55 West Monroe Street, Suite 3600
Chicago, Illinois 60603

312.977.0598

www.theniba.com

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David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

RE: CFTC Proposed Amendment to Regulation 1.35(a)

Dear Mr. Stawick:

I write on behalf of the National Introducing Brokers Association (NIBA). Founded in 1991, the NIBA represents Introducing Brokers (IBs), Commodity Trading Advisors (CTAs) and Associated Persons (APs) who are primarily engaged in the retail sector of the futures, options and forex business. NIBA, a non-profit association, has the support of ten major Futures Commission Merchants, and all U.S. Domestic Exchanges.

I write in regard to the Proposed Amendment to CFTC Regulation 1.35(a) (Reg. 1.35(a)) concerning the requirement that IBs record all oral communications that lead to the execution of transactions in a commodity interest or cash commodity. NIBA urges the commission to reject this amendment to Reg. 1.35(a).

NIBA has long been a supporter of the National Futures Association requirement that member firms with more than a certain percentage of APs who have been disciplined be required to record all telephone conversations between that member's APs and both existing and potential customers for a period of two years. We believe this rule acts as a deterrent to firms who may be tempted to hire APs with disciplinary issues because it imposes recordkeeping requirements and their attendant financial burdens on the hiring firm. This helps keep the 'bad apples' out of the industry. The proposed amendment to CFTC Reg. 1.35(a) effectively does away with the stigma and burden of the NFA requirement on the disciplined firms by imposing an overbroad burden on all IBs and APs, most of which run their businesses in accordance with the rules.

There are other significant reasons the proposed amendment to Reg. 1.35(a) should be rejected:

1. Most, if not all IBs, fall under the category of “small firms” as defined by the NASD. The proposed amendment contains no exemption for small IBs or small firms at all.
2. For most, if not all IBs, compliance with this amendment as proposed would force a very significant investment in very expensive technology. As one NIBA member pointed out:
“The initial investment in these types of technology is never the end of the issue. Ongoing upgrades and maintenance to these systems are additional costs which add up very quickly, and often.”
3. Communications between brokers and customers or potential customers while the broker is outside the office would be essentially shut off. For many IBs whose brokers trade for clients in overnight sessions while out of the office, this proposed amendment could essentially curtail that business.
4. This proposal does not meet the goal of customer protection the CFTC seeks when establishing regulations. It is naive to believe that an individual or firm who is willing to go outside the rules established by the Commission and the NFA will follow a rule that records their lack of compliance with those rules.
5. The explanatory comments concerning the application of this proposed amendment to Reg. 1.35(a) and CFTC Proposed Rule 23.202 are contradictory. Proposed rule 23.202(a)(1) does not establish an affirmative new requirement to create new recordings of all telephone conversations if a complete audit trail requirement can be met through other means such as electronic messaging or actual trading. But, the language of the proposed amendment to Reg. 1.35(a) does establish that affirmative new requirement. CFTC regulations should be consistent.
6. The NFA has already established and enforces regulation regarding oral communications for both disciplined and non-disciplined firms. Those requirements work well, and the NIBA supports the NFA regulations, policies and enforcement in this regard.

The National Introducing Brokers Association appreciates the Commission’s good intentions and commitment to the trading public. However, we urge the Commission to consider the comments of the National Futures Association and other industry commentators together with those of the NIBA, and to exempt Introducing Brokers entirely from this proposal.

Respectfully submitted,
Melinda H. Schramm, Chairman
Board of Directors
National Introducing Brokers Association
melinda@futuresrep.com
312.977.0598