

NIBA - The Association for Derivatives Professionals

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BY ELECTRONIC SUBMISSION

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581
September 28, 2017

Re: *CFTC Request for Public Input to Make Regulations(s) Simpler, Less Burdensome and Less Costly (Project KISS)*

Mr. Kirkpatrick:

The NIBA appreciates the opportunity to provide suggestions and comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") as it reviews existing rules and regulations with an eye toward possible reevaluation of certain of them. We support the review, and look forward to working with the Commission to applying the reviewed rules in a less burdensome, less costly manner which is simpler to understand and implement.

NIBA, established in 1991, is a membership association of registered derivatives professionals, primarily Introducing Brokers (IBs) and Commodity Trading Advisors (CTAs). Our mission has remained the same for over 26 years - to provide education to members in order that they can serve their customers better, stay in compliance and grow their businesses. We enjoy the support of 10 futures commission merchants (FCMs), as well as numerous trading facilities and industry service providers.

The NIBA Introducing Broker membership overwhelmingly requests a review and reevaluation of CFTC Reg. 1.35(a)(1) - Records of commodity interests and related cash or forward transactions, and supports the request with the following comments:

(1) Reg. 1.35(a)(1) and its exemption is based on faulty, incomplete information:

This rule appears to have been developed without any discussion with the Introducing Broker community as to its implementation, cost or benefit. NIBA has yet to talk to any IB registrant who was contacted by the CFTC when the rule was being drafted. The Association itself was not contacted although we submitted an opinion letter, and stood ready to assist the Commission.

Furthermore, even if the National Futures Association (NFA) was asked to provide data upon which the Commission based the rule, and particularly the exemption, NFA requires no financial filings from *Guaranteed* Introducing Brokers (GIBs). GIBs most generally comprise approximately at least one-half of the total IB registration class. It is reasonable to assume, that nearly 50% of the affected group was completely ignored by the Commission when this rule was written.

(2) The stated purpose of the rule has not been met:

When Reg. 1.35(a)(1) (most often referred to by NIBA members as “the taping rule”) was being drafted, then-Chairman Gensler stated the purpose was to make investigations more efficient by preserving critical evidence. In its original form, the rule was to be applied to swap dealers, successful IBs and cash grain buyers. But the final rule fails in both purpose and application.

This rule requires so much data to be preserved, that a complex and hugely time-consuming investigation of the data itself must be performed by the Commission before even beginning to follow the single transaction being investigated. The result will most often be that essentially 99% of the total information gathered will never be useful to the CFTC.

Moreover, both swap dealers and cash grain buyers have subsequently been exempted from the rule, leaving only the successful IB to comply. Most IBs already have best practice procedures in place to safeguard customer transactions, and guard against high-pressure sales, rendering Reg. 1.35(a)(1) entirely redundant and without any additional value to either the Commission or the public.

(3) Operational difficulty and cost of compliance is overly burdensome:

The difficulty of shifting through mounds of data to follow a specific conversation which may lead to a specific trade would seem to be the definition of a needle-in-a-haystack operation. Many NIBA members, especially those who service hedging clients in all markets -- agricultural, metals, financials and energies -- will have numerous conversations, often over a period of several months, to discuss strategies before a trade is ever placed. Given the 24-hour nature of the industry, the required recordings are capturing hours of phone calls, including private communications which must be regularly reviewed by the IB to ensure the technology is working properly and the record keeping requirements are being met. Moreover, significant amounts of both the IB’s and the audit team’s time is added to a CFTC or NFA audit, beginning with the pre-audit prep through the post-audit review.

IB members report that the initial cost of a service that is able to record all calls on all business lines is anywhere from \$10,000 to \$32,000, depending on the number of lines recorded and the sophistication of the system. NIBA members estimate the annual cost of maintenance of the system itself is between \$4,000 and \$7,200, which does not take into account any manual procedures required to be performed in order that an IB can quickly produce all calls which relate to a specific transaction in the event the firm is asked to produce those records during an audit or otherwise.

Obviously these costs are significant to any IB. Many IBs who must comply with Reg. 1.35(a)(1) support a network of branch offices in order to provide rural and other customers access to the marketplace. This rule is a highly unfair, punishment to any IB who falls under this rule simply because of the successful operation of her business.

(4) Reg. 1.35(a)(1) is duplicitous and no cost/benefit analysis has been performed:

The CFTC, in conjunction with the National Futures Association (NFA) already has rules in place to ensure that pre-trade conversations do not violate Commission rules, and that high-pressure sales practices are caught. NFA Rule 2-9, Enhanced Supervision, in effective since 2010, requires certain firms to record conversations with the public as a safeguard

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against violations of solicitation rules (and excess commission charges) by an IB and its Associated Persons (APs). The IB community views the enhanced supervision imposed by this rule as a clear detriment and, in fact, as a punishment, for bad behavior. CFTC rule 1.35(a)(1) does not add to the detriment factor of the NFA rule already in place -- it actually punishes the good behavior of successful IBs along with their violator-counterparts.

Furthermore, Futures Commission Merchants (FCMs) must retain the same records IBs retain with regard to customer transactions. Those records containing the evidence former Chairman Gensler might have been referring to, are easily found by contacting the IB's clearing FCM(s).

NIBA's understanding as of this writing, is that no cost/benefit analysis of this rule has ever been performed by the CFTC - not as a pre-implementation evaluation or as a post-implementation study.

(5) Cybersecurity concerns:

Cybersecurity is a top-priority of NIBA IB members. This rule actually creates another repository for information which is potentially available to hackers. Under what circumstances will the CFTC staff recommend an enforcement action where the IB has implemented procedures compliant with NFA rules? Although the actual expense of replacing the system and the information might be measured in dollars and cents, the cost of rehabilitating the lost customer relationship, including restoring his confidence in the marketplace, is immeasurable.

Summary and suggestions:

CFTC Reg. 1.35(a)(1) - Records of commodity interest and related cash or forward transactions, unfairly punishes the most successful Introducing Brokers. It is burdensome, difficult and costly to implement -- all the same areas the Commission now wishes to reevaluate, in addition to exposing a customer's information to cybersecurity concerns while adding no protections for that information or to participants in the normal course of their business in the marketplace.

NIBA strongly recommends that all IBs be exempted from the rule because, among the other above reasons: (a) the \$5 million dollar exemption requirement was imposed by the Commission without proper investigation, and is of little relief to the registration class resulting in an unfair regulation on its face; (b) records of IB's customer transactions are readily available from their clearing FCMs, making the rule duplicitous and unnecessary; and, (c) no analysis has been performed by the Commission so the effectiveness of the rule cannot be evaluated with cost/benefit review in mind.

NIBA thanks the Commission for the opportunity to submit these comments and remains available for further discussions regarding the above issues, and all other issues affecting the professional derivatives community.

Respectfully Submitted,
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