

PART 5—OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS

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§ 5.1 Definitions.

(a) *Affiliated person of a futures commission merchant* means a person described in section 2(c)(2)(B)(i)(II)(cc)(BB) of the Act;

(b) *Aggregate retail forex assets* means an amount of liquid assets held in accordance with § 5.8 of this part;

(c) *Associated person of an affiliated person of a futures commission merchant* means any natural person associated with an affiliated person of a futures commission merchant as a partner, officer or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(1) The solicitation or acceptance of retail forex customers' orders (other than in a clerical capacity); or

(2) The supervision of any person or persons so engaged;

(d)(1) *Commodity pool operator*, for purposes of this part, means any person who operates or solicits funds, securities, or property for a pooled investment vehicle that is not an eligible contract participant as defined in section 1a(18) of the Act, and that engages in retail forex transactions;

(2) *Associated person of a commodity pool operator*, for purposes of this part, means any natural person associated with a commodity pool operator as defined in paragraph (d)(1) of this section as a partner, officer, employee, consultant or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation of funds, securities, or property for a participation in a pooled investment vehicle; or

(ii) The supervision of any person or persons so engaged;

(e)(1) *Commodity trading advisor*, for purposes of this part, means any person who exercises discretionary trading authority or obtains written authorization to exercise discretionary trading authority over any account for or on behalf of any person that is not an eligible contract participant as defined in section 1a(18) of the Act, in connection with retail forex transactions;

(2) *Associated person of a commodity trading advisor*, for purposes of this part, means any natural person associated with a commodity trading advisor

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as defined in paragraph (e)(1) of this section as a partner, officer, employee, consultant or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation of a client's or prospective client's discretionary account; or

(ii) The supervision of any person or persons so engaged;

(f)(1) *Introducing broker*, for purposes of this part, means any person who solicits or accepts orders from a customer that is not an eligible contract participant as defined in section 1a(18) of the Act, in connection with retail forex transactions;

(2) *Associated person of an introducing broker*, for purposes of this part, means any natural person associated with an introducing broker as defined in paragraph (g)(1) of this section as a partner, officer, employee, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation or acceptance of retail forex customers' orders (other than in a clerical capacity); or

(ii) The supervision of any person or persons so engaged;

(g) *Primarily or substantially* means, when used to describe the extent of a futures commission merchant's engagement in the activities described in section 1a(28)(A)(i)(I)(aa)(AA) of the Act and section 1a(28)(A)(i)(II) of the Act insofar as that section references the activities described in section 1a(28)(A)(i)(I)(aa)(AA), that:

(1) Such activities account for more than fifty percent of the futures commission merchant's gross revenues, computed in accordance with generally accepted accounting principles, on an annual basis;

(2) The futures commission merchant receives gross revenues, computed in accordance with generally accepted accounting principles, from such activities in excess of \$500,000 in any twelve month period; or

(3) The futures commission merchant is a clearing member of a registered derivatives clearing organization.

(h)(1) *Retail foreign exchange dealer* means any person that is, or that offers to be, the counterparty to a retail

forex transaction, except for a person described in item (aa), (bb), (cc)(AA) or (dd) of section 2(c)(2)(B)(i)(II) of the Act;

(2) *Associated person of a retail foreign exchange dealer* means any natural person associated with a retail foreign exchange dealer as defined in paragraph (i)(1) of this section as a partner, officer or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves:

(i) The solicitation or acceptance of retail forex customers' orders (other than in a clerical capacity); or

(ii) The supervision of any person or persons so engaged;

(i) *Retail forex account* means the account of a person who is not an eligible contract participant as defined in section 1a(18) of the Act, established with a retail foreign exchange dealer or a futures commission merchant, in which account retail forex transactions (including options on contracts for the purchase or sale of foreign currency) with such retail foreign exchange dealer or futures commission merchant as counterparty are undertaken, or which account is established in order to enter into such transactions.

(j) *Retail forex account agreement* means the contractual agreement between a futures commission merchant or retail foreign exchange dealer and any person who is not an eligible contract participant as defined in section 1a(18) of the Act, which agreement contains the terms governing the person's retail forex account with such futures commission merchant or retail foreign exchange dealer.

(k) *Retail forex customer* means a person, other than an eligible contract participant as defined in section 1a(18) of the Act, acting on its own behalf and trading in any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act.

(l) *Retail forex obligation* means the net credit balance at a retail foreign exchange dealer or futures commission merchant that would be obtained by combining all money, securities and property deposited by a retail forex customer into a retail forex account or accounts, adjusted for the realized and

unrealized net profit or loss, if any, accruing on the open trades, contracts or transactions in the retail forex account or accounts, without including any retail forex customers' accounts that contain negative net liquidating balances.

(m) *Retail forex transaction* means any account, agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the Act. A retail forex transaction does not include an account, agreement, contract or transaction in foreign currency that is a contract of sale of a commodity for future delivery (or an option thereon) that is executed, traded on or otherwise subject to the rules of a contract market designated pursuant to section 5(a) of the Act.

[75 FR 55432, Sept. 10, 2010, as amended at 77 FR 66332, Nov. 2, 2012]

§ 5.2 Prohibited transactions.

(a) *Scope.* The provisions of this section shall be applicable to any retail forex transaction.

(b) *Fraudulent conduct prohibited.* It shall be unlawful for any person, by use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, in or in connection with any retail forex transaction:

(1) To cheat or defraud or attempt to cheat or defraud any person;

(2) Willfully to make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or

(3) Willfully to deceive or attempt to deceive any person by any means whatsoever.

(c) *Acting as counterparty and exercising discretion prohibited.* (1) No person who acts as the counterparty for any retail forex transaction may do so for an account for which the person or any affiliate of the person is authorized (by contract, power of attorney or otherwise) to cause transactions to be effected without the client's specific authorization.

(2) For purposes of this paragraph (c), an "affiliate" of a person means a person controlling, controlled by or under common control with, the first person.

§ 5.3 Registration of persons engaged in retail forex transactions.

(a) Subject to paragraph (b) of this section, each of the following is subject to the registration provisions under the Act and to part 3 of this chapter:

(1)(i) Any affiliated person of a futures commission merchant, as defined in § 5.1(a) of this part, which affiliated person:

(A) Solicits or accepts orders from any person that is not an eligible contract participant in connection with any retail forex transaction; or

(B) Accepts money, securities, or property (or extends credit in lieu thereof) in connection with such solicitation or acceptance of orders in order to engage in any retail forex transaction, is required to register as a retail foreign exchange dealer; and

(ii) Any associated person of an affiliated person of a futures commission merchant, as defined in § 5.1(c) of this part, is required to register as an associated person of an affiliated person of a futures commission merchant.

(2)(i) Any commodity pool operator, as defined in § 5.1(d)(1) of this part, is required to register as a commodity pool operator;

(ii) Any associated person of a commodity pool operator, as defined in § 5.1(d)(2) of this part, is required to register as an associated person of a commodity pool operator;

(3)(i) Any commodity trading advisor, as defined in § 5.1(e)(1) of this part, is required to register as a commodity trading advisor;

(ii) Any associated person of a commodity trading advisor, as defined in § 5.1(e)(2) of this part, is required to register as an associated person of a commodity trading advisor;

(4)(i) Any person registered as a futures commission merchant:

(A) That is not primarily or substantially engaged in the business activities described in section 1a(28)(A)(i)(I)(aa)(AA) of the Act and section 1a(28)(A)(i)(II) of the Act insofar as that section references the activities described in section 1a(28)(A)(i)(I)(aa)(AA);

(B) That solicits or accepts orders from any person that is not an eligible contract participant in connection with any retail forex transaction; and

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(C) That accepts money, securities, or property (or extends credit in lieu thereof) in connection with such solicitation or acceptance of orders in order to engage in retail forex transactions, is required to register as a retail foreign exchange dealer;

(ii) Any associated person of a futures commission merchant described in paragraph (a)(4)(i) of this section is required to register as an associated person of a futures commission merchant;

(5)(i) Any introducing broker, as defined in §5.1(f)(1) of this part, is required to register as an introducing broker;

(ii) Any associated person of an introducing broker, as defined in §5.1(f)(2) of this part, is required to register as an associated person of an introducing broker;

(6)(i) Any retail foreign exchange dealer, as defined in §5.1(h)(1) of this part is required to register as a retail foreign exchange dealer;

(ii) Any associated person of a retail foreign exchange dealer, as defined in §5.1(h)(2) of this part, is required to register as an associated person of a retail foreign exchange dealer;

(b) Any person described in paragraph (a) of this section that is already registered in the required capacity specified in paragraph (a) is not required under this section to register twice in the same capacity; Provided, however, that a person already registered as an associated person of one class of registrant may also be required to register as an associated person of another class of registrant in order to comply with this section.

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

§5.4 Applicability of part 4 of this chapter to commodity pool operators and commodity trading advisors.

Part 4 of this chapter applies to any person required pursuant to the provisions of this part 5 to register as a commodity pool operator or as a commodity trading advisor. Failure by any such person to comply with the requirements of part 4 will constitute a violation of this section and the relevant section of part 4.

§5.5 Distribution of “Risk Disclosure Statement” by retail foreign exchange dealers, futures commission merchants and introducing brokers regarding retail forex transactions.

(a) Except as provided in §5.23 of this part, no retail foreign exchange dealer, futures commission merchant, or in the case of an introduced account no introducing broker, may open an account that will engage in retail forex transactions for a retail forex customer, unless the retail foreign exchange dealer, futures commission merchant or introducing broker first:

(1)(i) In the case of a retail foreign exchange dealer or a person required to register as an introducing broker solely by reason of this part, furnishes the retail forex customer with a separate written disclosure statement containing only the language set forth in paragraph (b) of this section and the disclosure required by paragraph (e) of this section;

(ii) In the case of a futures commission merchant or a person required to register as an introducing broker because it engages in the activities described in §1.3 of this chapter, furnishes the retail forex customer with a separate written disclosure statement containing only the language set forth in paragraph (b) of this section and the disclosure required by paragraph (e) of this section; *Provided, however*, that the disclosure statement may be attached to other documents as the initial page(s) of such documents and as the only material on such page(s); and

(2) Receives from the retail forex customer an acknowledgment signed and dated by the retail forex customer that he received and understood the disclosure statement.

(b) The language set forth in the written disclosure statement required by paragraph (a) of this section shall be as follows:

RISK DISCLOSURE STATEMENT

OFF-EXCHANGE FOREIGN CURRENCY
TRANSACTIONS INVOLVE THE LEVER-
AGED TRADING OF CONTRACTS DENOMI-
NATED IN FOREIGN CURRENCY CON-
DUCTED WITH A FUTURES COMMISSION
MERCHANT OR A RETAIL FOREIGN EX-
CHANGE DEALER AS YOUR

Commodity Futures Trading Commission

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COUNTERPARTY. BECAUSE OF THE LEVERAGE AND THE OTHER RISKS DISCLOSED HERE, YOU CAN RAPIDLY LOSE ALL OF THE FUNDS YOU DEPOSIT FOR SUCH TRADING AND YOU MAY LOSE MORE THAN YOU DEPOSIT.

YOU SHOULD BE AWARE OF AND CAREFULLY CONSIDER THE FOLLOWING POINTS BEFORE DETERMINING WHETHER SUCH TRADING IS APPROPRIATE FOR YOU.

(1) TRADING IS NOT ON A REGULATED MARKET OR EXCHANGE—YOUR DEALER IS YOUR TRADING PARTNER WHICH IS A DIRECT CONFLICT OF INTEREST. BEFORE YOU ENGAGE IN ANY RETAIL FOREIGN EXCHANGE TRADING, YOU SHOULD CONFIRM THE REGISTRATION STATUS OF YOUR COUNTERPARTY.

The off-exchange foreign currency trading you are entering into is not conducted on an interbank market, nor is it conducted on a futures exchange subject to regulation as a designated contract market by the Commodity Futures Trading Commission. The foreign currency trades you transact are trades with the futures commission merchant or retail foreign exchange dealer as your counterparty. WHEN YOU SELL, THE DEALER IS THE BUYER. WHEN YOU BUY, THE DEALER IS THE SELLER. As a result, when you lose money trading, your dealer is making money on such trades, in addition to any fees, commissions, or spreads the dealer may charge.

(2) AN ELECTRONIC TRADING PLATFORM FOR RETAIL FOREIGN CURRENCY TRANSACTIONS IS NOT AN EXCHANGE. IT IS AN ELECTRONIC CONNECTION FOR ACCESSING YOUR DEALER. THE TERMS OF AVAILABILITY OF SUCH A PLATFORM ARE GOVERNED ONLY BY YOUR CONTRACT WITH YOUR DEALER.

Any trading platform that you may use to enter off-exchange foreign currency transactions is only connected to your futures commission merchant or retail foreign exchange dealer. You are accessing that trading platform only to transact with your dealer. You are not trading with any other entities or customers of the dealer by accessing such platform. The availability and operation of any such platform, including the consequences of the unavailability of the trading platform for any reason, is governed only by the terms of your account agreement with the dealer.

(3) YOUR DEPOSITS WITH THE DEALER HAVE NO REGULATORY PROTECTIONS.

All of your rights associated with your retail forex trading, including the manner and denomination of any payments made to you, are governed by the contract terms established in your account agreement with the futures commission merchant or retail foreign exchange dealer. Funds deposited by you with a futures commission merchant or

retail foreign exchange dealer for trading off-exchange foreign currency transactions are not subject to the customer funds protections provided to customers trading on a contract market that is designated by the Commodity Futures Trading Commission. Your dealer may commingle your funds with its own operating funds or use them for other purposes. In the event your dealer becomes bankrupt, any funds the dealer is holding for you in addition to any amounts owed to you resulting from trading, whether or not any assets are maintained in separate deposit accounts by the dealer, may be treated as an unsecured creditor's claim.

(4) YOU ARE LIMITED TO YOUR DEALER TO OFFSET OR LIQUIDATE ANY TRADING POSITIONS SINCE THE TRANSACTIONS ARE NOT MADE ON AN EXCHANGE OR MARKET, AND YOUR DEALER MAY SET ITS OWN PRICES.

Your ability to close your transactions or offset positions is limited to what your dealer will offer to you, as there is no other market for these transactions. Your dealer may offer any prices it wishes, and it may offer prices derived from outside sources or not in its discretion. Your dealer may establish its prices by offering spreads from third party prices, but it is under no obligation to do so or to continue to do so. Your dealer may offer different prices to different customers at any point in time on its own terms. The terms of your account agreement alone govern the obligations your dealer has to you to offer prices and offer offset or liquidating transactions in your account and make any payments to you. The prices offered by your dealer may or may not reflect prices available elsewhere at any exchange, interbank, or other market for foreign currency.

(5) PAID SOLICITORS MAY HAVE UNDISCLOSED CONFLICTS

The futures commission merchant or retail foreign exchange dealer may compensate introducing brokers for introducing your account in ways which are not disclosed to you. Such paid solicitors are not required to have, and may not have, any special expertise in trading, and may have conflicts of interest based on the method by which they are compensated. Solicitors working on behalf of futures commission merchants and retail foreign exchange dealers are required to register. You should confirm that they are, in fact registered. You should thoroughly investigate the manner in which all such solicitors are compensated and be very cautious in granting any person or entity authority to trade on your behalf. You should always consider obtaining dated written confirmation of any information you are relying on from your dealer or a solicitor in making any trading or account decisions.

FINALLY, YOU SHOULD THOROUGHLY INVESTIGATE ANY STATEMENTS BY

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ANY DEALERS OR SALES REPRESENTATIVES WHICH MINIMIZE THE IMPORTANCE OF, OR CONTRADICT, ANY OF THE TERMS OF THIS RISK DISCLOSURE. SUCH STATEMENTS MAY INDICATE POTENTIAL SALES FRAUD.

THIS BRIEF STATEMENT CANNOT, OF COURSE, DISCLOSE ALL THE RISKS AND OTHER ASPECTS OF TRADING OFF-EXCHANGE FOREIGN CURRENCY TRANSACTIONS WITH A FUTURES COMMISSION MERCHANT OR RETAIL FOREIGN EXCHANGE DEALER.

I hereby acknowledge that I have received and understood this risk disclosure statement.

Date

Signature of Customer

(c) The acknowledgment required by paragraph (a) of this section must be retained by the retail foreign exchange dealer, futures commission merchant or introducing broker in accordance with §1.31 of this chapter.

(d) This section does not relieve a retail foreign exchange dealer, futures commission merchant or introducing broker from any other disclosure obligation it may have under applicable law.

(e)(1) Immediately following the language set forth in paragraph (b) of this section, the statement required by paragraph (a) of this section shall include, for each of the most recent four calendar quarters during which the counterparty maintained retail forex customer accounts:

(i) The total number of non discretionary retail forex customer accounts maintained by the retail foreign exchange dealer or futures commission merchant;

(ii) The percentage of such accounts that were profitable during the quarter; and

(iii) The percentage of such accounts that were not profitable during the quarter.

(2) Identification of retail forex customer accounts for the purpose of this disclosure and the calculation in determining whether each such account was profitable or not profitable must be made in accordance with §5.18(i) of this part. Such statement of profitable trades shall include the following legend: PAST PERFORMANCE IS NOT

NECESSARILY INDICATIVE OF FUTURE RESULTS. Each retail foreign exchange dealer or futures commission merchant shall provide, upon request, to any retail forex customer or prospective retail forex customer the total number of non discretionary retail forex accounts maintained by such foreign exchange dealer or futures commission merchant, the percentage of such accounts that were profitable and the percentage of such accounts that were not profitable, calculated in accordance with §5.18(i) of this part, for each calendar quarter during the most recent five year period during which such retail foreign exchange dealer or futures commission merchant maintained non discretionary retail forex customer accounts.

[75 FR 55432, Sept. 10, 2010, as amended at 83 FR 7996, Feb. 23, 2018]

§5.6 Maintenance of minimum financial requirements by retail foreign exchange dealers and futures commission merchants offering or engaging in retail forex transactions.

(a) Each futures commission merchant offering or engaging in retail forex transactions or who files an application for registration as a futures commission merchant that will offer or engage in retail forex transactions and each person registered as a retail foreign exchange dealer or who files an application for registration as a retail foreign exchange dealer, who knows or should have known that its adjusted net capital at any time is less than the minimum required by §5.7 of this part or by the capital rule of a registered futures association of which it is a member, must:

(1) Give telephonic notice, to be confirmed in writing by facsimile notice, that the applicant's or registrant's adjusted net capital is less than that required by §5.7 of this part. The notice must be given immediately after the applicant or registrant knows or should know that its adjusted net capital is less than that required by any of the aforesaid rules to which the applicant or registrant is subject; and

(2) Provide together with such notice documentation in such form as necessary to adequately reflect the applicant's or registrant's capital condition

as of any date such person's adjusted net capital is less than the minimum required. The applicant or registrant must provide similar documentation for other days as the Commission may request.

(b) Each applicant or registrant, who knows or should have known that its adjusted net capital at any time is less than the greatest of:

(1) \$22,000,000;

(2) 110 percent of the amount required by § 5.7(a)(1)(i)(B) of this part; or

(3) 110 percent of the amount of adjusted net capital required by a registered futures association of which the futures commission merchant or retail foreign exchange dealer is a member, must file written notice to that effect within 24 hours of such event.

(c) If an applicant or registrant at any time fails to make or keep current the books and records required by these regulations, such applicant or registrant must, on the same day such event occurs, provide facsimile notice of such fact, specifying the books and records which have not been made or which are not current, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(d) Whenever any applicant or registrant discovers or is notified by an independent public accountant, pursuant to § 1.16(e)(2) of this chapter, of the existence of any material inadequacy, as specified in § 1.16(d)(2) of this chapter, such applicant or registrant must give facsimile notice of such material inadequacy within 24 hours, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the material inadequacy.

(e) Whenever any self-regulatory organization learns that a member registrant has failed to file a notice or written report as required by § 5.6 of this part, that self-regulatory organization must immediately report this failure by telephone, confirmed in writing immediately by facsimile notice, as provided in paragraph (h) of this section.

(f) A retail foreign exchange dealer or a futures commission merchant offering or engaging in retail forex trans-

actions shall provide written notice of a substantial reduction in capital as compared to that last reported in a financial report filed with the Commission pursuant to § 5.12 of this part. This notice shall be provided as follows:

(1) If any event or series of events, including any withdrawal, advance, loan or loss cause, on a net basis, a reduction in net capital of 20 percent or more, notice must be provided within two business days of the event or series of events causing the reduction; and

(2) If the equity capital of the retail foreign exchange dealer or futures commission merchant offering or engaging in retail forex transactions or the equity capital of a subsidiary or affiliate of the retail foreign exchange dealer or futures commission merchant offering or engaging in retail forex transactions consolidated pursuant to § 1.17(f) of this chapter would be withdrawn by action of a stockholder or a partner or a limited liability company member or by redemption or repurchase of shares of stock by any of the consolidated entities or through the payment of dividends or any similar distribution, or an unsecured advance or loan would be made to a stockholder, partner, sole proprietor, limited liability company member, employee or affiliate, such that the withdrawal, advance or loan would cause, on a net basis, a reduction in excess adjusted net capital of 30 percent or more, notice must be provided at least two business days prior to the withdrawal, advance or loan that would cause the reduction: Provided, however, That the provisions of paragraphs (f)(1) and (f)(2) of this section do not apply to any retail foreign exchange transaction in the ordinary course of business between a retail foreign exchange dealer and any affiliate where the retail foreign exchange dealer makes payment to or on behalf of such affiliate for such transaction and then receives payment from such affiliate for such transaction within two business days from the date of the transaction.

(3) Upon receipt of such notice from a futures commission merchant offering or engaging in retail forex transactions or a retail foreign exchange dealer, the Director of the Division of Swap Dealer

and Intermediary Oversight or the Director's designee may require that the futures commission merchant offering or engaging in retail forex transactions or retail foreign exchange dealer provide or cause a Material Affiliated Person (as that term is defined in §5.10(a)(2) of this part) to provide, within three business days from the date of the request or such shorter period as the Director or designee may specify, such other information as the Director or designee determines to be necessary based upon market conditions, reports provided by the retail foreign exchange dealer or futures commission merchant offering or engaging in retail forex transactions, or other available information.

(g) Whenever a person registered as a futures commission merchant offering or engaging in retail forex transactions or a retail foreign exchange dealer knows or should know that the total amount of its retail forex obligation exceeds the amount of the aggregate retail forex assets the registrant maintains in accordance with the provisions of §5.8 of this chapter, the registrant must report such deficiency immediately by telephone notice, confirmed immediately in writing by facsimile notice.

(h) Every notice and written report required to be given or filed with the Commission by this section by an applicant must be filed with the regional office of the Commission with jurisdiction over the state in which the applicant's principal place of business is located, and with the National Futures Association. Every notice and written report required to be given or filed with the Commission by this section by a registrant or self-regulatory organization must be filed with the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located, and with the registrant's designated self-regulatory organization. In addition, every notice and written report required to be given by this section must also be filed with the Chief Accountant of the Division of Swap Dealer and Intermediary Oversight at the Commission's principal office in Washington, DC.

(i) In lieu of filing paper copies with the Commission, all filings or other notices prepared by a futures commission merchant or retail foreign exchange dealer pursuant to this section may be submitted to the Commission in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission, if the futures commission merchant, retail foreign exchange dealer or a designated self-regulatory organization has provided the Commission with the means necessary to read and to process the information contained in such report. Any such electronic submission must clearly indicate the registrant or applicant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer.

[75 FR 55432, Sept. 10, 2010, as amended at 78 FR 22419, Apr. 16, 2013]

§5.7 Minimum financial requirements for retail foreign exchange dealers and futures commission merchants offering or engaging in retail forex transactions.

(a)(1)(i) Each futures commission merchant offering or engaging in retail forex transactions and each retail foreign exchange dealer must maintain adjusted net capital equal to or in excess of the greatest of:

- (A) \$20,000,000;
- (B) \$20,000,000 plus five percent of the futures commission merchant's or retail foreign exchange dealer's total retail forex obligation in excess of \$10,000,000;
- (C) any amount required under §1.17 of this chapter, as applicable; or
- (D) the amount of adjusted net capital required by a registered futures association of which the futures commission merchant or retail foreign exchange dealer is a member.

(ii) Section 1.17 of this chapter shall apply to retail foreign exchange dealers as if such retail foreign exchange dealers were futures commission merchants, or as applicable, applicants or registrants, as stated in §1.17 for the

purpose of determining the adjusted net capital under this section. For the purpose of applying this section, “applicant” or “registrant” shall include retail foreign exchange dealers and futures commission merchants offering or engaging in retail forex transactions and applicants therefore.

(2) No person applying for registration as a retail foreign exchange dealer or a futures commission merchant that will engage in retail forex transactions shall be so registered unless such person affirmatively demonstrates to the satisfaction of a registered futures association that it complies with the financial requirements of this section.

(3) Each registrant must be in compliance with this section at all times and must be able to demonstrate such compliance to the satisfaction of the Commission or the registrant’s designated self-regulatory organization.

(4) A registrant who is not in compliance with this section, or is unable to demonstrate such compliance as required by paragraph (a)(3) of this section, shall, as directed by and under the supervision of the Commission or the registrant’s designated self-regulatory organization, either liquidate or transfer all retail forex accounts (including the novation of retail forex contracts) and refund or transfer all funds associated with such retail forex accounts and immediately cease offering or engaging in retail forex transactions until such time as the firm is able to demonstrate to the Commission or the registrant’s designated self-regulatory organization such compliance: *Provided, however,* That if such registrant immediately demonstrates to the satisfaction of the Commission or the registrant’s designated self-regulatory organization the ability to achieve compliance, the Commission or the registrant’s designated self-regulatory organization may in its discretion allow such registrant up to a maximum of 10 business days, or such additional time as determined by the Commission, in which to achieve compliance without having to liquidate positions or transfer accounts and cease doing business as required above. Nothing in this paragraph (a)(4) shall be construed as preventing the Commission or the registrant’s designated self-

regulatory organization from taking action against a registrant for non-compliance with any of the provisions of this section.

(b) For the purposes of this section:

(1) Where the applicant or registrant has an asset or liability which is defined in Securities Exchange Act Rule 15c3-1 (§240.15c3-1 of this title) the inclusion or exclusion of all or part of such asset or liability for the computation of adjusted net capital shall be in accordance with §240.15c3-1 of this title, unless specifically stated otherwise in this section or in §1.17 of this chapter.

(2) The adjusted net capital of an applicant or registrant for the purpose of this section shall be determined by the application of §1.17 pursuant to paragraph (a)(1)(ii) of this section, with the following additions:

(i) All positions in retail forex accounts and other financial positions and instruments of the applicant or registrant must be marked to market and adjusted daily by referencing to current market prices or rates of exchange.

(ii) Current assets must exclude any retail forex account which liquidates to a deficit or contains a debit ledger balance only and is not secured in accordance with §1.17(c)(3).

(iii) Current assets must exclude any unsecured receivable accrued from any over-the-counter transaction in foreign currency, options on foreign currency or options on contracts for the purchase or sale of foreign currency, or arising from the deposit of collateral or compensating balances with respect to such transactions, unless such unsecured receivable is from a person who is an eligible contract participant that also is:

(A) A bank or trust company regulated by a United States banking regulator;

(B) A broker-dealer registered with the Securities and Exchange Commission and a member of the Financial Industry Regulatory Authority;

(C) A futures commission merchant registered with the Commission and a member of the National Futures Association;

(D) A retail foreign exchange dealer registered with the Commission and a

member of the National Futures Association;

(E) An entity regulated as a foreign equivalent of any of the persons listed in paragraphs (b)(2)(iii)(A) through (D) of this section, if such person is regulated in a money center country as defined in §1.49 of this chapter and recognized by the futures commission merchant's or retail foreign exchange dealer's designated self-regulatory organization as a foreign equivalent;

(F) Any other entity approved by the futures commission merchant's or retail foreign exchange dealer's designated self-regulatory organization.

(iv) The value attributed to any retail forex transaction that is an option shall be the difference between the option's exercise value or striking value and the market value of the underlying. In the case of a call, if the market value of the underlying is less than the exercise value or striking value of such call, it shall be given no value; and, in the case of a put, if the market value of the underlying is more than the exercise value or striking value of the put, it shall be given no value.

(v)(A) In computing adjusted net capital, the capital deductions set forth in §1.17(c)(5)(ii) of this chapter shall apply to retail forex transactions other than options. The capital deductions which apply are six percent for net positions in Euros, British pounds, Canadian dollars, Japanese yen, or Swiss francs and 20 percent for net positions in all other foreign currencies, *Provided, however*, That there shall be no capital deductions for retail forex transactions covered (as defined in §1.17(j) of this chapter) by the applicant or registrant by open futures contracts to the extent such futures contracts are not otherwise designated as cover for any other net capital purposes. For purposes of this paragraph (b)(2)(v)(A), such retail forex transactions shall be treated as if they were inventory and cover were therefore applicable. A retail foreign exchange dealer or futures commission merchant may not use an affiliate (unless approved by the firm's designated self-regulatory organization) or any person that is considered unregulated under the rules of the firm's designated self-regulatory organization to cover

its currency positions for purposes of this section.

(B) In computing adjusted net capital, the capital deductions set forth in §1.17(c)(5)(vi) of this chapter shall apply to all retail forex transactions that are options.

(C) For the purpose of applying capital deductions on open proprietary futures positions under §1.17(c)(5)(x) of this chapter, net or individual positions in retail forex transactions shall not constitute cover under §1.17(j) for the purpose of applying such charges.

(c) An applicant or registrant must prepare, and keep current, ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting the applicant's or registrant's asset, liability, income, expense and capital accounts, and in which (except as otherwise permitted in writing by the Commission) all the applicant's or registrant's asset, liability and capital accounts are classified into the account classification subdivisions specified on Form 1-FR-FCM. Each applicant or registrant shall prepare and keep current such records.

(d) An applicant or registrant must make and keep as a record in accordance with §5.14 of this part formal computations of its adjusted net capital and of its minimum financial requirements pursuant to this section as of the close of business each month and on other such dates called for by the Commission, the National Futures Association, or another self-regulatory organization of which the firm is a member. Such computations must be completed and made available for inspection by any representative of the Commission, the National Futures Association, a self-regulatory organization of which the firm is a member, or the United States Department of Justice commencing the first month-end after the date the application for registration is filed.

§5.8 Aggregate retail forex assets.

(a) Each retail foreign exchange dealer and futures commission merchant offering or engaging in retail forex transactions shall calculate its total retail forex obligation and shall at all times hold assets solely of the type

permissible under § 1.25 of this chapter equal to or in excess of the total retail forex obligation at one or more qualifying institutions in the United States or money center countries as defined in § 1.49 of this chapter.

(b) For assets held in the United States, a qualifying institution is:

(1) A bank or trust company regulated by a United States banking regulator;

(2) A broker-dealer registered with the Securities and Exchange Commission and a member of the Financial Industry Regulatory Authority; or

(3) A futures commission merchant registered with the Commission and a member of the National Futures Association.

(c) For assets held in a money center country, a qualifying institution is:

(1) A bank or trust company regulated in a money center country, *Provided* that the bank or trust company has regulatory capital in excess of \$1 billion;

(2) An entity regulated in a money center country as an equivalent of a broker-dealer or futures commission merchant as determined by the retail foreign exchange dealer's or futures commission merchant's designated self-regulatory organization, *Provided* that the entity maintains regulatory capital in excess of \$100 million; or

(3) A futures commission merchant registered with the Commission and a member of the National Futures Association.

(d) Assets held in a money center country are not eligible to meet the requirements of paragraph (a) of this section unless the retail foreign exchange dealer or futures commission merchant has entered into an agreement that is acceptable to the firm's designated self-regulatory organization and that authorizes the qualifying institution to provide account information to the Commission and the firm's designated self-regulatory organization.

(e) In computing its adjusted net capital pursuant to § 5.7 of this part, a retail foreign exchange dealer or futures commission merchant may not include aggregate retail forex assets as current assets or otherwise record any property received from retail forex customers as an asset without recording a cor-

responding liability to the retail forex customers.

§ 5.9 Security deposits for retail forex transactions.

(a) Each futures commission merchant engaging, or offering to engage, in retail forex transactions and each retail foreign exchange dealer must collect from each retail forex customer a minimum security deposit for each retail forex transaction equal to the applicable percentage as set by the registered futures association of which they are a member; *Provided*, that the registered futures association's security deposit requirement cannot be less than:

(1) 2% of the notional value of the retail forex transaction for major currency pairs and 5% of the notional value of the retail forex transaction for all other currency pairs;

(2) For short options, 2% for major currency pairs and 5% for all other currency pairs of the notional value of the retail forex transaction, plus the premium received by the retail forex customer; or

(3) For long options, the full premium charged and received by the futures commission merchant or retail foreign exchange dealer from the retail forex customer.

(b) Security deposits must be made in the form of cash or other financial instruments that comply with the requirements specified in § 1.25 of this chapter.

(c) A futures commission merchant or retail foreign exchange dealer is required to collect additional security deposits from a retail forex customer, or liquidate the retail forex customer's positions, if the amount of the retail forex customer's security deposits maintained with the futures commission merchant or retail foreign exchange dealer are not sufficient to meet the requirements of this section.

(d) A major currency pair security deposit percentage is only applicable when both sides of a retail over-the-counter foreign exchange transaction involve major currencies.

(e) Any registered futures association whose members serve as counterparties to retail forex transaction shall designate which currencies are "major

currencies”, and shall review, no less frequently than annually, major currency designations and security deposit requirements, and shall adjust the designations and requirements as necessary.

§ 5.10 Risk assessment recordkeeping requirements for retail foreign exchange dealers.

(a) *Requirement to maintain and preserve information.* (1) Each retail foreign exchange dealer registered with the Commission pursuant to section 2(c)(2)(B)(i)(II)(ff) of the Act shall prepare, maintain and preserve the following information:

(i) An organizational chart which includes the retail foreign exchange dealer and each of its affiliated persons. Included in the organizational chart shall be a designation of which affiliated persons are “Material Affiliated Persons” as that term is used in paragraph (a)(2) of this section, which Material Affiliated Persons file routine financial or risk exposure reports with the Securities and Exchange Commission, a federal banking agency, an insurance commissioner or other similar official or agency of a state, or a foreign regulatory authority, and which Material Affiliated Persons are dealers in financial instruments with off-balance sheet risk and, if a Material Affiliated Person is such a dealer, whether it is also an end-user of such instruments;

(ii) Written policies, procedures, or systems concerning the retail foreign exchange dealer’s:

(A) Method(s) for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons;

(B) Financing and capital adequacy, including information regarding sources of funding, together with a narrative discussion by management of the liquidity of the material assets of the retail foreign exchange dealer, the structure of debt capital, and sources of alternative funding;

(C) Establishing and maintaining internal controls with respect to market risk, credit risk, and other risks created by the retail foreign exchange dealer’s trading activities, including systems and policies for supervising, monitoring, reporting and reviewing

trading activities in forex transactions, securities, futures contracts, commodity options, forward contracts and financial instruments; policies for hedging or managing risks created by trading activities or supervising accounts carried for affiliates, including a description of the types of reviews conducted to monitor positions; and policies relating to restrictions or limitations on trading activities: *Provided, however,* that if the retail foreign exchange dealer has no such written policies, procedures or systems, it must so state in writing;

(iii) Fiscal year-end consolidated and consolidating balance sheets for the highest level Material Affiliated Person within the retail foreign exchange dealer’s organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated balance sheets shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which shall include appropriate explanatory notes. The consolidating balance sheets may be those prepared by the retail foreign exchange dealer’s highest level Material Affiliated Person as part of its internal financial reporting process. Any additional information required to be filed under § 5.11(a)(2)(iii) of this part shall also be maintained and preserved; and

(iv) Fiscal year-end consolidated and consolidating income statements and consolidated cash flow statements for the highest level Material Affiliated Person within the retail foreign exchange dealer’s organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated statements shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which shall include appropriate explanatory notes. The consolidating statements may be those

prepared by the retail foreign exchange dealer's highest level Material Affiliated Person as part of its internal financial reporting process. Any additional information required to be filed under § 5.11(a)(2)(iii) shall also be maintained and preserved.

(2) The determination of whether an affiliated person of a retail foreign exchange dealer is a Material Affiliated Person shall involve consideration of all aspects of the activities of, and the relationship between, both entities, including without limitation, the following factors:

(i) The legal relationship between the retail foreign exchange dealer and the affiliated person;

(ii) The overall financing requirements of the retail foreign exchange dealer and the affiliated person, and the degree, if any, to which the retail foreign exchange dealer and the affiliated person are financially dependent on each other;

(iii) The degree to which the retail foreign exchange dealer and the affiliated person directly or indirectly engage in over-the-counter transactions with each other;

(iv) The degree, if any, to which the retail foreign exchange dealer or its customers rely on the affiliated person for operational support or services in connection with the retail foreign exchange dealer's business;

(v) The level of market, credit or other risk present in the activities of the affiliated person; and

(vi) The extent to which the affiliated person has the authority or the ability to cause a withdrawal of capital from the retail foreign exchange dealer.

(3) For purposes of this section and § 5.11 of this part, the term Material Affiliated Person does not include a natural person.

(4) The information, reports and records required by this section shall be maintained and preserved, and made readily available for inspection, in accordance with the provisions of § 1.31 of this chapter.

(b) *Special provisions with respect to Material Affiliated Persons subject to the supervision of certain domestic regulators.* A retail foreign exchange dealer shall be deemed to be in compliance with the

recordkeeping requirements of paragraphs (a)(1)(i), (iii) and (iv) of this section with respect to a Material Affiliated Person if:

(1) The Material Affiliated Person is required to maintain and preserve information pursuant to § 240.17h-1T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt, and the retail foreign exchange dealer maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of the records and reports maintained and filed on Form 17-H (or such other forms or reports as may be required) by the Material Affiliated Person with the Securities and Exchange Commission pursuant to §§ 240.17h-1T and 240.17h-2T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt;

(2) In the case of a Material Affiliated Person (including a foreign banking organization) that is subject to examination by, or the reporting requirements of, a Federal banking agency, the retail foreign exchange dealer or such Material Affiliated Person maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of all reports submitted by such Material Associated Person to the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners' Loan Act, or section 5 of the Bank Holding Company Act of 1956; or

(3) In the case of a Material Affiliated Person that is subject to the supervision of an insurance commissioner or other similar official or agency of a state, the retail foreign exchange dealer or such Material Affiliated Person maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of the annual statements with schedules and exhibits prepared by the Material Affiliated Person on forms prescribed by the National Association of Insurance Commissioners or by a state insurance commissioner.

(c)(1) *Special provisions with respect to Material Affiliated Persons subject to the supervision of a Foreign Regulatory Authority.* A retail foreign exchange dealer shall be deemed to be in compliance with the recordkeeping requirements of paragraphs (a)(1)(iii) and (iv) of this section with respect to a Material Affiliated Person if such retail foreign exchange dealer maintains and makes available, or causes such Material Affiliated Person to make available, for inspection by the Commission in accordance with the provisions of this section copies of any financial or risk exposure reports filed by such Material Affiliated Person with a foreign futures authority or other foreign regulatory authority, provided that:

(i) The retail foreign exchange dealer agrees to use its best efforts to obtain from the Material Affiliated Person and to cause the Material Affiliated Person to provide, directly or through its foreign futures authority or other foreign regulatory authority, any supplemental information the Commission may request and there is no statute or other bar in the foreign jurisdiction that would preclude the retail foreign exchange dealer, the Material Affiliated Person, the foreign futures authority or other foreign regulatory authority from providing such information to the Commission; or

(ii) The foreign futures authority or other foreign regulatory authority with whom the Material Affiliated Person files such reports has entered into an information-sharing agreement with the Commission which is in effect as of the retail foreign exchange dealer's fiscal year-end and which will allow the Commission to obtain the type of information required herein.

(2) The retail foreign exchange dealer shall maintain a copy of the original report and a copy translated into the English language. For the purposes of this section, the term "Foreign Futures Authority" shall have the meaning set forth in section 1a(26) of the Act.

(d) *Exemptions.* The Commission may exempt any retail foreign exchange dealer from any provision of this section if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from

which the exemption is sought. The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(e) *Location of records.* A retail foreign exchange dealer required to maintain records concerning Material Affiliated Persons pursuant to this section may maintain those records either at the principal office of the Material Affiliated Person or at a records storage facility, provided that, except as set forth in paragraph (c) of this section, the records are located within the boundaries of the United States and the records are kept and available for inspection in accordance with §1.31 of this chapter. If such records are maintained at a place other than the retail foreign exchange dealer's principal place of business, the Material Affiliated Person or other entity maintaining the records shall file with the Commission a written undertaking, in a form acceptable to the Commission, signed by a duly authorized person, to the effect that the records will be treated as if the retail foreign exchange dealer were maintaining the records pursuant to this section and that the entity maintaining the records will permit examination of such records at any time, or from time to time during business hours, by representatives or designees of the Commission and promptly furnish the Commission representative or its designee true, correct, complete and current hard copy of all or any part of such records. The election to maintain records at the principal place of business of the Material Affiliated Person or at a records storage facility pursuant to the provisions of this paragraph shall not relieve the retail foreign exchange dealer required to maintain and preserve such records from any of its responsibilities under this section or §5.11 of this part.

(f) *Confidentiality.* All information obtained by the Commission pursuant to the provisions of this section from a retail foreign exchange dealer concerning a Material Affiliated Person shall be deemed confidential information for the purposes of section 8 of the Act.

(g) *Implementation schedule.* Each retail foreign exchange dealer who is subject to the requirements of this section

shall maintain and preserve the information required by paragraphs (a)(1)(i) and (ii) of this section commencing 60 calendar days after registration becomes effective and the information required by paragraphs (a)(1)(iii) and (iv) of this section commencing 105 calendar days following the first fiscal year-end occurring after registration becomes effective.

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

§ 5.11 Risk assessment reporting requirements for retail foreign exchange dealers.

(a) *Reporting requirements with respect to information required to be maintained by § 5.10 of this part.* (1) Each retail foreign exchange dealer registered with the Commission pursuant to Section 2(c)(2)(B)(i)(II)(ff) of the Act shall file the following with the regional office of the Commission with which it files periodic financial reports within 60 calendar days after the effective date of such registration:

(i) A copy of the organizational chart maintained by the retail foreign exchange dealer pursuant to § 5.10(a)(1)(i) of this part. Where there is a material change in information provided, an updated organizational chart shall be filed within sixty calendar days after the end of the fiscal quarter in which the change has occurred; and

(ii) Copies of the financial, operational, and risk management policies, procedures and systems maintained by the retail foreign exchange dealer pursuant to § 5.10(a)(1)(ii) of this part. If the retail foreign exchange dealer has no such written policies, procedures or systems, it must file a statement so indicating. Where there is a material change in information provided, such change shall be reported within sixty calendar days after the end of the fiscal quarter in which the change has occurred.

(2) Each retail foreign exchange dealer registered with the Commission pursuant to section 2(c)(2)(B)(i)(II)(ff) of the Act shall file the following with the regional office with which it files periodic financial reports within 105 calendar days after the end of each fiscal year or, if a filing is made pursuant to a written notice issued under para-

graph (a)(2)(iii) of this section, within the time period specified in the written notice:

(i) Fiscal year-end consolidated and consolidating balance sheets for the highest level Material Affiliated Person within the retail foreign exchange dealer's organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated balance sheets shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which consolidated balance sheets shall include appropriate explanatory notes. The consolidating balance sheets may be those prepared by the retail foreign exchange dealer's highest level Material Affiliated Person as part of its internal financial reporting process;

(ii) Fiscal year-end annual consolidated and consolidating income statements and consolidated cash flow statements for the highest level Material Affiliated Person within the retail foreign exchange dealer's organizational structure, which shall include the retail foreign exchange dealer and its other Material Affiliated Persons, prepared in accordance with generally accepted accounting principles, which consolidated statements shall be audited by an independent certified public accountant if an annual audit is performed in the ordinary course of business, but which otherwise may be unaudited, and which consolidated statements shall include appropriate explanatory notes. The consolidating statements may be those prepared by the retail foreign exchange dealer's highest level Material Affiliated Person as part of its internal financial reporting process; and

(iii) Upon receiving written notice from any representative of the Commission and within the time period specified in the written notice, such additional information which the Commission determines is necessary for a complete understanding of a particular affiliate's financial impact on the retail foreign exchange dealer's organizational structure.

(3) For the purposes of this section, the term Material Affiliated Person shall have the meaning used in §5.10 of this part.

(4) The reports required to be filed pursuant to paragraphs (a)(1) and (2) of this section shall be considered filed when received by the regional office of the Commission with whom the retail foreign exchange dealer files financial reports pursuant to §5.12 of this part.

(b) *Exemptions.* The Commission may exempt any retail foreign exchange dealer from any provision of this section if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought. The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(c) *Special provisions with respect to Material Affiliated Persons subject to the supervision of certain domestic regulators.*

(1) In the case of a Material Affiliated Person that is required to maintain and preserve information pursuant to §240.17h-1T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt, the retail foreign exchange dealer shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to such Material Affiliated Person if the retail foreign exchange dealer maintains and makes available for inspection by the Commission in accordance with the provisions of this section copies of the records and reports maintained and filed on Form 17-H (or such other forms or reports as may be required) by the Material Affiliated Person with the Securities and Exchange Commission pursuant to §§240.17h-1T and 240.17h-2T of this title, or such other risk assessment regulations as the Securities and Exchange Commission may adopt;

(2) In the case of a Material Affiliated Person (including a foreign banking organization) that is subject to examination by, or the reporting requirements of, a Federal banking agency, the retail foreign exchange dealer shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to such Material Affiliated Person if the

retail foreign exchange dealer or such Material Affiliated Person maintains in accordance with §5.10 of this part copies of all reports filed by the Material Affiliated Person with the Federal banking agency pursuant to section 5211 of the Revised Statutes, section 9 of the Federal Reserve Act, section 7(a) of the Federal Deposit Insurance Act, section 10(b) of the Home Owners' Loan Act, or section 5 of the Bank Holding Company Act of 1956.

(3) In the case of a retail foreign exchange dealer that has a Material Affiliated Person that is subject to the supervision of an insurance commissioner or other similar official or agency of a state, such retail foreign exchange dealer shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to the Material Affiliated Person if:

(i) With respect to a Material Affiliated Person organized as a mutual insurance company or a non-public stock company, the retail foreign exchange dealer or such Material Affiliated Person maintains in accordance with §5.14 of this part copies of the annual statements with schedules and exhibits prepared by the Material Affiliated Person on forms prescribed by the National Association of Insurance Commissioners or by a state insurance commissioner; and

(ii) With respect to a Material Affiliated Person organized as a public stock company, the retail foreign exchange dealer or such Material Affiliated Person maintains, in addition to the annual statements with schedules and exhibits required to be maintained pursuant to §1.14 of this chapter, copies of the filings made by the Material Affiliated Person pursuant to sections 13 or 15 of the Securities Exchange Act of 1934 and the Investment Company Act of 1940.

(4) No retail foreign exchange dealer shall be required to furnish to the Commission any examination report of any Federal banking agency or any supervisory recommendations or analyses contained therein with respect to a Material Affiliated Person that is subject to the regulation of a Federal banking agency. All information received by

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the Commission pursuant to this section concerning a Material Affiliated Person that is subject to examination by or the reporting requirements of a Federal banking agency shall be deemed confidential for the purposes of section 8 of the Act.

(5) The furnishing of any information or documents by a retail foreign exchange dealer pursuant to this section shall not constitute an admission for any purpose that a Material Affiliated Person is otherwise subject to the Act.

(d) *Special provisions with respect to Material Affiliated Persons subject to the supervision of a Foreign Regulatory Authority.* A retail foreign exchange dealer shall be deemed to be in compliance with the reporting requirements of paragraph (a)(2) of this section with respect to a Material Affiliated Person if such retail foreign exchange dealer furnishes, or causes such Material Affiliated Person to make available, in accordance with the provisions of this section, copies of any financial or risk exposure reports filed by such Material Affiliated Person with a foreign futures authority or other foreign regulatory authority, provided that:

(1) The retail foreign exchange dealer agrees to use its best efforts to obtain from the Material Affiliated Person and to cause the Material Affiliated Person to provide, directly or through its foreign futures authority or other foreign regulatory authority, any supplemental information the Commission may request and there is no statute or other bar in the foreign jurisdiction that would preclude the retail foreign exchange dealer, the Material Affiliated Person, the foreign futures authority or other foreign regulatory authority from providing such information to the Commission; or

(2) The foreign futures authority or other foreign regulatory authority with whom the Material Affiliated Person files such reports has entered into an information sharing agreement with the Commission which is in effect as of the retail foreign exchange dealer's fiscal year-end and which will allow the Commission to obtain the type of information required herein. The retail foreign exchange dealer shall file a copy of the original report and a copy translated into the English language. For

the purposes of this section, the term "Foreign Futures Authority" shall have the meaning set forth in section 1a(26) of the Act.

(e) *Confidentiality.* All information obtained by the Commission pursuant to the provisions of this section from a retail foreign exchange dealer concerning a Material Associated Person shall be deemed confidential information for the purposes of section 8 of the Act.

(f) *Implementation schedule.* Each retail foreign exchange dealer who is subject to the requirements of this section shall file the information required by paragraph (a)(1) of this section within 60 calendar days after registration is granted, and the information required by paragraph (a)(2) of this section within 105 calendar days after registration is granted.

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

§ 5.12 Financial reports of retail foreign exchange dealers.

(a)(1) Each person who files an application for registration as a retail foreign exchange dealer with the National Futures Association shall submit, concurrently with the filing of such application, either:

(i) A Form 1-FR-FCM certified by an independent public accountant as of a date not more than 45 days prior to the date on which such report is filed; or

(ii) A Form 1-FR-FCM as of a date not more than 17 business days prior to the date on which such report is filed and a Form 1-FR-FCM certified by an independent public accountant as of a date not more than one year prior to the date on which such report is filed.

(2) Each such person must include with such financial report a statement describing the source of his current assets and representing that his capital has been contributed for the purpose of operating his business and will continue to be used for such purpose.

(3) The provisions of paragraph (a)(1) of this section do not apply to any person succeeding to and continuing the business of another retail foreign exchange dealer.

(b)(1) Each person registered as a retail foreign exchange dealer must file a

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Form 1-FR-FCM as of the close of business each month. Each Form 1-FR must be filed no later than 17 business days after the date for which the report is made.

(2) In addition to the monthly financial reports required by paragraph (b)(1) of this section, each person registered as a retail foreign exchange dealer must file a Form 1-FR-FCM as of the close of its fiscal year, which must be certified by an independent public accountant and must be filed no later than 90 days after the close of the retail foreign exchange dealer's fiscal year.

(3) A Form 1-FR-FCM required to be certified by an independent public accountant which is filed by a retail foreign exchange dealer must be filed in paper form and may not be filed electronically with the Commission. A Form 1-FR-FCM required to be certified by an independent public accountant which is filed by an applicant for registration as a retail foreign exchange dealer with the National Futures Association must be filed electronically in accordance with electronic filing procedures established by the National Futures Association, however a paper copy of any such filing with the original manually signed certification must be maintained by the applicant for registration as a retail foreign exchange dealer in accordance with §1.31.

(c) Each Form 1-FR-FCM required by the provisions of paragraphs (a)(1) and (b)(2) of this section to be certified by an independent public accountant must be certified in accordance with §1.16 of this chapter, and must be accompanied by the accountant's report on material inadequacies in accordance with the provisions of §1.16(c)(5) of this chapter. In all other respects, the independent public accountant shall act in accordance with the provisions of §1.16 (except paragraph (f)) of this chapter: Provided, however, that the term "§5.7" shall be substituted for the term "§1.17," and the term "retail foreign exchange dealer" shall be substituted for the term "futures commission merchant."

(d) Upon receiving written notice from any representative of the Commission, National Futures Association,

or any self-regulatory organization of which the firm is a member, a retail foreign exchange dealer or applicant for such registration, must, monthly or at such times as specified, furnish the Commission, National Futures Association, or self-regulatory organization a Form 1-FR-FCM or such other financial information requested in the written notice. Each such Form 1-FR-FCM or such other information must be furnished within the time period specified in the written notice, and in accordance with the provisions of paragraph (i) of this section.

(e)(1) Each Form 1-FR-FCM filed pursuant to this §5.12 which is not required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain:

(i) A statement of financial condition as of the date for which the report is made;

(ii) A statement of income (loss) for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(iii) A statement of changes in ownership equity for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(iv) A statement of changes in liabilities subordinated to claims of general creditors for the period between the date of the most recent statement of financial condition filed with the Commission and the date for which the report is made;

(v) A statement of the computation of the minimum capital requirements pursuant to §5.7 of this part as of the date for which the report is made; and

(vi) In addition to the information expressly required, such further material information as may be necessary to make the required statements and schedules not misleading.

(2) Each Form 1-FR-FCM filed pursuant to this §5.12 which is required to be certified by an independent public accountant must be completed in accordance with the instructions to the form and contain:

(i) A statement of financial condition as of the date for which the report is made;

(ii) Statements of income (loss), cash flows, changes in ownership equity, and changes in liabilities subordinated to claims of general creditors, for the period between the date of the most recent certified statement of financial condition filed with the Commission and the date for which the report is made: Provided, That for an applicant filing pursuant to paragraph (a) of this section the period must be the year ending as of the date of the statement of financial condition;

(iii) A statement of the computation of the minimum capital requirements pursuant to §5.7 of this part as of the date for which the report is made;

(iv) Appropriate footnote disclosures;

(v) A reconciliation, including appropriate explanations, of the statement of the computation of the minimum capital requirements pursuant to §5.7 of this part, in the certified Form 1-FR-FCM with the applicant's or registrant's corresponding uncertified most recent Form 1-FR-FCM filing when material differences exist or, if no material differences exist, a statement so indicating; and

(vi) In addition to the information expressly required, such further material information as may be necessary to make the required statements not misleading.

(3) The statements required by paragraphs (e)(2)(i) and (ii) of this section may be presented in accordance with generally accepted accounting principles in the certified reports filed as of the close of the registrant's fiscal year pursuant to paragraph (b)(2) of this section or accompanying the application for registration pursuant to paragraph (a)(1) of this section, rather than in the format specifically prescribed by these regulations: Provided, the statement of financial condition is presented in a format as consistent as possible with the Form 1-FR-FCM and a reconciliation is provided reconciling such statement of financial condition to the statement of the computation of the minimum capital requirements pursuant to §5.7 of this part. Such reconciliation must be certified by an inde-

pendent public accountant in accordance with §1.16 of this chapter.

(4) Attached to each Form 1-FR-FCM filed pursuant to this section must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the Form 1-FR-FCM is true and correct. The individual making such oath or affirmation must be: If the registrant or applicant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the chief executive officer or chief financial officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.

(f) *Election of fiscal year.* (1) An applicant wishing to establish a fiscal year other than the calendar year may do so by notifying the National Futures Association of its election of such fiscal year, in writing, concurrently with the filing of the Form 1-FR-FCM pursuant to paragraph (a)(1) of this section, but in no event may such fiscal year end more than one year from the date of the Form 1-FR-FCM filed pursuant to paragraph (a)(1) of this section. An applicant that does not so notify the National Futures Association will be deemed to have elected the calendar year as its fiscal year.

(2)(i) A registrant must continue to use its elected fiscal year, calendar or otherwise, unless a change in such fiscal year has been approved pursuant to this paragraph (f)(2).

(ii) A registrant may file with its designated self-regulatory organization an application to change its fiscal year, a copy of which the registrant must file with the Commission. The application shall be approved or denied in writing by the registrant's designated self-regulatory organization. The registrant must file immediately with the Commission a copy of any notice it receives from its designated self-regulatory organization to approve or deny the registrant's application to change its fiscal year. A written notice of approval shall become effective upon the filing

by the registrant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(g) In the event a retail foreign exchange dealer or applicant for registration as a retail foreign exchange dealer finds that it cannot file its Form 1-FR-FCM for any period within the time specified in paragraph (b)(1) or (2) of this section without substantial undue hardship, it may request approval for an extension of time by filing an application for an extension of time with, in the case of a registrant, its designated self-regulatory organization, or, in the case of an applicant, the National Futures Association. The registrant or applicant also must file a copy of its application for an extension of time with the Commission. The application shall be approved or denied in writing by the National Futures Association or designated self-regulatory organization, as applicable. The registrant or applicant must file immediately with the Commission a copy of any notice it receives approving or denying the request for extension of time. A written notice of approval shall become effective upon the filing by the registrant or applicant of a copy with the Commission, and a written notice of denial shall be effective as of the date of the notice.

(h) *Public availability of reports.* (1) Forms 1-FR-FCM filed pursuant to this section will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter, except for the information described in paragraph (i)(2) of this section.

(2) The following information in Forms 1-FR-FCM will be publicly available:

(i) The amount of the applicant's or registrant's adjusted net capital; the amount of its minimum net capital requirement under §5.7 of this chapter; the amount of its adjusted net capital in excess of its minimum net capital requirement; and the amount of the retail forex obligation owed to its retail forex customers; and

(ii) The Statement of Financial Condition and the opinion of the inde-

pendent public accountant in the certified annual financial reports of retail foreign exchange dealers.

(3) All information that is exempt from mandatory public disclosure under paragraph (h)(1) of this section will, however, be available for official use by any official or employee of the United States or any State, by the National Futures Association or any other self-regulatory organization of which the person filing such report is a member, and by any other person to whom the Commission believes disclosure of such information is in the public interest. Nothing in this paragraph (h) will limit the authority of any self-regulatory organization to request or receive any information relative to its members' financial condition.

(i)(1) In the case of an applicant, all filings or other notices provided for in this section will be considered filed when received by the regional office of the Commission with jurisdiction over the state in which the applicant's principal place of business is located and by the National Futures Association. In the case of a registrant, all filings or other notices provided for in this section will be considered filed when received by the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located and by the registrant's designated self-regulatory organization. Any copy that under paragraph (f)(2) or (g) of this section is required to be filed with the Commission shall be filed with the regional office of the Commission with jurisdiction over the state in which the registrant's principal place of business is located.

(2) All filings or other notices filed pursuant to this section which need not be certified in accordance with §1.16 may be submitted to the Commission in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission, if the retail foreign exchange dealer or a designated self-regulatory organization has provided the Commission with the means necessary to read and to process the information

contained in such report. Any such electronic submission must clearly indicate the registrant or applicant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer. In the case of a Form 1-FR filed via electronic transmission in accordance with procedures established by or approved by the Commission, such transmission must be accompanied by the user authentication assigned to the authorized signer under such procedures, and the use of such user authentication will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in paragraph (e)(4) of this section.

§ 5.13 Reporting to customers of retail foreign exchange dealers and futures commission merchants; monthly and confirmation statements.

(a) *Monthly statements.* Each retail foreign exchange dealer or futures commission merchant must promptly furnish in writing to each retail forex customer, as of the close of the last business day of each month or as of any regular monthly date selected, except for accounts in which there are neither open positions at the end of the statement period nor any changes to the account balance since the prior statement period, but in any event not less frequently than once every three months, a statement which clearly shows:

- (1) For each retail forex customer:
 - (i) The open retail forex transactions with prices at which acquired;
 - (ii) The net unrealized profits or losses in all open retail forex transactions marked to the market; and
 - (iii) Any money, securities or other property carried with the retail foreign exchange dealer or futures commission merchant; and
 - (iv) A detailed accounting of all financial charges and credits to such retail forex accounts during the monthly reporting period, including money, securities or property received from or disbursed to such customer and realized profits and losses; and

(2) For each retail forex customer engaging in forex options transactions:

- (i) All forex options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;
- (ii) The open forex option positions carried for such customer as of the end of the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;
- (iii) All open forex option positions marked to the market and the amount each position is in the money, if any;
- (iv) Any money, securities or other property carried with the retail foreign exchange dealer or futures commission merchant; and
- (v) A detailed accounting of all financial charges and credits to such retail forex account(s) during the monthly reporting period, including money, securities and property received from or disbursed to such customer, premiums charged and received, and realized profits and losses.

(b) *Confirmation statement.* Each retail foreign exchange dealer or futures commission merchant must, not later than the next business day after any retail forex or forex option transaction, furnish:

- (1) To each retail forex customer, a written confirmation of each retail forex transaction caused to be executed by it for the customer, including offsetting transactions executed during the same business day and the rollover of an open retail forex transaction to the next business day.
- (2) To each retail forex customer engaging in forex option transactions, a written confirmation of each forex option transaction, containing at least the following information:
 - (i) The retail forex customer's account identification number;
 - (ii) A separate listing of the actual amount of the premium, as well as each mark-up thereon, if applicable, and all other commissions, costs, fees and other charges incurred in connection with the forex option transaction;
 - (iii) The strike price;

(iv) The underlying retail forex transaction or underlying currency;

(v) The final exercise date of the forex option purchased or sold; and

(vi) The date the forex option transaction was executed.

(3) To each retail forex customer engaging in forex option transactions, upon the expiration or exercise of any forex option, a written confirmation statement thereof, which statement shall include the date of such occurrence, a description of the forex option involved, and, in the case of exercise, the details of the retail forex or physical currency position which resulted therefrom including, if applicable, the final trading date of the retail forex transaction underlying the option.

(4) Notwithstanding the provisions of paragraphs (b)(1) through (3) of this section, a retail forex transaction or forex option transaction that is caused to be executed for a pooled investment vehicle that engages in retail forex transactions need be confirmed only to the operator of such pooled investment vehicle.

(c) *Controlled accounts.* With respect to any account controlled by any person other than the retail forex customer or forex option customer for whom such account is carried, each retail foreign exchange dealer or futures commission merchant shall promptly furnish in writing to such other person the information required by paragraphs (a) and (b) of this section.

(d) *Recordkeeping.* Each retail foreign exchange dealer or futures commission merchant shall retain, in accordance with § 1.31 of this chapter, a copy of each monthly statement and confirmation required by this section.

(e) *Introduced accounts.* Each statement provided pursuant to the provisions of this section must, if applicable, show that the account for which the retail foreign exchange dealer or futures commission merchant is providing the statement was introduced by an introducing broker and the names of the retail foreign exchange dealer or futures commission merchant and introducing broker.

(f) *Electronic transmission of statements.* (1) The statements required by this section may be furnished to a retail forex customer by means of elec-

tronic media if the retail forex customer so consents, *Provided, however,* that a retail foreign exchange dealer or futures commission merchant must, prior to the transmission of any statement by means of electronic media, disclose the electronic medium or source through which statements will be delivered, the duration, whether indefinite or not, of the period during which consent will be effective, any charges for such service, the information that will be delivered by such means, and that consent to electronic delivery may be revoked at any time, and provided, further, that a retail foreign exchange dealer or futures commission merchant must obtain the retail forex customer's signed consent acknowledging such disclosure prior to the transmission of any statement by means of electronic media.

(2) Any statement required to be furnished to a person other than a retail forex customer in accordance with paragraph (f) of this section may be furnished by electronic media.

(3) A retail foreign exchange dealer or futures commission merchant who furnishes statements to a retail forex customer by means of electronic media must retain a daily confirmation statement for such retail forex customer as of the end of the trading session, reflecting all transactions made during that session for the customer, in accordance with § 1.31 of this chapter.

(g) *Combination with other statements.* Any futures commission merchant required to deliver statements to retail forex customers in accordance with § 1.33 of this chapter may combine into one monthly statement or confirmation statement, as the case may be, the information required by this section and the information required by § 1.33, provided that retail forex account information is separately identified from any other trading or account activity of the retail forex customer.

§ 5.14 Records to be kept by retail foreign exchange dealers and futures commission merchants.

(a) No person shall be registered as a retail foreign exchange dealer under the Act unless, commencing on the

date his application for such registration is filed, he prepares and keeps current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting his asset, liability, income, expense and capital accounts, and in which (except as otherwise permitted in writing by the Commission) all his asset, liability and capital accounts are classified into either the account classification subdivisions specified on Form 1-FR-FCM or categories that are in accord with generally accepted accounting principles as applicable. Each person so registered shall prepare and keep current such records.

(b) Each applicant or registrant must make and keep as a record in accordance with §1.31 of this chapter formal computations of its adjusted net capital and of its minimum financial requirements pursuant to §1.17 or §5.7 of this chapter, or the requirements of the designated self-regulatory organization to which it is subject, as applicable, as of the close of business each month. Such computations must be completed and made available for inspection by any representative of the National Futures Association, in the case of an applicant, or of the Commission or designated self-regulatory organization, if any, in the case of a registrant, within 17 business days after the date for which the computations are made, commencing the first month end after the date the application for registration is filed.

§5.15 Unlawful representations.

It shall be unlawful for any person registered pursuant to the requirements of this part to represent or imply in any manner whatsoever that such person has been sponsored, recommended or approved, or that its abilities or qualifications have been reviewed or evaluated, by the Commission, the Federal government or any agency thereof.

§5.16 Prohibition of guarantees against loss.

(a) No retail foreign exchange dealer, futures commission merchant or introducing broker may in any way represent that it will, with respect to any

retail foreign exchange transaction in any account carried by a retail foreign exchange dealer or futures commission merchant for or on behalf of any person:

(1) Guarantee such person against loss;

(2) Limit the loss of such person; or

(3) Not call for or attempt to collect security deposits, margin, or other deposits as established for retail forex customers.

(b) No person may in any way represent that a retail foreign exchange dealer, futures commission merchant or introducing broker will engage in any of the acts or practices described in paragraph (a) of this section.

(c) This section shall not be construed to prevent a retail foreign exchange dealer, futures commission merchant or introducing broker from assuming or sharing in the losses resulting from an error or mishandling of an order.

(d) This section shall not affect any guarantee entered into prior to October 18, 2010, but this section shall apply to any extension, modification or renewal thereof entered into after such date.

§5.17 Authorization to trade.

No retail foreign exchange dealer, futures commission merchant, introducing broker or any of their associated persons may directly or indirectly effect a retail forex transaction for the account of any customer unless before the transaction the customer, or person designated by the customer to control the account specifically authorized 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 pre-

pared 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.

(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;

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(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 thereafter request filed in any material legal proceeding instituted against any person who is a principal of the retail foreign exchange dealer, futures commission merchant CPO, CTA or IB (as the term "principal" is defined in §3.1(a) of this chapter) arising from conduct in such person's capacity as a principal of the retail foreign exchange dealer, futures commission merchant, CPO, CTA or IB and alleging violations, with regard to retail forex transactions, of:

(1) The Act or any rule, regulation, or order thereunder; or

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(2) Provisions of state law relating to a duty or obligation owed by such a principal.

(c) All documents required by this section to be submitted to the Commission shall be mailed via first-class or submitted by other more expeditious means to the Commission's headquarters office in Washington, DC, Attention: Director, Division of Enforcement. All documents required by this section to be submitted to the Commission as to matters pending on October 18, 2010 shall be mailed to the Commission within 45 days of that effective date. Thereafter, all decisions and notices of appeal required to be submitted by retail foreign exchange dealers, futures commission merchants, CPOs, CTAs or IBs shall be mailed within 10 days of the filing or receipt by the retail foreign exchange dealer or futures commission merchant of the relevant notice of appeal. For purposes of paragraph (a) and (b) of this section, a "material legal proceeding" includes but is not limited to actions involving alleged violations of the Commodity Exchange Act or the Commission's regulations. However, a legal proceeding is not "material" for the purposes of this rule if the proceeding is not in a federal or state court or if the Commission is a party.

§ 5.20 Special calls for account and transaction information.

(a) *Preparation and transmission of information upon special call.* All information required upon special call shall be prepared in such form and manner and in accordance with such instructions, and shall be transmitted at such time and to such office of the Commission, as may be specified in the call.

(b) *Special calls for information on controlled accounts from retail foreign exchange dealers, futures commission merchants and introducing brokers.* Upon call by the Commission, each retail foreign exchange dealer, futures commission merchant and introducing broker shall file with the Commission the names and addresses of all persons who, by power of attorney or otherwise, exercise trading control over any customer's account in retail forex transactions.

(c) *Special calls for information on open transactions in accounts carried or introduced by retail foreign exchange dealers, futures commission merchants, and introducing brokers.* Upon special call by the Commission for information relating to retail forex transactions held or introduced on the dates specified in the call, each retail foreign exchange dealer, futures commission merchant, or introducing broker shall furnish to the Commission the following information concerning accounts of traders owning or controlling such retail forex transaction positions, as may be specified in the call:

(1) The name, address, and telephone number of the person for whom each account is carried;

(2) The principal business or occupation of the person for whom each account is introduced or carried, as specified in the call;

(3) The name, address and principal business or occupation of any person who controls the trading of each account;

(4) The name and address of any person having a financial interest of ten percent or more in each account;

(5) The number of open retail forex transaction positions introduced or carried in each account, as specified in the call; and

(6) The total number of retail forex transactions against which delivery has been made.

(d) *Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight and the Director of the Division of Enforcement.* The Commission hereby delegates, until the Commission orders otherwise, to the Director of the Division of Swap Dealer and Intermediary Oversight and the Director of the Division of Enforcement, or to the respective Director's designees, the authority set forth in this section to make special calls for information on controlled accounts from retail foreign exchange dealers, futures commission merchants and from introducing brokers, and to make special calls for information on open contracts in accounts carried or introduced by futures commission merchants, introducing brokers, and foreign brokers. Either Director may submit to the Commission for its consideration any

matter that has been delegated pursuant to this section. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section to the Directors.

[75 FR 55432, Sept. 10, 2010, as amended at 78 FR 22419, Apr. 16, 2013; 82 FR 28767, June 26, 2017]

§ 5.21 Supervision.

Each Commission registrant subject to this part 5, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all retail forex accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.

§ 5.22 Registered futures association membership.

(a) Each person registered as a retail foreign exchange dealer must become and remain a member of at least one futures association that is registered under section 17 of the Act and that provides for the membership therein of such retail foreign exchange dealer.

(b) Each person required to register as:

(1) An introducing broker, because the person solicits or accepts orders for retail forex transactions;

(2) A commodity pool operator because the person operates, or solicits funds, securities, or property for, a pooled investment vehicle that engages in retail forex transactions; or

(3) A commodity trading advisor because the person exercises discretionary trading authority, or obtains written authorization to exercise discretionary trading authority over, an account in connection with retail forex transactions, must become and remain a member of at least one futures association that is registered under section 17 of the Act and that provides for the membership therein of such person.

§ 5.23 Notice of bulk transfers and bulk liquidations.

(a) *Notice and disclosure to retail forex customers of a bulk transfer.* (1) A retail foreign exchange dealer, futures commission merchant or introducing broker must obtain the written prior and specific consent of its retail forex customer to the assignment of any position or transfer of any account of the retail forex customer to another retail foreign exchange dealer, futures commission merchant or introducing broker, unless made at the retail forex customer's request.

(2) Absent a request of the retail forex customer or the consent described in paragraph (a)(1) of this section, assignments of positions and transfers of accounts of retail forex customers may be permitted under rules of the retail forex dealer's, futures commission merchant's, or introducing broker's designated self-regulatory organization that establish notice and other requirements with respect to the assignment of positions and transfers of accounts of retail forex customers. If such rules permit implied consent as a result of the failure of the retail forex customer to object after having received notice of the proposed assignment or transfer, such rules must provide that the notice must include a statement that the retail forex customer is not required to accept the proposed assignment or transfer and may direct the transferor firm to liquidate the positions of the retail forex customer or transfer the account to a firm of the retail forex customer's selection.

(3) For assignments and transfers made under this section, other than at the retail forex customer's request, the transferee retail foreign exchange dealer, futures commission merchant or introducing broker must provide to the retail forex customer the risk disclosure statements and forms of acknowledgment required by part 5 of this chapter and receive the required signed acknowledgments within sixty days of such assignments or transfers. This requirement shall not apply:

(i) If the transferee retail foreign exchange dealer, futures commission merchant or introducing broker has clear written evidence that the retail

forex customer has received and acknowledged receipt of the required disclosure statements; or

(ii) If the transfer of accounts is made from one introducing broker to another introducing broker guaranteed by the same retail foreign exchange dealer or futures commission merchant pursuant to a guarantee agreement in accordance with the requirements of § 1.10(j) of this chapter and such retail foreign exchange dealer or futures commission merchant maintains the relevant acknowledgments required by part 5 of this chapter.

(b) *Notice to the Commission.* Each retail foreign exchange dealer, futures commission merchant or introducing broker shall file with the Commission prior notice of any transfer of accounts of any retail forex customer that is not initiated at the request of the customer, where the transfer involves 50 percent or more of the transferor's total number of retail forex customer accounts.

(c) *Contents of notice to the Commission.* The notice required by paragraph (b) of this section shall include:

(1) The name, principal business address and telephone number of the transferor futures retail foreign exchange dealer, futures commission merchant or introducing broker;

(2) The name, principal business address and telephone number of each transferee retail foreign exchange dealer, futures commission merchant or introducing broker;

(3) The designated self-regulatory organization for the transferor and transferee firms;

(4) A brief statement as to the reasons for the transfer;

(5) A copy of any notices to customers regarding the transfers; and

(6) A statement of the number of accounts to be transferred.

(d) *Notice of the bulk liquidation of retail forex transactions.* A retail foreign exchange dealer or futures commission merchant may not initiate the bulk liquidation of properly margined retail forex transactions unless such liquidation complies with the rules and procedures of the retail forex dealer's or futures commission merchant's designated self-regulatory organization and the retail forex dealer or futures

commission merchant provides the Commission with prior written notice of the liquidation.

(e) *Contents of notice of bulk liquidation.* The notice required by paragraph (d) of this section shall include:

(1) The name, principal business address and telephone number of the initiating retail foreign exchange dealer or futures commission merchant;

(2) A brief statement of the reasons for the liquidation;

(3) A copy of any notices to customers regarding the liquidation; and

(4) A statement of the number of accounts to be liquidated.

(f) *Filing of notices.* The notice required by paragraph (b) and (d) of this section shall be filed five business days prior to the transfer or liquidation of the retail forex transaction with the Deputy Director, Compliance and Registration Section, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; the National Futures Association Attn: Vice President-Compliance; and the designated self-regulatory organization for the transferor firm.

(g) *No effect on other obligations.* The requirements of this section shall not affect the obligations of a retail foreign exchange dealer, futures commission merchant or introducing broker under the rules of a self-regulatory organization or applicable customer account agreement with respect to assignments of positions or transfers of accounts or liquidation of positions.

(h) *Corrective notice.* If a proposed transfer is not completed in accordance with the notice required to be filed by paragraph (b) of this section, a corrective notice shall be filed within five business days of the date such proposed transfer was to occur explaining why the proposed transfer was not completed.

[75 FR 55432, Sept. 10, 2010, as amended at 78 FR 22419, Apr. 16, 2013]

§ 5.24 Applicability of other parts of this chapter

Insofar as it is consistent with the requirements of this part, all other provisions of this chapter that apply to a person shall apply to such person as

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though such provisions were expressly set forth in this part.

§ 5.25 Applicability of the Act.

Except as otherwise specified in this part and unless the context otherwise requires, the provisions of Sections 4b, 4c(b), 4f, 4g, 4k, 4m, 4n, 4o, 6(c)–(e), 6b, 6c, 8(a)–(e), 8a and 12(f) of the Act shall apply to retail forex transactions that are subject to the requirements of this part as though such provisions were set forth herein and included specific references to retail forex transactions and the persons defined in § 5.1 of this part.

PART 7—REGISTERED ENTITY RULES ALTERED OR SUPPLEMENTED BY THE COMMISSION

AUTHORITY: 7 U.S.C. 7a–2(c) and 12a(7), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

SOURCE: 77 FR 66332, Nov. 2, 2012, unless otherwise noted.

Subpart A—General Provisions

§ 7.1 Scope of rules.

This part sets forth registered entity rules altered or supplemented by the Commission pursuant to section 8a(7) of the Act.

Subparts B–C [Reserved]

PART 8 [RESERVED]

PART 9—RULES RELATING TO REVIEW OF EXCHANGE DISCIPLINARY, ACCESS DENIAL OR OTHER ADVERSE ACTIONS

Subpart A—General Provisions

Sec.

- 9.1 Scope of rules.
- 9.2 Definitions.
- 9.3 Provisions referenced.
- 9.4 Filing and service; official docket.
- 9.5 Motions.
- 9.6 Sanctions for noncompliance.
- 9.7 Settlement.
- 9.8 Practice before the Commission.

- 9.9 Waiver of rules; delegation of authority.

Subpart B—Notice and Effective Date of Disciplinary Action or Access Denial Action

- 9.10 [Reserved]
- 9.11 Form, contents and delivery of notice of disciplinary or access denial action.
- 9.12 Effective date of disciplinary or access denial action.
- 9.13 Publication of notice.
- 9.14–9.19 [Reserved]

Subpart C—Initial Procedure With Respect to Appeals

- 9.20 Notice of appeal.
- 9.21 Record of exchange proceeding.
- 9.22 Appeal brief.
- 9.23 Answering brief.
- 9.24 Petition for stay pending review.
- 9.25 Limited participation of interested persons.
- 9.26 Participation of Commission staff.
- 9.27–9.29 [Reserved]

Subpart D—Commission Review of Disciplinary, Access Denial or Other Adverse Action

- 9.30 Scope of review.
- 9.31 Commission review of disciplinary or access denial action on its own motion.
- 9.32 Oral argument.
- 9.33 Final decision by the Commission.

AUTHORITY: 7 U.S.C. 1a, 2, 6b–1, 6c, 7, 7a–2, 7b–3, 8, 9, 9a, 12, 12a, 12c, 13b, 16a, 18, 19, and 21.

SOURCE: 52 FR 25366, July 7, 1987, unless otherwise noted.

Subpart A—General Provisions

§ 9.1 Scope of rules.

(a) *Matters included.* This part governs the review by the Commission, pursuant to section 8c of the Act, as amended, of any suspension, expulsion, disciplinary or access denial action, or other adverse action by an exchange.

(b) *Matters excluded.* This part does not apply to and the Commission will not accept notices of appeal, or petitions for stay pending review, of:

- (1) Any arbitration proceeding, regardless of whether the proceeding involved a controversy between members of an exchange;
- (2) Except as provided in §§ 9.11(a), (b)(3)(i) through (v), and (c), and 9.12(a)