

August 29, 2019

Via Federal Express and E-mail (Ckirkpatrick@cftc.gov)

Mr. Christopher J. Kirkpatrick
Secretary
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: National Futures Association: Proposed Amendments to NFA Compliance Rule 2-29: Communications with the Public and Promotional Material, NFA Compliance Rule 2-36: Requirements for Forex Transactions, Related Interpretive Notices and other Technical Amendments to NFA Requirements

Dear Mr. Kirkpatrick:

Pursuant to Section 17(j) of the Commodity Exchange Act ("CEA" or "Act"), as amended, National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("CFTC" or "Commission") proposed amendments to NFA Compliance Rules 2-29 and 2-36 and proposed amendments to several NFA Interpretive Notices under NFA Compliance Rules 2-29 and 2-36. NFA's Board of Directors ("Board") unanimously approved the proposed amendments at its meeting on August 15, 2019.

NFA is invoking the "ten-day" provision of Section 17(j) of the CEA and plans to issue a Notice to Members establishing an effective date for this proposal as early as ten days after receipt of this submission by the Commission unless NFA is notified that the Commission has determined to review the proposal for approval.

PROPOSED AMENDMENTS

(additions are underscored and deletions are ~~stricken through~~)

COMPLIANCE RULES

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**Part 2 – RULES GOVERNING THE BUSINESS CONDUCT OF MEMBERS
REGISTERED WITH THE COMMISSION**

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RULE 2-29. COMMUNICATIONS WITH THE PUBLIC AND PROMOTIONAL MATERIAL.

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(a) General Prohibition.

No FCM, IB, CPO or CTA Member or Associate shall make any communication related to its commodity interest business that with the public which:

- (1) operates as a fraud or deceit;
- (2) employs or is part of a high-pressure approach; or
- (3) makes any statement that commodity interest futures trading is appropriate for all persons.

(b) Content of Promotional Material.

No FCM, IB, CPO or CTA Member or Associate shall use any promotional material that which:

- (1) is likely to deceive the public;
- (2) contains any material misstatement of fact or which the Member or Associate knows omits a fact if the omission makes the promotional material misleading;
- (3) mentions the possibility of profit unless accompanied by an equally prominent ~~statement~~ discussion of the risk of loss;
- (4) includes any reference to actual past trading profits without mentioning that past results are not necessarily indicative of future results;
- (5) includes any specific numerical or statistical information about the past performance of any actual accounts (including rate of return) unless:
 - (i) ~~unless~~ such information is and can be demonstrated to NFA to be representative of the actual performance for the same time period of all reasonably comparable accounts;
 - (ii) the performance is presented net of all commissions, fees and expenses; and
 - (iii) in the case of rate of return figures, ~~unless~~ such figures are calculated in a manner consistent with CFTC Regulation 4.25(a)(7) for commodity pools and with CFTC Regulation 4.35(a)(6), as modified by NFA Compliance Rule 2-34(a), for figures based on separate accounts; or
- (6) includes a testimonial that is not representative of all reasonably comparable accounts, does not prominently state that the testimonial is

not indicative of future performance or success, and does not prominently state that it is a paid testimonial (if applicable).

(c) Hypothetical Results.

(1) Any FCM, IB, CPO or CTA Member or Associate who uses promotional material which includes a measurement or description of or makes any reference to hypothetical performance results which could have been achieved had a particular trading system of the FCM, IB, CPO or CTA Member or Associate been employed in the past must include in the promotional material the following disclaimer prescribed by NFA's Board of Directors:

HYPOTHETICAL PERFORMANCE RESULTS HAVE MANY INHERENT LIMITATIONS, SOME OF WHICH ARE DESCRIBED BELOW. NO REPRESENTATION IS BEING MADE THAT ANY ACCOUNT WILL OR IS LIKELY TO ACHIEVE PROFITS OR LOSSES SIMILAR TO THOSE SHOWN. IN FACT, THERE ARE FREQUENTLY SHARP DIFFERENCES BETWEEN HYPOTHETICAL PERFORMANCE RESULTS AND THE ACTUAL RESULTS SUBSEQUENTLY ACHIEVED BY ANY PARTICULAR TRADING PROGRAM.

ONE OF THE LIMITATIONS OF HYPOTHETICAL PERFORMANCE RESULTS IS THAT THEY ARE GENERALLY PREPARED WITH THE BENEFIT OF HINDSIGHT. IN ADDITION, HYPOTHETICAL TRADING DOES NOT INVOLVE FINANCIAL RISK, AND NO HYPOTHETICAL TRADING RECORD CAN COMPLETELY ACCOUNT FOR THE IMPACT OF FINANCIAL RISK IN ACTUAL TRADING. FOR EXAMPLE, THE ABILITY TO WITHSTAND LOSSES OR TO ADHERE TO A PARTICULAR TRADING PROGRAM IN SPITE OF TRADING LOSSES ARE MATERIAL POINTS WHICH CAN ALSO ADVERSELY AFFECT ACTUAL TRADING RESULTS. THERE ARE NUMEROUS OTHER FACTORS RELATED TO THE MARKETS IN GENERAL OR TO THE IMPLEMENTATION OF ANY SPECIFIC TRADING PROGRAM WHICH CANNOT BE FULLY ACCOUNTED FOR IN THE PREPARATION OF HYPOTHETICAL PERFORMANCE RESULTS AND ALL OF WHICH CAN ADVERSELY AFFECT ACTUAL TRADING RESULTS.

If an FCM, IB, CPO or CTA Member or Associate has either less than one year of experience in directing customer accounts or trading proprietary accounts, then the disclaimer must also contain the following statement:

(THE MEMBER) HAS HAD LITTLE OR NO EXPERIENCE IN TRADING ACTUAL ACCOUNTS FOR ITSELF OR FOR CUSTOMERS. BECAUSE THERE ARE NO ACTUAL TRADING RESULTS TO COMPARE TO THE HYPOTHETICAL PERFORMANCE RESULTS, CUSTOMERS SHOULD

BE PARTICULARLY WARY OF PLACING UNDUE RELIANCE ON THESE HYPOTHETICAL PERFORMANCE RESULTS.

(2) Any FCM, IB, CPO or CTA Member or Associate who uses promotional material which includes a measurement or description of or makes any reference to a hypothetical composite performance record showing what a multi-advisor account portfolio or pool could have achieved in the past if assets had been allocated among particular trading advisors must include in the promotional material the following disclaimer prescribed by NFA's Board of Directors instead of the disclaimer prescribed by Section (c)(1) of this Rule:

THIS COMPOSITE PERFORMANCE RECORD IS HYPOTHETICAL AND THESE TRADING ADVISORS HAVE NOT TRADED TOGETHER IN THE MANNER SHOWN IN THE COMPOSITE. HYPOTHETICAL PERFORMANCE RESULTS HAVE MANY INHERENT LIMITATIONS, SOME OF WHICH ARE DESCRIBED BELOW. NO REPRESENTATION IS BEING MADE THAT ANY MULTI-ADVISOR MANAGED ACCOUNT OR POOL WILL OR IS LIKELY TO ACHIEVE A COMPOSITE PERFORMANCE RECORD SIMILAR TO THAT SHOWN. IN FACT, THERE ARE FREQUENTLY SHARP DIFFERENCES BETWEEN A HYPOTHETICAL COMPOSITE PERFORMANCE RECORD AND THE ACTUAL RECORD SUBSEQUENTLY ACHIEVED.

ONE OF THE LIMITATIONS OF A HYPOTHETICAL COMPOSITE PERFORMANCE RECORD IS THAT DECISIONS RELATING TO THE SELECTION OF TRADING ADVISORS AND THE ALLOCATION OF ASSETS AMONG THOSE TRADING ADVISORS WERE MADE WITH THE BENEFIT OF HINDSIGHT BASED UPON THE HISTORICAL RATES OF RETURN OF THE SELECTED TRADING ADVISORS. THEREFORE, COMPOSITE PERFORMANCE RECORDS INVARIABLY SHOW POSITIVE RATES OF RETURN. ANOTHER INHERENT LIMITATION ON THESE RESULTS IS THAT THE ALLOCATION DECISIONS REFLECTED IN THE PERFORMANCE RECORD WERE NOT MADE UNDER ACTUAL MARKET CONDITIONS AND, THEREFORE, CANNOT COMPLETELY ACCOUNT FOR THE IMPACT OF FINANCIAL RISK IN ACTUAL TRADING. FURTHERMORE, THE COMPOSITE PERFORMANCE RECORD MAY BE DISTORTED BECAUSE THE ALLOCATION OF ASSETS CHANGES FROM TIME TO TIME AND THESE ADJUSTMENTS ARE NOT REFLECTED IN THE COMPOSITE.

If an FCM, IB, CPO or CTA Member or Associate has less than one year of experience allocating assets among particular trading advisors, then the disclaimer must also contain the following statement:

(THE MEMBER) HAS HAD LITTLE OR NO EXPERIENCE ALLOCATING ASSETS AMONG PARTICULAR TRADING ADVISORS. BECAUSE THERE ARE NO ACTUAL ALLOCATIONS TO COMPARE TO THE

PERFORMANCE RESULTS FROM THE HYPOTHETICAL ALLOCATION, CUSTOMERS SHOULD BE PARTICULARLY WARY OF PLACING UNDUE RELIANCE ON THESE RESULTS.

(3) Any FCM, IB, CPO or CTA Member or Associate who uses promotional material which includes a measurement or description of or makes any reference to hypothetical performance results which could have been achieved had a particular trading system of the FCM, IB, CPO or CTA Member or Associate been employed in the past must include in the promotional material comparable information regarding:

(i) past performance results of all customer accounts directed by the FCM, IB, CPO or CTA Member pursuant to a power of attorney over at least the last five years or over the entire performance history if less than five years;

(ii) if the FCM, IB, CPO or CTA Member has less than one year of experience in directing customer accounts, past performance results of its ~~his~~ proprietary trading over at least the last five years or over the entire performance history if less than five years.

(4) No FCM, IB, CPO or CTA Member or Associate may use promotional material which includes a measurement or description of or makes any reference to hypothetical performance results which could have been achieved had a particular trading system of the FCM, IB, CPO or CTA Member or Associate been employed in the past if the FCM, IB, CPO or CTA Member or Associate has three months of actual trading results for that system.

(5) Any FCM, IB, CPO or CTA Member or Associate utilizing promotional material containing hypothetical performance results must adhere to all the requirements, contained in the Board's Interpretive Notice 9025 entitled Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results. ~~relating to this issue.~~

(6) ~~These~~ The restrictions on the use of hypothetical trading results set forth in subsections (3) and (4), as well as related portions of Interpretive Notice 9025, shall not apply to promotional material directed exclusively to persons who meet the standards of a "Qualified Eligible Person" (QEP) under CFTC Regulation 4.7.

(7) For promotional material directed exclusively to QEPs that includes a measurement or description of or makes any reference to extracted performance (i.e., performance where a Member or Associate highlights one or more components of its overall past trading results), the Member may include either the disclaimer required under subsection (c)(1) or other language that appropriately describes the performance shown and the limitations of such performance.

(8) For promotional material directed exclusively to QEPs that includes a measurement or description of or makes reference to a composite performance record, showing what a multi-advisor account portfolio or pool could have achieved in the past if assets had been allocated among particular trading advisors, the Member may include either the disclaimer required under subsection (c)(2) or other language that appropriately describes the performance shown and the limitations of such performance.

(d) Statements of Opinion.

Statements of opinion included in promotional material of an FCM, IB, CPO or CTA Member must be clearly identifiable as such and must have a reasonable basis in fact.

(e) Supervisory Requirements

Every FCM, IB, CPO and CTA Member shall adopt and enforce written procedures to supervise its Associates and employees for compliance with this Rule. Prior to its first use, all promotional material (as defined in paragraph (i) of this Rule) shall be reviewed and approved, in writing, by an officer, general partner, sole proprietor, branch office manager or other supervisory employee other than the individual who prepared such material (unless such material was prepared by the only individual qualified to review and approve such material). If the Member is registered as a broker-dealer under Section 15(b)(11) of the Exchange Act and the promotional material specifically refers to security futures products, the individual reviewing and approving the promotional material must be a designated security futures principal.

(f) Recordkeeping.

Copies of all promotional material along with a record of the review and approval required under paragraph (e) of this Rule and supporting materials for any results described under paragraphs (b)(5)-(6) or (c) of this Rule must be maintained by each FCM, IB, CPO and CTA Member and be available for examination for the periods specified in CFTC Regulation 1.31, measured from the date of the last use. Each Member who uses promotional material of the types described in paragraph (b)(5)-(6) or (c) of this Rule shall demonstrate the basis for any reported results to NFA upon request.

(g) Filing with NFA.

The Compliance Department may require any FCM, IB, CPO and CTA Member for any specified period to file copies of all promotional material with NFA promptly after its first use.

(h) ~~Radio and Television Advertisements~~ Audio and Video Promotional Material.

No FCM, IB, CPO or CTA Member shall use or directly benefit from any promotional material radio or television advertisement or any other that uses audio or video content advertisement distributed through media accessible by the public if the advertisement to make makes any specific trading recommendation or refer refers to or describe describes the extent of any profit obtained in the past or that can be achieved in the future unless the Member submits the advertisement to NFA's Promotional Material Review Team for its review and approval at least 10 days prior to first use or such shorter period as NFA may allow in particular circumstances.

(i) Definitions.

(1) For purposes of this Rule "promotional material" includes: (i) any Any text of a standardized oral presentation, or any communication for publication in any newspaper, magazine or similar medium, or for broadcast over television, radio, internet or other electronic medium, which is disseminated or directed to the public concerning a commodity interest futures account, agreement or transaction; (ii) any standardized form of report, letter, electronic communication (e.g., email, text message or instant message), circular, memorandum, presentation or publication that which is disseminated or directed to the public concerning a commodity interest account, agreement or transaction directed to the public; and (iii) any other written material disseminated or directed to the public for the purpose of soliciting a commodity interest futures account, agreement or transaction.

(2) "Commodity interest Futures account, agreement or transaction" includes commodity interest futures accounts, transactions and orders, commodity pool participations, agreements to direct or guide trading in commodity interest futures accounts, and agreements and transactions involving the sale, through publications or otherwise, of non-personalized trading advice concerning commodity interests futures.

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RULE 2-36. REQUIREMENTS FOR FOREX TRANSACTIONS

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(g) Filing Promotional Materials with NFA: Communications with the Public and Promotional Material.

Forex Dealer Members and, as applicable, Associates of Forex Dealer Members must comply with sections (a) through (h) of NFA Compliance Rule 2-29 and the Interpretive Notices related to these provisions. The Compliance Department may require any Forex Dealer Member for any specified period to file copies of all promotional material with NFA for its review and approval at least 10 days prior to its first use or such shorter period as NFA may allow. ~~The Compliance Department may also require a Forex~~

~~Dealer Member to file for review and approval copies of promotional material prepared or used by some or all of the non-Members it is responsible for under Section (d).~~

~~(h) Hypothetical Results Reserved~~

~~Any Member who uses promotional material that includes a measurement or description or makes any reference to hypothetical forex transaction performance results that could have been achieved had a particular trading system of the Member or Associate been employed in the past must comply with Compliance Rule 2-29(c) and the related Interpretive Notice as if the performance results were for transactions in on-exchange futures contracts.~~

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INTERPRETIVE NOTICES

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9003 - NFA COMPLIANCE RULE 2-29: COMMUNICATIONS WITH THE PUBLIC AND PROMOTIONAL MATERIAL

I. Introduction

Section 17(p)(3) of the Commodity Exchange Act (7 U.S.C. §21(p)(3)) requires that the rules of a registered futures association such as NFA "establish minimum standards governing the sales practices of its members and persons associated therewith. . . ." NFA has established such minimum standards in the form of its Compliance Rules which, among other things, generally prohibit fraud and deceit and require Members and Associates to "observe high standards of commercial honor and just and equitable principles of trade in the conduct of their commodity ~~futures~~ interest business." Although these rules supply the required minimum ~~standard~~ standards, they are general in nature and may not always provide specific guidance as to what particular conduct may be prohibited. ~~It is expected that more detailed content will be given to those general rules through the work of~~ Additional information related to how NFA rules apply to specific conduct may be found by reviewing disciplinary decisions issued by NFA's Business Conduct Committees and Interpretive Notices issued by NFA. ~~, which will issue decisions in disciplinary cases applying the rules to specific conduct. It is also expected that NFA's Advisory Committees, through study and recommendation of rule changes, will further the development of uniform industrywide sales practice standards.~~

~~NFA's Board of Directors has adopted and the CFTC has approved a new Compliance Rule, 2-29, which was proposed to the Board by the FCM Advisory Committee ("The Committee"). The Committee published a notice for public comment on its proposed rule on February 21, 1985, and considered the comments received in drafting the final rule.~~

II. The ~~Contemplated~~ Relationship of Compliance Rule 2-29 With Other NFA Rules

NFA Compliance Rule 2-29 implements specific requirements for deals specifically with communication with the public and promotional material prepared and used in the conduct of related to the a Member's or Associate's futures commodity interest business of an FCM, IB, CPO or CTA Member. However, all Members and Associates are subject to all other applicable NFA requirements, including NFA's rules related to fraudulent and deceptive practices (Compliance Rule 2-2) and just and equitable principles of trade (Compliance Rule 2-4) with respect to their communications with the public and promotional materials.

~~However, Member and Associate conduct in that area, as in all others related to futures, is, and under the new rule continues to be, subject to all other NFA requirements. For example, certain other NFA Rules deal specifically with communications with the public and promotional materials in a narrower context. Compliance Rule 2-13, which incorporates CFTC Rule 4.41, regulates the advertising of Commodity Pool Operators ("CPOs") and Commodity Trading Advisors ("CTAs"). In addition, all Member and Associate conduct, including communications with the public, is subject to the requirements of Compliance Rule 2-2 (Fraud and Related Matters) and Compliance Rule 2-4 (Just and Equitable Principles of Trade).~~

~~The new Compliance Rule 2-29 is not intended to supplant those or any other NFA Requirements but rather to augment them. Hence, literal compliance with Rule 2-29 will not preclude NFA from raising compliance issues with the content of promotional material or taking a disciplinary action be a "safe harbor" from NFA disciplinary action if the Member or Associate violates any other NFA Requirement.~~

III. The Scope of Compliance Rule 2-29

The definition of "promotional material" set forth in Compliance Rule 2-29 is broad and Rule 2-29 is intended to apply to all forms of communication with the public by an FCM, IB, CPO or CTA Member or Associate without exception if the communication relates in any way to solicitation of an account, agreement or transaction in the conduct of the Member's or Associate's commodity interest business, in futures as the term "futures" is now or may be defined.⁴

~~However, in drafting the Rule the Committee recognized that some NFA recognizes certain specific standards that which would be appropriate for communications prepared in advance of delivery to the public might be unenforceable and even inappropriate in the context of routine day-to-day contact with customers. The Committee was concerned that Compliance Rule 2-29 is not intended to impede the free flow of information and advice to customers might be impeded to their detriment if by subjecting spontaneous communication were subjected to rigorous and detailed content standards.~~

To address this problem, the final Compliance Rule 2-29 distinguishes routine day-to-day communications with customers and applies a different regulatory standard to such communications. This is accomplished by providing a definition of "promotional material" to identify the kinds of communications with the public that ~~which~~ will be subject to specific content standards and other requirements beyond those provided in Section (a) General Prohibition. Therefore, the definition of promotional material (~~which is a broadened version of the definition of that term in the CFTC's option pilot program rules~~) is intended to include all kinds of promotional communications with the public, other than routine day-to-day contact with customers. It includes, for example, any kind of written, electronic or mechanically reproduced message or presentation that ~~which~~ is directed to any member of the public, ~~whether broadcast over the media, delivered through the mail or presented personally.~~ It also includes any oral presentations or statements to customers or prospective customers, ~~whether delivered over the telephone or in person,~~ the substance of which is standardized, outlined or scripted in advance for delivery to such persons.

IV. Section-by-Section Analysis

Section (a) General Prohibition

This Section provides the general rule governing all communications with the public and ~~is the only portion of the Rule applicable to~~ applies to routine day-to-day communication with customers. That means that routine customer contact ~~will~~ would not violate ~~run afoul of~~ Compliance Rule 2-29 as long as it is not fraudulent or ~~deceptive~~ deceitful, is does not involve a high-pressure approach in nature and does not contain any statement indicating that commodity interest futures trading is appropriate for all persons. NFA believes that the general prohibition should not hamper free and open communication with individual customers on a day-to-day basis. ~~In that regard, it is expected that Business Conduct Committees would not find such communications to operate as a~~ In general, a communication will not be considered fraudulent or deceptive fraud or deceit in the absence of evidence of such intentional or recklessness conduct on the part of the FCM, IB, CPO or CTA Member or Associate.² In certain circumstances intentional or reckless conduct may be presumed (e.g., if a Member or Associate specifically contradicts or downplays any disclosure statement required to be made by CFTC regulations or NFA rules).

Section (b) Content of Promotional Material

Deceptive or Misleading Promotional Material

This Section sets out the specific prohibitions and requirements applicable to promotional material, as defined. Subsection (1) bans material likely to deceive the public. Proof of violation of this subsection ~~provision~~ does not require proof of a specific intent to deceive. This Subsection instead places the burden on the Member to determine whether the material is likely to be deceptive in effect. Of course, to find a violation of this Subsection a Business Conduct Committee would have to find that the

Member or Associate reasonably should have been able to determine that the material was likely to deceive. The fact that someone was actually deceived would not, by itself, be enough.

Subsection (2) also prohibits FCM, IB, CPO and CTA Members from making material misstatements or knowingly omitting any fact that makes promotional material misleading. This subsection deals with facts only. It requires that the facts which a Member or Associate chooses to include must be true and that no facts knowingly be left out which are necessary to make the facts stated not misleading. With that exception, this Subsection does not require the disclosure of facts. As with deceptive materials Subsection (1), a negligence standard a Member must determine whether promotional material is likely to be misleading in effect and specific intent need not be shown to find that a Member violated these provisions by ~~would be applied in finding violations of Subsection (2) for making material misstatements of fact in promotional material.~~ However, because evaluating omissions is a much more difficult task, ~~this Subsection applies only to knowing~~ NFA has implemented a knowledge requirement for omissions (i.e., instances where the person preparing or reviewing the promotional material knew the omitted fact and failed to include it). This knowledge requirement may complicate the proof necessary to establish a violation of this Subsection. However, knowledge can be inferred from a pattern of failures to include a material fact, the omission of which makes the promotional material misleading. Once knowledge is established, the decision whether the failure to include a fact makes the promotional material misleading in violation of Rule 2-29 will be made by a Business Conduct Committee under a standard of reasonableness.

Additional information related to deceptive advertising is set forth in Interpretive Notice 9033 – NFA Compliance Rule 2-29: Deceptive Advertising.

Other Content Requirements for Promotional Material Used By FCM, IB, CPO or CTA Members and Associates

Subsection (3) requires FCM, IB, CPO and CTA Members and Associates to include a statement discussion of risk to "balance" any discussion of the possibility of profit in promotional material. The requirement that the ~~statement discussion~~ discussion of risk have equal prominence is not intended to mean that the reference to risk must be as long as the discussion of the possibility of profit or indeed to impose any unbending measure of prominence. It is intended to mean only that in the context of the particular promotional material, the reference to discussion of the risk of loss is clearly displayed and is must not be downplayed or hidden.

Subsection (4) ~~requires the~~ provides that any FCM, IB, CPO or CTA Member or Associate using promotional material that refers to actual past trading profits must state that past results are not necessarily indicative of future results. ~~to make a statement in the promotional material concerning the predictive value of past results if reference is made in the material to past trading results.~~

~~Subsection (5) If performance information is included in promotional material used by an FCM, IB, CPO or CTA Member or Associate, Compliance Rule 2-29(b)(5) does not require disclosure of past performance of managed accounts.³ It does require provides that if performance information is given, it must be the Member or Associate must be able to demonstrate that the performance information is representative of the actual performance for the same time period of all reasonably comparable accounts. Hence, under Subsection (5) a An FCM, IB, CPO or CTA Member or Associate could not, for example, advertise the performance of a "model" account unless that performance is representative of all reasonably comparable accounts.⁴ Subsection (5) also makes explicit in this context the Members' existing responsibility to be able to demonstrate that performance information is accurate and representative. A An FCM, IB, CPO or CTA Member or Associate may be able to exclude from "reasonably comparable accounts" those accounts that were actually traded pursuant to a different trading strategy or accounts that were traded independently of the accounts in the program for which performance is presented.~~

The use of performance information in promotional material is, of course, subject to all of the content standards of Compliance Rule 2-29, and compliance with Subsection (b)(5) will not excuse violations of other Subsections. If in presenting performance information for an account or group of accounts, a Member omits facts about those accounts or the differences between those accounts and the account being promoted, and the omission makes the material misleading, the use of the material violates Subsection (b)(2) even though the performance information given is accurate and is representative of all reasonably comparable accounts in compliance with (b)(5). This interaction of the requirements of Subsections (b)(2) and (b)(5) will come into play whenever a Member chooses to present performance information about an account or program which differs materially from the account or program being promoted; for example, where performance information about a house account is used, or where trading control or strategies, commission rates or account sizes which applied in the account or program for which performance is being shown differ from those which will apply in the account or program for which the customer is being solicited. Under the Rule, a Member is free to use a sales tool performance information about accounts which differ from the accounts being promoted, but must take care to ensure first, that the performance information complies with Subsection (b)(5), and second, that the differences are explained to the extent necessary to make the promotional material not misleading.

Finally, ~~Subsection (b)(5) also provides requires~~ that the rate of return must be presented net of all fees and expenses and must not be calculated in a manner that is consistent with the applicable requirements of Part 4 of the CFTC's Regulations and NFA Compliance Rule 2-34, inconsistent with that required under the CFTC's Part 4 Rules, which define rate of return as the ratio between net performance and beginning net asset value for the period. This is not intended to require that the precise Part 4 formula be used in all cases but rather to prohibit the use of methods which lead to rates of return which are materially higher than those produced by the Part 4 method.

Compliance Rule 2-29(b)(6) provides that any testimonial used in promotional material must be representative of all reasonably comparable accounts, prominently state that the testimonial is not indicative of future performance, and, if applicable, state that it is a paid testimonial.

Section (c) Hypothetical Results

Compliance Rule 2-29(c) establishes requirements for FCM, IB, CPO or CTA Members and Associates that utilize hypothetical performance results. Additional information related to these requirements is set forth in Interpretive Notice 9025 - *Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results.*

Although promotional material directed exclusively to persons who meet the standards of a Qualified Eligible Person (QEP) under CFTC Regulation 4.7 are not specifically required to comply with Compliance Rule 2-29(c)(3), the presentation of hypothetical performance results in promotional material is subject to all other NFA rules, including Compliance Rule 2-29(b)(1), which prohibits the use of misleading or deceptive promotional material. Therefore, even for promotional material directed exclusively to QEPs, if not including the past performance information required under Compliance Rule 2-29(c)(3) would make the promotional material misleading, then a Member may be subject to discipline under Compliance Rule 2-29(b)(1).

Section (d) Statements of Opinion

Under Compliance Rule 2-29(d), FCM, IB, CPO and CTA Members and Associates must clearly identify statements of opinion used in promotional material as opinions. In addition, any statement of opinion must have a reasonable basis in fact.

Section (e) Written Supervisory Procedures

Pursuant to Compliance Rule 2-29(e), FCM, IB, CPO and CTA Members must implement and enforce written supervisory procedures that are designed to achieve compliance with NFA's requirements for promotional material. In recognition of the fact that promotional material may be prepared by many individuals within a Member's organization, this Section ~~In addition, all promotional material must be reviewed and approved in writing by an appropriate supervisory employee prior to its first use.~~ requires that promotional material be reviewed and approved by someone in a supervisory position before it is used. It should be emphasized, however, that even communications with the public which do not fall within the definition of promotional material must be diligently supervised under other existing NFA and CFTC rules.

Section (f) Recordkeeping

This Section ~~Compliance Rule 2-29(f)~~ is intended to provide a way in which NFA can conduct meaningful sales practice audits which will reveal examinations of both the content of and supervisory procedures for promotional material and whether the

~~supervisory procedures required under Section (e) are being carried out. In addition, this Section contains a requirement that FCM, IB, CPO and CTA Members who use hypothetical performance results be prepared to demonstrate to NFA's satisfaction the basis for such results. This means that these Members must maintain the records necessary to document how the hypothetical results were calculated.~~

~~[NOTE: This requirement was extended to all performance results effective July 24, 2000.]~~

Section (g) Filing with NFA

This Section Compliance Rule 2-29(g) allows the Compliance Department to implement filing requirements for any FCM, IB, CPO and CTA Member. This provision is intended to allow NFA to maintain close review of promotional material in circumstances where special scrutiny is warranted.

~~[NOTE: This interpretive notice was amended effective July 24, 2000 to conform it to subsequent changes in NFA rules. In particular, the amendments eliminate the discussion of hypothetical results and update section references within Compliance Rule 2-29 based on changes to Compliance Rule 2-29's treatment of hypothetical results; eliminate references to options rules that are no longer in effect; and make other technical amendments to correspond to subsequent changes to other NFA rules. Furthermore, adjudicated disciplinary decisions are now issued by NFA Hearing Panels rather than Business Conduct Committees. Therefore, all references to Business Conduct Committees, while not changed in the notice, now refer to Hearing Panels. In all other respects, this interpretive notice remains an interpretation adopted by the Board of Directors contemporaneously with the adoption of NFA Compliance Rule 2-29.]~~

¹Article XVIII(k) of NFA's Articles of Incorporation defines futures to include "options contracts traded on a contract market, and such other commodity-related instruments as the Board may from time to time declare by Bylaw to be properly the subject of NFA regulation and oversight." Currently, the only NFA Bylaw expanding that definition is Bylaw 1507, which states that "'futures' as used in these Bylaws shall include option contracts granted by a person that has registered with the Commission under Section 4c(d) of the Act as a grantor of such option contracts or has notified the Commission under the Commission's rules that it is qualified to grant such option contracts." [Bylaw 1507 has since been amended to include foreign futures and options contracts and leverage transactions.]

²However, it must be noted that much, if not all, of the benefits to customers of the disclosures and cautionary statements required to be included in promotional material by other sections of Rule 2-29 and other disclosure statements required by CFTC and NFA Rules (e.g., the risk disclosure statements required by CFTC Rule 1.55 and NFA Compliance Rule 2-27) can be intentionally diminished in the course of oral communications with customers. To avoid that result it is expected that Business Conduct Committees will presume intentional or reckless deceit in instances where a Member or Associate specifically contradicts or downplays any disclosure statement required to be made by CFTC or NFA rules.

³CPOs and CTAs are, however, subject to such a requirement through the CFTC's Part 4 Rules.

~~4-The Committee expects that a Member or Associate could exclude from "reasonably comparable accounts" those that were actually traded pursuant to a different trading strategy or those that were traded independently of the accounts in the program for which performance is cited. With respect to the question of independence the indicia of independence listed in the CFTC's statement of policy concerning when accounts should be aggregated for position limit purposes would be useful guides for Members, Associates and Business Conduct Committees. *Statement of Aggregation Policy* (1977-80 Transfer Binder) Comm. Fut. L. Rep. (CCH) 20.837 (June 13, 1979); 44 *Fed. Reg.* 33839.~~

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9009 - NFA COMPLIANCE RULE 2-29: REVIEW OF PROMOTIONAL MATERIAL PRIOR TO ITS FIRST USE

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~~As a service to its Members and the investing public, NFA offers a program for the to review of the promotional material of an FCM, IB, CPO or CTA Member prior to its first use. This program is voluntary and no Member must is required to file promotional material with NFA prior to using the material unless otherwise required to do so by an NFA rule or directive. In addition, the use of this program in no way lessens the requirement that Members supervise the preparation of and review, approve and supervise the use of all of their promotional material. A Member Members may not rely on or attempt to use NFA staff's review as a substitute for its own to meet its promotional material supervisory obligations under NFA Compliance Rule 2-29.~~

~~Any FCM, IB, CPO or CTA Member Members wishing to use avail themselves of the pre-review program may must submit promotional material to the Compliance Department through NFA's electronic Promotional Material Filing System at least 14 24 calendar days prior to its first intended use.¹ This material should be directed to:~~

~~National Futures Association
Compliance Department
Advertising Regulation Team
Suite 1800
300 S. Riverside Plaza
Chicago, IL 60606~~

~~In addition, Members may ask general questions about promotional material or Compliance Rule 2-29 by contacting NFA's Information Center at (312) 781-1410 or (800) 621-370 or through the "contact" feature of NFA's web site at www.nfa.futures.org. Such inquiries will be forwarded to the appropriate personnel for response.~~

~~Submitted Promotional material must be submitted to NFA for review by a firm representative who has been designated to file promotional material on behalf of the Member by its security manager, accompanied by a cover letter signed by a supervisory~~

~~¹ See A Guide to NFA Compliance Rules 2-29 and 2-36 for additional information on NFA's Promotional Material Filing System.~~

~~employee responsible for the review of the Member's promotional material. NFA staff will not pre-review material received directly from APs. The filing must also include the following information:~~

- The name of the supervisor(s) who reviewed and approved the promotional material;
- A description of how the promotional material will be used and disseminated to prospective client(s);
- The type(s) of investment products being offered in the promotional material; and
- The date the Member intends to begin using the promotional material.

~~NFA staff will review submissions as expeditiously as possible. The Member will be notified if ~~if~~ additional information is needed or the review cannot be completed within the 24 ~~14~~ day period, ~~the Member will be so notified. (In our experience, most reviews take far less than 21 days, and reviews take more than 21 days only in highly unusual circumstances.)~~ The firm representative may communicate with the reviewer regarding a particular submission at any time during the review process by sending an electronic message through the system.~~

~~NFA will notify the Member by email when the review is complete and instruct the firm to access the Promotional Material Filing System to view any review comments or obtain notification that staff has no further comments and the material may be used.~~

~~The Member is responsible for ensuring the accuracy of all information in the promotional material. NFA staff will not be able to independently verify the accuracy of every statement or numerical claim made in a piece of promotional material within the 14-day review period, and submitting promotional material to NFA will not preclude NFA from raising compliance issues with the content of the promotional material or taking a disciplinary action for misstatements, omissions of material facts or other violations of NFA rules that are subsequently identified. NFA staff's review is designed to provide guidance to Members, particularly with regard to whether the material presents the appropriate balance regarding the possibility of profit and the risk of loss and the proper use of disclaimers.~~

~~At the conclusion of the review the comments of NFA staff will be conveyed to the Member, generally by telephone. Obviously NFA staff will not be able to independently verify the accuracy of every statement or numerical claim made in a piece of promotional material within the 21-day review period; that responsibility remains with the Member. Therefore, submitting promotional material to NFA will not provide a "safe harbor" for Members if misstatements or omissions of material facts are discovered subsequently. However, NFA staff review will provide valuable guidance to Members, particularly with regard to such areas as balance and the proper use of disclaimers.~~

~~Members may also ask general questions about promotional material or Compliance Rule 2-29 by contacting NFA's Information Center at (312) 781-1410 or (800) 621-3570~~

or through the "contact" feature of NFA's web site at www.nfa.futures.org. Inquiries will be forwarded to the appropriate personnel for response.

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9025 - COMPLIANCE RULE 2-29: USE OF PROMOTIONAL MATERIAL CONTAINING HYPOTHETICAL PERFORMANCE RESULTS

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Over the years the use of hypothetical performance results has repeatedly produced highly misleading promotional material. By their very nature, such performance results have certain limitations. For example, hypothetical performance results do not represent actual trading and are generally designed with the benefit of hindsight, which may under- or over-compensate for the impact of certain market factors, including lack of liquidity and price slippage. Furthermore, since hypothetical trading does not involve financial risk, no hypothetical performance results can completely account for the impact of certain factors associated with risk, including the ability of the customer or the advisor to withstand losses or to adhere to a particular trading program in the face of trading losses. Despite these limitations, there have been numerous instances in which Members ~~in one form or another~~ have attempted to induce customers to place undue reliance on hypothetical results. NFA's Business Conduct Committee has not hesitated to issue charges against Members engaging in such practices and will continue to pay close attention to ~~advertising~~ promotional materials that ~~which~~ display hypothetical results.

The use of hypothetical results has been the subject of regulatory scrutiny ~~before~~. In 1981, the Commodity Futures Trading Commission ("CFTC" or "Commission") considered a total ban on the use of such results. Ultimately, the Commission required ~~determined to require~~ CPOs and CTAs displaying hypothetical results to display the disclaimer set forth in CFTC Regulation 4.41. The Commission noted at the time that it might well impose sterner measures if the disclaimer proved ineffective at preventing abuses. NFA subsequently required all NFA FCM, IB, CPO or CTA Members and Associates to display Regulation 4.41's disclaimer in any promotional material that ~~which~~ contains such results.

In NFA's experience, however, the use of the mandated disclaimer has not prevented recurring abuses in the presentation of hypothetical results. In some instances, Members have touted dramatic hypothetical profits without revealing that their actual performance is much worse. This situation ~~was~~ ~~has been~~ addressed by an amendment to NFA Compliance Rule 2-29(c)(3)~~(2)~~ that ~~which~~ requires FCM, IB, CPO and CTA Members advertising hypothetical results to disclose their actual results as well, except as provided in NFA Compliance Rule 2-29(c)(6). In other cases, Members have effectively diminished the impact of the disclaimer by ~~grossly~~ over-emphasizing the significance of ~~very dramatic~~ hypothetical profits. For example, some Members have utilized promotional material that ~~which~~ presents hypothetical rates of return in large,

bold-face print while the disclaimer can be read only with a magnifying glass. In other advertising pieces the disclaimer is so far removed from the touted hypothetical profits that customers may never find it. There have also been instances in which Members or Associates have attempted to disguise hypothetical performance results as actual performance results by referring to the performance with terms such as "live" or "real-time" results. In many cases, the intention of these ambiguous references are intended to give the appearance that hypothetical performance is actual performance.

~~Due to these problems~~ the nature and the frequency of the issues noted in the use of hypothetical performance, NFA's Board of Directors previously considered a complete ban on the presentation of hypothetical results in promotional material. ~~recently reviewed whether NFA Members and Associates should be permitted to utilize hypothetical performance results in promotional material. During this review, the Board considered a complete ban on the presentation of these results in promotional material due to its potentially abusive and misleading nature.~~ However, in considering such a ban, the Board also recognized that the presentation of hypothetical performance results in promotional material may have some limited utility in certain circumstances, for example, where a Member has developed a new trading program for which there are no actual trading results. As a result, the Board decided to continue to allow FCM, IB, CPO and CTA Members and Associates to utilize promotional material containing hypothetical performance results under very stringent restrictions. Hypothetical results will not be allowed, however, for any trading program for which the Member has three months of actual trading results except as provided in Compliance Rule 2-29(c)(6). Any FCM, IB, CPO and CTA Member or Associate utilizing promotional material that which includes hypothetical results shall, at a minimum, adhere to the following requirements set forth in NFA Compliance Rule 2-29(c), which are described more fully below.

First, any FCM, IB, CPO or CTA Member or Associate utilizing promotional material that which presents hypothetical performance results must provide to customers the disclaimer contained in NFA Compliance Rule 2-29(c)(1). ~~The Board has expanded the required~~ This disclaimer addresses ~~to provide a more thorough discussion of the~~ limitations of hypothetical results and of the dangers in placing undue reliance upon them. To prevent the over-emphasis of hypothetical performance results, the disclaimer must be displayed as prominently as the hypothetical results themselves. Generally, this would require that the disclaimer be printed in a type size at least as large as that used for the hypothetical results. Similarly, to avoid circumstances where hypothetical performance results are presented in one section of the promotional material with the disclaimer buried in another, the disclaimer ~~should~~ must now immediately precede, or follow the hypothetical the performance results. Whenever the FCM, IB, CPO or CTA Member or Associate has less than 12 months of actual results, the disclaimer must immediately precede the hypothetical performance results.¹ Furthermore, if the promotional material contains several pages of hypothetical performance results, then the Member or Associate may need to include this disclaimer more than once in the material.

Second, any FCM, IB, CPO or CTA Member or Associate utilizing promotional material ~~that which~~ presents hypothetical performance results must also describe in the promotional material all of the material assumptions that were made in preparing the hypothetical results.² At a minimum, the description of material assumptions must cover ~~points such as initial investment amount, reinvestment or distribution of profits,~~ commission charges, management and incentive fees, and a general discussion of how performance was calculated (e.g., based on settlement prices, real time pricing) the method used to determine purchase or sale prices for each trade. FCM, IB, CPO or CTA Members must also make all material disclosures necessary to place the hypothetical results in their proper context, which in most ~~some~~ instances may go well beyond the prescribed disclaimer. Furthermore, FCM, IB, CPO or CTA Members and Associates must calculate hypothetical performance results in a manner consistent with that required under Part 4 of the CFTC's Part 4 Regulations.

Third, when any FCM, IB, CPO or CTA Member or Associate utilizes promotional material ~~that which~~ contains both hypothetical and actual performance results, ~~then~~ the actual results must be presented with at least the same prominence devoted to the hypothetical results. ~~Both the~~ Hypothetical and actual performance results must be appropriately identified, presented separately³ ~~formatted~~, discussed in an equally balanced manner and calculated pursuant to the same rate of return method. Furthermore, the promotional material must not contain any statement ~~that which~~ places undue emphasis on the hypothetical performance results, for example, by discounting or downplaying the significance of any actual performance results.

NFA's Board of Directors further notes that, ~~as explained above~~, the preceding requirements also apply to an FCM, IB, CPO or CTA Member or Associate's use of promotional material containing a composite performance record showing what a multi-advisor managed account or pool could have achieved if the account's or pool's assets had been allocated among particular trading advisors. In the past, Members have often referred to these composite performance records as pro forma results; however, NFA's Board of Directors believes the pro forma label is misleading. Although the performance for each individual trading advisor is based upon actual results, the selection of and allocation among trading advisors has been done with the benefit of hindsight and, thus, the composite performance record is hypothetical in nature.

¹This requirement does not apply to promotional material directed exclusively to QEPs.

² For promotional material directed exclusively to QEPs, the Member is required to provide the material assumptions only in those instances where the material assumptions differ from the disclosed features of the offered trading program.

³For promotional material directed exclusively to QEPs, hypothetical and actual performance may be presented together provided that each is clearly identified as hypothetical or actual performance.

Therefore, in addition to the preceding requirements, FCM, IB, CPO or CTA Members and Associates must appropriately label any composite performance record for a multi-advisor managed account or pool as hypothetical and not pro forma. Additionally, because the composite performance record is hypothetical in nature, FCM, IB, CPO or CTA Members must include a description of all the material assumptions noted above and, in this context, also describe the method used to select and allocate assets among particular trading advisors. Furthermore, any hypothetical composite performance results for multi-advisor accounts must be calculated based on the nominal funding level required to trade with each of the advisor's in the composite as required by NFA Compliance Rule 2-34. The performance should be presented based on the trading level that is the basis for the CTA's trading decisions rather than its customer's cash management practices. Presenting the hypothetical performance of a multi-advisor composite based on the cash investment of a partially funded account is not appropriate. Presenting the effects of partial funding at varying cash investment levels creates a potential to manipulate the hypothetical rates of returns by simply increasing or decreasing the cash funding level. The Board also notes that if if an FCM, IB, CPO or CTA Member or Associate previously used promotional material containing hypothetical composite performance records for multi-advisor managed accounts or pools and the hypothetical results were substantially higher than the actual results subsequently obtained by the Member or Associate in allocating assets among the multi-advisors, then this fact must be disclosed in the promotional material.

The presentation of hypothetical performance results in promotional material is, of course, subject to all other NFA Requirements. Pursuant to NFA Compliance Rule 2-29 (b)(1) and (2), the ultimate test of any promotional material is whether the overall impact of the material is misleading or is likely to be deceptive ~~deceive the public~~. Although NFA has issued this Interpretive Notice, the Board recognizes that it cannot describe every manner in which promotional material containing hypothetical performance results may be misleading. The fact that an NFA Member or Associate has printed the disclaimer required pursuant to NFA Compliance Rule 2-29 and that the promotional material is in facial compliance with this Interpretive Notice does not ensure that the material is not misleading.

Promotional material ~~that~~ ~~which~~ contains hypothetical performance results will continue to be carefully scrutinized by NFA staff. Pursuant to NFA Compliance Rule 2-29(f), FCM, IB, CPO or CTA Members and Associates presenting hypothetical results in their promotional material must be able to demonstrate to NFA's satisfaction the validity of the presentation of the results. The greater the emphasis on dramatic hypothetical profits, the greater the Member's burden in demonstrating the validity of the presentation.

Addressing a different concern, the Board of Directors also believes that hindsight analysis may be misleading as applied to the presentation of *extracted performance* in which an FCM, IB, CPO or CTA Member or Associate selects one component of its overall past trading results to highlight to customers. In order to prevent the misleading use of such results, except in the case of promotional material directed exclusively to

QEPs, the use of extracted performance is permitted only when a CPO's or CTA's previous disclosure documents designated the percentage of assets ~~that~~ which would be committed toward that particular component of the overall trading program. For example, if the previous disclosure document stated that 25 percent of a fund's assets would be dedicated to trading financial futures contracts, and if 25 percent of the fund's assets were in fact dedicated to trading financial futures contracts, the CPO would be allowed to present the extracted performance of its financial futures trading based on net asset values equal to 25 percent of the fund's total net asset value. Performance may also be extracted from a managed account program run by an FCM or IB if these same requirements are met. In other words, the FCM or IB must have previously prepared and distributed to all customers participating in the trading program a written report or similar document which designated the percentage of assets ~~that~~ which would be committed toward ~~that a~~ a particular component of the overall trading program. Oral representations, or written documents ~~that~~ which were not distributed to the customers, are not sufficient. Furthermore, any promotional material referring to extracted results must clearly label those results as such and must disclose in an equally prominent fashion the overall actual trading results from which the extracted results were drawn. Members presenting extracted performance in promotional material directed exclusively to QEPs are not required to satisfy the requirements of this paragraph, provided that such performance information is clearly identified and accompanied by disclosure of material assumptions that were made in preparing the extracted performance that differ from the disclosed features of the offered trading program.

Lastly, the Board of Directors believes that the use of pro forma performance histories can present useful information to customers, particularly when used to show how the past performance of a given FCM, IB, CPO or CTA Member or Associate would have been affected by the commission or fee structure ~~that~~ which applies to the ~~futures or options~~ commodity interest contracts, commodity pool, or trading program offered, recommended or described by the Member or Associate is offering, recommending, or providing information on. Therefore, an FCM, IB, CPO or CTA Member or Associate may use pro forma results to adjust for differences in commissions and fees as long as the pro forma results are not calculated in a misleading manner and the assumptions used to arrive at the pro forma results are clearly disclosed.

* * *

9033 – NFA COMPLIANCE RULE 2-29: DECEPTIVE ADVERTISING

NFA Compliance Rule 2-29 governs the use of promotional material and communications between NFA FCM, IB, CPO and CTA Members and the public. ~~Among other things, the~~ The rule prohibits the use of misleading, deceptive or high-pressure promotional material which is misleading or deceptive. ~~The Board's purposes in adopting purpose of this rule were to protect~~ is to protect the public from fraudulent advertising and sales solicitations and to provide Members with specific guidance on the standards by which their promotional material ~~would~~ and sales solicitations will be judged.

Recently, a relative handful of Members have used strikingly similar promotional materials, usually in the form of radio or television advertising, which clearly This Interpretive Notice provides guidance that will help FCM, IB, CPO and CTA Members identify and refrain from using practices that violate both the letter and or the spirit of NFA Compliance Rule 2-29. The core problem with all of these promotional materials is that they suggest the One common theme of deceptive or misleading promotional material is the suggestion of a strong likelihood of reaping that customers will reap dramatic profits by investing with the Member firm when, in fact, nothing in the Member's past experience provides any basis for those claims. Typically, these commercials employ a variety of techniques to mislead the public: Below are examples of conduct that may be deemed deceptive or misleading:

- **Claims Regarding Seasonal Trades and Historical Price Moves** – Some Members have suggested almost certain profits from so-called seasonal trades in, among other things, heating oil and unleaded gas. These ads promotional materials cite historical data which supposedly shows showing that certain trades produce dramatic profits year in and year out. Another theme is the reference to historic price moves in particular commodities with a suggestion that the same record setting move is likely to occur once again. For example, promotional material may refer to a time when a particular commodity traded at a high price, suggest that a similar movement is imminent and project that a customer can expect to double, triple or quadruple their investments in a short period of time. Invariably, however Promotional material can also be deceptive or misleading if the "historical data" involves different products, different time frames or different fee structures. The most One telling point, by far, is that the firm's customers have never experienced the types of profits touted have not been achieved by the Member or its customers.
- ~~**Claims Regarding Historic Price Moves**~~ – Another frequent theme in these misleading commercials or solicitations is the reference to historic price moves in particular commodities with a suggestion that the same record setting move is likely to occur now. For example, these promotional materials refer to times when sugar traded at \$.66 per pound, gold at \$800 per ounce and silver at \$50 per ounce. By suggesting that a similar movement is imminent, the Member projects that customers can expect to double, triple or quadruple their investments in a short period of time. In point of fact, however, the Member has made similar claims in the past and its customers have never experienced such profits.
- **"Cherry Picked" Trades** – Occasionally, Members have sought seek to entice prospective investors by claiming that their customers have made dramatic profits, for example, citing returns of 50 percent or more on particular trades. When However, when asked to support these claims, the Members rely on a few isolated trades in specific customer accounts. What these Members fail to say in their commercials and solicitations disclose is that those profitable trades are not at all representative of the overall performance either of either that customer's

account or its other customers. ~~and that, in fact~~ In some cases, the customer referred to in the ~~commercial~~ promotional material has actually lost money overall.

- **Profit Projections** – ~~Over and over, some Members have claimed claim~~ that, based on current market conditions, customers can "turn \$10,000 into \$40,000," or profits of a similar magnitude. Again, however, ~~the fact is that~~ the Member has not achieved produced anything like the projected profits for its customers in the past. A variation of this technique involves highlighting the tremendous profits that will result from projected price movements that are characterized, directly or indirectly, as conservative estimates when, in fact, such price movements would be dramatic.
- **Use of Mathematical Leverage Examples** – Members have improperly used leverage examples as a means of suggesting that prospective customers are likely to earn large profits trading in commodity interests despite the fact that the past performance of the Members' customers does not support their claims.
- **Use of Price Moves in One Product to Solicit Investment for a Different Product** – Members have referred to historical price data for different products than those that are being offered, sold or traded by the Members. For example, Members soliciting for options may present price data relating to the cash or futures market instead of pricing data related to the options.
- **Use of Arbitrary Leverage Level** – Members have presented performance results for a trading program that have been adjusted using an arbitrary leverage factor (e.g., depicting returns that are based on a partially funded investment). Some Members have claimed that the presentation is being made to illustrate the effects that partial funding could have on a trading program's performance; however, the particular trading program is not available to customers using the leverage or partial funding level depicted in the promotional material. In some examples, the promotional material also fails to provide the customer with the performance of the Member's actual trading program, which would typically show a materially different rate of return. In addition, the presentation does not adequately, if at all, explain the manner in which the rates of returns were calculated.
- **Use of Third-Party Index Performance** – Members have used the performance of a third-party index as a way to promote the benefits of managed futures. In some cases, Members have referenced or highlighted the performance of a third-party index even though it is not representative of the Member's trading program or performance results. In other cases, Members have drawn inappropriate or misleading comparisons between their trading program and a third-party index. Members have also failed to adequately disclose the basis and limitations associated with the index and/or a statement that the customer is unable to invest directly in the index.

Each of the practices described above presents a distorted and misleading view of the likelihood of customers earning dramatic profits by investing with the Member firm, and each of these practices represents a clear violation of NFA sales practice rules. ~~For those few firms which engage in such practices, the Board wishes to reiterate that FCM, IB, CPO and CTA Members may not use any promotional material engage in a pattern of advertising or make any solicitation which makes reference to referencing dramatic profits that which could be achieved in the future or could have been achieved in the past by trading futures or options in commodity interest contracts for a particular commodity or in the futures or options markets market in general unless the Member can demonstrate to NFA that, based on the past performance of its customers, those claims are not misleading.~~

Any FCM, IB, CPO or CTA Member making the types of claims referred to above must be able to demonstrate to NFA upon request that the actual performance of its customers supports those claims. Failure to provide adequate documentation will constitute *prima facie* evidence that the promotional material is misleading.

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9034 - NFA COMPLIANCE RULE 2-29: DECEPTIVE ADVERTISING RESERVED

~~NFA Compliance Rule 2-29 prohibits the use of promotional material which is misleading or deceptive. The purpose of the rule is to protect the public from fraudulent advertising and sales solicitations and provide guidance to Members on the standards by which their promotional material will be evaluated.~~

~~In June 1996, NFA issued a Notice to Members (1-96-11) entitled "Deceptive Advertising." The notice described certain misleading advertising practices that some Members were employing, mainly in radio and TV ads. These included claims suggesting that so-called seasonal trades produce dramatic profits year-in and year-out; claims regarding historic price moves in particular commodities that suggested that the same record setting move was likely to occur again; claims of dramatic profits made by customers based on isolated trades in specific customer accounts (so-called "cherry picked" trades); and claims concerning projected profits, (e.g., "turn \$10,000 into \$40,000").~~

~~The June 1996 Notice made clear that NFA would regard these types of claims to be misleading and a clear violation of NFA sales practice rules unless the Member can demonstrate that based on the actual performance of its customers those claims are not misleading. Since the issuance of the June 1996 Notice, NFA has brought a number of disciplinary cases against Members who have employed misleading advertising techniques of the type described in the Notice. Recently, however, NFA has encountered variations of these types of advertising problems. Due to these recent developments, NFA considers it advisable to issue this supplemental Notice.~~

~~"MATHEMATICAL EXAMPLES OF LEVERAGE" AND DISCLAIMER STATEMENTS~~

~~NFA has consistently maintained that: 1) it is a violation of NFA's sales practice rules for a Member to mislead customers by suggesting that they have a high probability of achieving dramatic profits trading futures and options unless the Member's customers' performance validates such a claim; and 2) it is permissible for Members to use examples in their advertising to illustrate the effect of leverage in futures and options trading.~~

~~A problem that has developed is that some Members are improperly using "leverage examples" as a means of suggesting that prospective customers are likely to earn large profits trading futures and options when the past performance of the Members' customers does not support this claim. In some cases, Members will include disclaimer statements in their ads indicating that references to future profits are only "mathematical examples" of the effect of leverage and that no representation is made that any of the Member's customers has achieved or is likely to achieve profits similar to those in the example. Notwithstanding these disclaimers, the entire thrust of the ad is to convey exactly the opposite message. In these circumstances, disclaimer statements will not provide a safe harbor or insulate the Member from liability for a misleading ad which presents a distorted picture of the probability of success trading futures and options.~~

~~A variation of this technique involves highlighting the tremendous profits which will result from projected price movements which are characterized, directly or indirectly, as conservative estimates when, in fact, such price movements would be dramatic. Ads that use this technique are highly misleading.~~

~~USING PRICE MOVES FOR ONE PRODUCT TO SOLICIT INVESTORS FOR A DIFFERENT PRODUCT~~

~~An additional problem that NFA has noted with some recent ads, particularly those which refer to seasonal trades and historical prices, is that they refer to historical price data for different products than the investment products being sold. For example, ads for options often cite price data relating not to options but to cash or futures prices of the underlying commodity. This practice can be highly misleading. Options prices do not necessarily move in tandem with cash or futures prices. In fact, in many of these ads, the price of the options which are being sold only move a fraction of the price move in the underlying futures.~~

~~Historical pricing data must be for the product being marketed. Thus, if a Member is soliciting for options, then any pricing data that is used must refer to the historical premium value of the option that most closely resembles the type of option that is being marketed; it would be improper, for example, to cite historical price moves relating to at-the-money options when marketing out-of-the-money options. Promotional material that uses historical price data for a product different from the one being marketed in the promotional material will be considered per se misleading and a violation of NFA's sales practice rules.~~

Examples of the types of ads that NFA will regard as misleading include:

- ads that use pricing data relative to the cash or futures markets to sell options
- ads that use pricing data for at-the-money options to sell out-of-the-money options
- ads that use pricing data which does not include commissions and fees comparable to those charged by the Member

An ad touting seasonal trades can also be misleading, even if it uses historical pricing data for the same product that is being offered for sale, if it cherry-picks optimal entry and exit prices and suggests that they demonstrate a consistent price trend when no such consistent price trend exists. For example, it is misleading to claim that heating oil options always go up in value from summer lows to winter highs when heating oil – like all commodity markets – has peaks and valleys and one would incur losses during purported seasonal periods by buying at the high and selling at the low.

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9037 - NFA COMPLIANCE RULES 2-9, 2-10, 2-29, 2-36 and 2-39: SUPERVISORY PROCEDURES FOR E-MAIL GUIDANCE ON THE USE AND SUPERVISION OF WEBSITES, SOCIAL MEDIA AND OTHER ELECTRONIC COMMUNICATIONS

* * *

Technology has impacted nearly every aspect of how Members conduct their commodity interest business, including how they communicate with customers and other market participants. Many Members use websites, social media and other internet-based forums (e.g., blogs, chat rooms, etc.) to promote and conduct their business with customers. E-mail and other electronic communications (e.g., instant messaging, text messaging, messaging services provided by a social networking site, etc.) have enabled Members and their Associates to engage in frequent and instantaneous communications with customers. While these platforms have many benefits, they also provide opportunities to spread unsubstantiated rumors, intentional misrepresentations and engage in other conduct that is inconsistent with NFA rules. Members and Associates are reminded that many NFA requirements, including Compliance Rules 2-9, 2-10, 2-29, 2-36 and 2-39 apply to all forms of communication related to their commodity interest business.

NFA Compliance Rule 2-9 requires Members and Associates with supervisory duties to diligently supervise employees and agents in the conduct of their commodity futures interest activities for or on behalf of the Member. The rule is broadly written to provide Members with flexibility in developing procedures tailored to meet their particular needs. This Interpretive Notice is intended to provide guidance to help FCM, IB, CPO and CTA Members establish appropriate content standards and supervisory oversight of

websites, social media and other electronic communications used to conduct commodity interest business.

~~On certain issues, however, NFA has issued Notices to Members to provide more specific guidance on acceptable standards for supervisory procedures. Currently, information technology is changing nearly every aspect of how Members conduct business, including how they communicate with their customers. For example, e-mail and internet-based communications have enabled Members and their employees and agents to communicate with customers more frequently and efficiently. Expanded use of this technology, however, also requires Members to re-examine their methods of supervising their communications with the public.~~

~~This Notice addresses the supervisory issues raised by use of e-mail and web sites to conduct futures-related business. Although this Notice does not specifically address every aspect of electronic communication, such as the use of chat rooms to conduct business or after-hours electronic trading activity, this is not intended to suggest that Members have no supervisory obligations regarding these types of activities. Consistent with the approach taken in this Notice, in establishing supervisory procedures for electronic communications, Members may wish to draw from their experience in supervising non-electronic communications.~~

Web Sites Websites, Social Media and other Internet-Based Forums

~~Both Members and their employees and agents can inexpensively and quickly create have used websites, social media and other internet-based forums (e.g., blogs, chat rooms, etc.) to promote and conduct their attract business with customers. NFA's Compliance Rule 2-29 establishes the standards that web site content must meet. Any communication related to a commodity interest account, agreement or transaction that is posted by or on behalf of an FCM, IB, CPO or CTA Member on a website, social media page or another internet-based forum that can be viewed by the general public or a closed community that includes current and potential customers, falls within the definition of promotional material and is subject to the requirements of NFA rules. For example, a website, social media page or blog discussing commodity interests that is used, maintained or administered by or on behalf of a Member is considered promotional material. The same is true for any commodity interest-related content written by an FCM, IB, CPO or CTA Member or Associate that is posted on a website, social media page or other communication platform maintained by a third party.~~

~~FCM, IB, CPO and CTA Members must implement written supervisory procedures governing the use of websites, social media and other internet-based forums that are designed to achieve compliance with the requirements of NFA rules, including Compliance Rules 2-10 and 2-29. The procedures that Members adopt to supervise the use of web sites must be designed and enforced to ensure that the web sites comply with these standards. These supervisory procedures: must require prior review and approval of a website, social media page or forum used in connection with the commodity interest business of a Member by an appropriate supervisor and must ensure that each substantive change to or new version of such a website, social media~~

page or other internet-based forum is reviewed and approved prior to its first use. Supervisory procedures should also prohibit or describe how the Member will supervise any features that cannot be reviewed in advance (e.g., a streaming script containing real-time market news). Finally, Members must periodically evaluate and, when necessary, modify their review procedures for website, social media and internet-based forums to ensure that they remain effective and must retain all required records, including records of prior versions and supervisory reviews and approvals.

- ~~• be written;~~
- ~~• require prior review and approval of the web site by an appropriate supervisor; and~~
- ~~• require documentation of the review.~~

~~Because the substantive content of web sites can change frequently, the Member's procedures should address how it will ensure that each substantively new version of a web page will be subject to the review procedures. Members' review procedures should adequately address features unique to electronic communications, e.g., streaming script containing real-time market news, for which neither prior review nor post-review of each bit of information may be possible.~~

~~Unless the website, social media page or internet-based forum limits access to a particular target audience, through an acknowledgment by the user a login mechanism or other means, the Member's review procedures should take into consideration the fact that the content web site, like other forms of mass media advertising, is available to the public at large. If the firm permits its Personal websites, social media pages or other internet-based forums of Associates, employees and/or agents to use personal web sites that are used in connection with their commodity interest activities constitute promotional material of the Member and must be covered by the Member's supervisory program. to attract business for the firm, these web sites will constitute firm promotional material.~~ Consequently, the Member's procedures must be adequate to enable it to properly review the its Associates', employees' and agents' websites, social media pages and other internet-based forums, including all substantive modifications, according to its procedures. Additionally, to ensure compliance with the recordkeeping requirements, the firm's procedures should provide the means to identify the time frame in which particular versions of the website, social media page or other internet-based forum are in use. Finally, Members must periodically evaluate and modify as necessary their ~~web site~~ review procedures to ensure their effectiveness.

If a Member or Associate maintains a website, a presence on social media sites or hosts a blog, a chat room or other forum where commodity interests are discussed, the Member firm must supervise the use of that site, page or forum, including supervising comments or posts made by participants that are not affiliated with the Member. At a minimum, the Member or Associate must regularly monitor the content of the sites, pages or forums it hosts, promptly take down any post that violates NFA rules (e.g., a deceptive, misleading or fraudulent post) and ban users for egregious or repeat

violations. Not only are these actions required by NFA's supervision rules, they are both common sense and standard practice.

~~As is the case with other media, the use of agents' web sites to solicit leads may subject a firm to liability if the agents' leads were generated through deceptive materials posted on a web site. If a Member solicits leads through another party's website, social media or other forum, the Member will be responsible for supervising the content of such platforms and will be subject to an NFA disciplinary action for any content that violates NFA rules. Likewise, a Member may be subject to an NFA disciplinary action if it knows or should know that a non-Member or Member firm maintains a website, social media page or other internet-based forum with deceptive or misleading information related to commodity interests that links to the Member's website, social media page or other internet-based forum and the Member fails to take corrective action. If a firm (either non-Member or Member) maintains a web site which contains deceptive information regarding futures or options trading and a Member pays that firm to provide a hyperlink to the Member's web site, the Member may well be held accountable for the content of the other firm's web site.~~

The fact that a Member creates a hyperlink from its website, social media page or internet-based forum to another website, social media page or internet-based forum does not, in and of itself, make the Member firm accountable for the content of the other website, page or forum. Member firms should bear in mind, though, that their supervisory obligations under Rule 2-9 and Rule 2-29 require them to diligently supervise their employees and agents who are responsible for creating and maintaining the web sites, social media pages or internet-based forums including hyperlinks to ~~other web sites~~. Members' ~~should consider whether appropriate supervisory procedures should~~ include periodic inquiries as to whether their employees and agents are monitoring the general content of the website, social media page or internet-based forum to which the Member links. NFA is not suggesting that firms are necessarily responsible for ~~the a~~ virtually infinite chain of links from ~~its web site to others~~. At the same time, Members who seek to circumvent NFA promotional material and supervision rules by using a chain of hyperlinks to a "remote" website, social media page or internet-based forum may be held accountable for the content of that site, page or forum that "remote" web site's content.

E-mail Electronic Communications

~~A~~ An FCM, IB, CPO or CTA Member's duty to supervise the use of futures commodity interest-related electronic communications, including e-mails, instant messages, text messages and messages sent through social media, by its employees and agents is basically the same as its duty to supervise other forms of correspondence. NFA ~~would expect~~ expects each Member to adopt review procedures that are appropriate in light of its business activities, including the structure, size and nature of its business operations. Like other supervisory procedures, a Member's supervisory procedures with respect to ~~e-mail~~ electronic communications must:

- be in writing; ~~and~~
- identify by title or position the person responsible for conducting the review; ~~In addition, firms may wish to consider whether the following procedures would be appropriate as well:~~
- specify how and with what frequency ~~e-mails~~ electronic communications will be reviewed and how that review will be documented; ~~and~~
- categorize ~~what the type of e-mail~~ electronic communications that will be pre-reviewed or post-reviewed; and
- specify how electronic communications will be maintained and made available upon request by NFA and the CFTC.

Each Member is free to adopt the specific procedures that it will use to conduct its review. However, those procedures must take into consideration the nature of the communication, the relative sophistication of the recipient and the training and background of the employees and agents. In some instances, spot-checking, or sampling, or using automated tools or key word searches to identify potentially problematic electronic communications ~~e-mail messages representing routine communications between Associates,~~ employees or agents and existing customers, may be appropriate and in others it may not. For example, a firm dealing with sophisticated or institutional customers might choose to implement an automated review, key word search or sample a relatively small but representative amount of the routine electronic communications ~~correspondence to review.~~ On the other hand, firms dealing with individual, ~~relatively unsophisticated~~ retail customers might ~~consider using a~~ choose to use an automated review, key word search and review a larger sample of or even reviewing all the routine e-mail electronic communications. Similarly, a firm may wish to conduct a comprehensive review of employees' and agents' ~~e-mail~~ electronic communications if they have a disciplinary history involving problems with customers or were employed by or associated with ~~came from~~ a firm that has been disciplined for fraud or sales practice violations.

Members' procedures should also address whether employees and agents are permitted to use ~~e-mail~~ electronic communication systems other than the firm's system. If a firm permits them to use other systems for business purposes, whether on their work or home computer, the firm's procedures must treat these off-system ~~e-mails~~ electronic communications as its own records and must ensure that the firm is capable of adequately retaining, reviewing them and supervising these records. Given the supervisory problems ~~that~~ which could arise, some firms may choose not to permit their employees and agents to communicate with the public outside of work through an ~~e-mail~~ electronic communication system that is not linked to the firm's network. A Member should implement supervisory procedures that are reasonably designed to ensure that

its personnel are not using unauthorized electronic communications systems to conduct business on behalf of the Member.

In many instances ~~e-mails~~ electronic communications may constitute promotional material. ~~E-mail~~ Electronic communications directed to the public soliciting business constitutes advertising and is subject to the same rules as any other form of promotional material. For example, an e-mail message sent to targeted individuals or groups would be considered promotional material if its ultimate purpose was to solicit funds or orders. A Member's ~~e-mail~~ electronic communication review procedures must be designed to ensure compliance with NFA's promotional material content and review requirements. These requirements, found in NFA Compliance Rule 2-29, provide, among other things, for prior review of this type of ~~e-mail~~ electronic communication by appropriate supervisory personnel. Additionally, this type of ~~e-mail~~ electronic communication is subject to the specific recordkeeping requirements of Compliance Rule 2-29.

Members should properly educate and train their employees and agents on the firm's policies regarding ~~e-mail~~ electronic communications - particularly on those communications that are not reviewed by supervisory personnel prior to use. Special attention should be given to those employees and agents with previous compliance or disciplinary problems. Finally, Members must periodically evaluate the effectiveness of their ~~e-mail~~ electronic communications review procedures and modify them as necessary.

Recordkeeping

Pursuant to NFA Compliance Rule 2-10, FCM, IB, CPO and CTA Members must maintain certain books and records related to the conduct of their commodity interest business. Members are reminded that the content of electronic communication, and not the type of device or technology used to transmit the communication, determines whether the communication is subject to recordkeeping requirements. Furthermore, Members must train their Associates, employees and agents to ensure that they understand and comply with applicable record retention requirements.

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9038 – NFA COMPLIANCE RULE 2-29: HIGH-PRESSURE SALES PRACTICES

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NFA Compliance Rule 2-29 governs FCM, IB, CPO and CTA Members' communications with the public and is one of the most important NFA rules in ensuring that Members observe high ethical standards in their dealings with customers. NFA Compliance Rule 2-29(a)(2) prohibits the use of high-pressure sales practices. The rule itself does not define "high-pressure sales practices." However, NFA has taken there have been a significant number of disciplinary actions related to high-pressure sales practices ~~NFA enforcement cases prosecuted under the rule~~, and those cases provide

guidance to Members on the types of practices ~~that~~ ~~which~~ have been found to constitute high-pressure sales practices.

A common thread in many of the disciplinary actions involving high-pressure sales practices cases brought by the Business Conduct Committee is a the sense of undue urgency which the associated person conveys conveyed to the customer by an AP. In essence, the AP is asking the customer to act now and think later. The purpose of NFA's rule is to ensure that the customer makes a fully informed and carefully considered investment decision. Any tactic, such as those outlined below, that pressures a customer for a hasty decision will be considered a violation of NFA Compliance Rule 2-29(a)(2).

Over the years, NFA has observed an undue sense of urgency conveyed through many different high-pressure tactics. In some cases, the AP rushes the customer through the account opening forms, glossing over the risk disclosure in his or her haste to open the account. Frequently In other cases, APs have inundated a customer with multiple communications designed to provide a sense of urgency to open an account to avoid missing out on predicted market movements. APs have also used electronic communications with bolded, capitalized or highlighted text or subject lines in an attempt to convey false urgency to a customer. APs have even actively attempted to dissuade unsophisticated customers from seeking further advice on their investment decision from friends, relatives or advisors or have tried to threaten or intimidate customers.

These high-pressure sales practices have been enhanced by rapidly changing technology, including smartphones with multiple communication applications, easily accessible online account forms, the use of electronic signatures and the electronic transfer of funds. Members must be aware of the changes to technology and new technology that could be used by APs to pressure customers into investing or entering into trades in violation of NFA rules.

~~This approach can take several different forms. Frequently, an overnight courier service delivers the blank forms to the customer and waits while the customer completes the form. In some cases, APs have actively attempted to dissuade unsophisticated customers from seeking further advice on their investment decision from friends, relatives or advisors or have tried to threaten or intimidate customers. The purpose of NFA's rule is to ensure that the customer makes a fully informed and carefully considered investment decision. Any tactic, such as those outlined above, which presses a customer for a hasty decision will be considered a violation of NFA Compliance Rule 2-29(a)(2).~~

~~Another familiar theme in NFA's high High-pressure sales cases practices could also involve involves a pattern of telephone calls, emails, instant messages and/or text messages, which are unusual in their timing or frequency. In several cases, the For example, an AP may barrage a barraged the customer with calls, emails, instant messages and/or text messages at all hours of the day, including late at night, early in~~

~~the morning and during weekends either late at night or early in the morning. In other cases, the Alternatively, an AP's telephone solicitations to open an account may occur occurred several times a day, several days a week for weeks on end. Phone calls Any solicitation designed to abuse, annoy or harass a customer into opening an account, including soliciting customers at unusual hours and with unusual frequency may constitute a high-pressure approach in violation of NFA Compliance Rule 2-29., unless made at the customer's request, can be an abusive practice, designed to abuse, annoy or harass a customer into opening an account and constituting a violation of NFA Compliance Rules.~~

Perhaps the most obvious indicator of a high-pressure sales practice is simply the tone used by the AP to address the customer. In a handful of cases, APs have shouted at customers, used profane language or otherwise berated the customer in an attempt to bully the customer into opening an account. Such conduct clearly violates NFA rules.

This notice cannot and is not intended to alert Members to all of the factors that may constitute a high-pressure approach sales practice. Each of the factors highlighted above, however, has frequently been present in the high-pressure sales cases brought by NFA, and Members should certainly be vigilant in preventing and detecting such practices in their own operations.

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9039 - NFA COMPLIANCE RULES 2-29 AND 2-9: NFA'S REVIEW AND APPROVAL OF CERTAIN RADIO AND TELEVISION AUDIO AND VIDEO ADVERTISEMENTS

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NFA Compliance Rule 2-29 governs communications between NFA FCM, IB, CPO and CTA Members and the public. Among other things, the rule prohibits the use of promotional material ~~which that~~ is misleading or deceptive. The purpose of this rule is to protect the public from fraudulent advertising and sales solicitations and to provide guidance to Members on the standards by which their promotional material will be evaluated.

~~Over the last few years, NFA's Board of Directors ("Board") has become increasingly concerned with several types of misleading radio and television advertisements that a small number of Member and non-member firms are using with greater frequency previously issued guidance establishing specific requirements for certain radio and television advertisements. Though these problem ads vary somewhat, their consistent theme is that customers are likely to make substantial profits by following the sponsoring firm's recommendations. These advertisements hurt both the customers naïve enough to believe the claims and the reputation of the industry. Though NFA's current compliance rules provide a basis for prosecuting the Members who either sponsor such ads or reap any benefits from the ads, the Board has always felt that it is better to prevent rather than prosecute fraud. Emerging technologies and innovations,~~

including internet broadcasts, various forms of social media and downloadable audio or video content, have led to a wide range of audio and video forums beyond traditional radio and television that allow Members to reach a broad and, in some cases, targeted audience. Since these technologies may also be used to disseminate deceptive or misleading content, the Board has, as described below, amended Compliance Rule 2-29(h) to apply to all promotional materials and public advertisements that use audio or video content.

Although the content and method of delivery may vary, many problematic audio and video advertisements have a consistent theme, which is that customers are likely to make substantial profits by following the sponsoring firm's recommendations. These advertisements hurt both customers naïve enough to believe the claims and the reputation of the industry. The Board is especially concerned where FCM, IB, CPO or CTA Members are making trade recommendations or touting the profitability of past or future trading performance. Some FCM, IB, CPO or CTA Members have taken advantage of audio and video forums to distribute advertisements that are misleading or deceptive. For example, FCM, IB, CPO or CTA Members have used audio or video advertisements that have intentionally omitted required risk disclosures and material information required to put the content of the advertisement in the proper context.

~~To achieve this goal, the Board recently amended NFA Compliance Rule 2-29 to add a new subsection (h) to require~~ requires any FCM, IB, CPO or CTA Member firm using or directly benefiting from any a radio or television advertisement promotional material or public advertisement that uses audio or video content to make that makes any specific trading recommendation or refers refer to or describes describe the extent of any profit obtained in the past or that can be achieved in the future to submit the advertisement to NFA's Promotional Material Review Team for its review and approval at least 10 days prior to first use. If additional information is needed, or the review cannot be completed within the 10-day period, the Member will be so notified. Obviously, NFA staff will not be able to independently verify the accuracy of every statement made in an advertisement within the 10-day review period; that responsibility remains with the Member. Therefore, submitting promotional material to NFA will not preclude NFA from raising compliance issues with the content of the promotional material or instituting a disciplinary action provide a "safe harbor" from NFA actions for Members if misstatements, or omissions of material fact or other violations of NFA rules are subsequently identified. ~~are discovered subsequently or NFA otherwise later determines that the material is in violation of standards set forth herein.~~

~~At this time, the Board also wishes to reiterate that two prior Notices to Members dated June 4, 1996 (I-96-11) and September 2, 1998 (I-98-15) describe particular fraudulent techniques that a relative handful of Members use in their radio and television advertisements. NFA's Business Conduct Committee ("BCC") has not hesitated to issue a number of Complaints against Member firms utilizing the techniques mentioned in those Notices. Furthermore, after recently reviewing the particular types of radio and television advertisements forming the basis of these BCC Complaints, the~~ The Board has directed staff to be particularly vigilant in reviewing radio and television audio and

video advertisements containing specific trading recommendations and/or a description of past or future profits. In fact, the Board finds the content of certain advertisements to be inherently misleading and has further directed staff to disapprove of their usage. Typically, these advertisements include one or more of the following practices outlined in Interpretive Notice 9033 – NFA Compliance Rule 2-29: Deceptive Advertising, which describes a variety of problematic practices. ~~each of which is described in the prior Notices:~~

- ~~• **Claims Regarding Seasonal Trades:** These ads cite seasonal data which supposedly shows that certain trades produce dramatic profits year in and year out in such products as heating oil in the winter and unleaded gas in the summer.~~
- ~~• **Claims Regarding Historic Price Moves** – These ads refer to historic price moves in particular commodities such as sugar when it was trading at \$0.66 per pound, gold at \$800 per ounce and silver at \$50, with a suggestion that the same record setting move is likely to occur again.~~
- ~~• **Claims Regarding Price Movements** – These ads highlight the tremendous profits which will result from projected price movements which are characterized, directly or indirectly, as conservative estimates when, in fact, such price movements would be dramatic.~~
- ~~• **Claims Using Certain Pricing Data** – These ads use price data for a product different from the one being marketed in the promotional material. Examples of these types of ads include: ads that use pricing data relative to the cash or futures markets to sell options; ads that use pricing data for at-the-money options to sell out-of-the-money options; and ads that use pricing data that do not include commissions and fees comparable to those charged by the Member.~~
- ~~• **Claims Containing Profit Projections** – These ads claim that customers can turn a \$10,000 investment into \$25,000 or make similar types of dramatic profit projections.~~
- ~~• **Claims Containing "Cherry Picked" Trades** – These ads seek to entice prospective investors by claiming that their customers have made dramatic profits; however, such claims rely on isolated trades in specific customer accounts.~~
- ~~• **Claims Regarding Mathematical Examples of Leverage** – These ads improperly use "leverage examples" as a means of suggesting that prospective customers are likely to earn large profits trading futures and options.~~

It is important to note that this the list of deceptive advertising techniques described in NFA's Interpretive Notice 9033 – NFA Compliance Rule 2-29: Deceptive Advertising, is not all inclusive. Each of the practices described above Any practice that presents a distorted and misleading view of the likelihood of customers earning dramatic profits by

investing with the Member, ~~and each of these practices~~ represents a clear violation of NFA's sales practice rules.

Finally, one additional issue relating to advertising occurs when a Member benefits from the use of a "blind ad." Specifically, some Members attempt to evade NFA's advertising requirements by purchasing leads from non-Members that run misleading ~~radio and television commercials~~ audio and video advertisements basically identical to those prosecuted by NFA's BCC. These ads do not identify any particular Member firm and invite the viewer to call a toll-free number or subscribe online to obtain more information. The non-Member then sells the resulting leads to a Member firm, which then claims that it has no responsibility for the content of the advertisement. Members cannot evade their supervisory responsibilities by buying leads from such firms.

NFA Compliance Rule 2-9 requires each Member to diligently supervise its employees and agents in the conduct of their ~~commodities futures~~ commodity interest activities. The CFTC has brought cases against companies that run "blind ads" and has alleged that they are, in fact, soliciting orders and are required to be registered as IBs. In addition to a Member's responsibilities under NFA Bylaw 1101, the Board believes that Member firms have a supervisory duty to ensure, to the extent possible, that their employees and agents are not purchasing leads from non-Members required to be registered and/or using fraudulent advertising practices.

In many instances, a Member firm will have direct knowledge of the source of leads that the Member purchases. For example, the Member firm purchases leads from a provider that generates leads solely incidental to some other business purpose (e.g., a subscription list). However, in the event a Member firm does not have direct knowledge, then the Member firm has a duty to inquire as to the source of leads. Specifically, under those circumstances, a Member firm has an affirmative duty to determine if the leads were generated from a provider using any type of advertisement soliciting investments in ~~futures~~ commodity interests, one of whose business purposes is the generation and sale of the leads. If a Member firm purchases leads from such a provider, then the Member must ensure, prior to soliciting any customer with the leads that the advertisement utilized by the lead provider submitted the advertisement to NFA for review and approval pursuant to complies with NFA Compliance Rule 2-29(h). ~~If the advertisement was not approved by NFA~~ does not comply with the requirement outlined by this rule, then the Member is not permitted to solicit any customer with the leads purchased from that provider.

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9042 - COMPLIANCE RULE 2-9: SPECIAL SUPERVISORY REQUIREMENTS FOR MEMBERS REGISTERED AS BROKER-DEALERS UNDER SECTION 15(b)(11) OF THE SECURITIES EXCHANGE ACT OF 1934

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Promotional Material and Correspondence

FCM, IB, CPO and CTA Members must comply with ~~the interpretive notice entitled "Interpretive Notice 9037 – NFA Compliance Rules: 2-9, 2-10, 2-29, 2-36 and 2-39: Supervisory Procedures For E-Mail Guidance on the Use and Supervision of Websites, Social Media and Other Electronic Communications" (9037)~~ for security futures products. E-mails are not the only type of security futures correspondence that must be reviewed, however. Both incoming and outgoing correspondence must be reviewed, and the designated security futures principal must make a record of the review, including noting who conducted the review. The review must include steps to ensure that all correspondence is retained and that the names of the persons who prepared outgoing correspondence are ascertainable from the retained record.

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Use and Disclosure of the Member's Name

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The use of misleading names, affiliations, and qualifications is a violation of Compliance Rule 2-29(a)(1) and (b)(1). For example, if reference is made to membership in any organization (e.g., NFA, SIPC, an exchange), it should be clear which entity belongs to that organization. Similarly, Members and Associates may not state or imply that any individual has any degree or designation that does not exist or is self-conferred, nor may they use bona fide degrees or designations in a misleading manner. Therefore, the Member's supervisory procedures should be reasonably designed to ensure that neither the Member nor its employees use misleading names, affiliations, or qualifications in connection with their security futures activities.

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9043 - NFA COMPLIANCE RULE 2-29: USE OF PAST OR PROJECTED PERFORMANCE; DISCLOSING CONFLICTS OF INTEREST FOR SECURITY FUTURES PRODUCTS

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Use of Misleading Statements

NFA Compliance Rule 2-29(b)(1) prohibits FCM, IB, CPO and CTA Members from using ~~the use of~~ promotional material that is likely to deceive the public. Additionally, NFA Compliance Rule 2-29(b)(2) prohibits FCM, IB, CPO and CTA Members from using ~~the use of~~ promotional material which contains any material misstatement of fact or which the Member or Associate knows omits a fact which causes the material to be misleading. NFA has always considered the following items to be violations of these Rules:

- Promotional material that uses outdated information to support current claims;¹
- Promotional material that makes claims regarding research or other facilities beyond those which the Member or Associate actually possesses or has reasonable capacity to provide.²
- Promotional material that makes any statement to the effect that any report, analysis, or other service will be furnished free or without any charge unless such report, analysis or other service actually is or will be furnished entirely free and without condition or obligation.³

Use of Past or Projected Performance

NFA Compliance Rule 2-29 places certain limitations on the use of past or projected performance in communications with the public. Some of those limitations — most of which apply to all futures contracts regardless of the underlying commodity — are discussed in this section.

Provided that the performance is representative of all reasonably comparable accounts, most promotional material may discuss past performance of actual or recommended transactions if it meets a number of standards.

- Performance must be presented in a balanced manner. (See NFA Compliance Rule 2-29(b)(2) and (b)(5).)
- The promotional material must disclose all relevant costs, including commissions and fees. (See NFA Compliance Rule 2-29(b)(2)).
- Any discussion of the ~~past~~ performance of recommended transactions must comply with NFA Compliance Rule 2-29(b) and (c).
- For security futures products, the promotional material must indicate the general market conditions during the period covered. (See NFA Compliance Rule 2-29(b)(1) and (2).)
- Performance information used by FCMs, IBs, and their Associates must include the date of each initial recommendation or transaction; the price at that date; and the date and price at the end of the period or when liquidation was suggested or effected, whichever was earlier. If a summary is used, it must be calculated in a manner consistent with CFTC Regulation 4.25(a)(7)(i)(F) and NFA Compliance Rule 2-34. (See NFA Compliance Rule 2-29(b)(2) and (5).)
- Performance information used by FCMs, IBs, and their Associates must also be current, meaning that it must cover at least the most recent 12-month period or must include the performance in its entirety if less than 12 months. The Member or Associate must disclose more than the last 12 months of performance if the last 12 months is not representative, and the Member or Associate may not include gaps or otherwise cherry-pick the periods for which it discloses performance. (See NFA Compliance Rule 2-29(b)(1) and (2).)
- The Member or Associate must keep records showing how it calculated the performance numbers used in the promotional material. These records must identify the trades and accounts that were used in calculating performance,

describe how and why those transactions and accounts were selected, and demonstrate how the results are representative of all reasonably comparable accounts. (See NFA Compliance Rule 2-29(f).)

- A person who is authorized to approve the promotional material must determine that the performance information is accurate and is presented in a manner that is not misleading. (See NFA Compliance Rules 2-9(a) and 2-29(e).)

Promotional material that discusses projected performance must also meet a number of standards.

- The promotional material must disclose, and the projected performance must be adjusted for, all relevant costs, including commissions and fees. (See NFA Compliance Rule 2-29(b)(2).)
- The projected performance must have a reasonable basis in fact. (See NFA Compliance Rule 2-29(d).)
- All material assumptions made in projecting performance must be clearly identified. (See NFA Compliance Rule 2-29(b)(2).)
- The risks must be discussed and balanced with the discussion of projected profits. (See NFA Compliance Rule 2-29(b)(3).)

Annual rates of return may not be used in any promotional material unless they are based on 12 consecutive months of actual performance, and they must be calculated in a manner consistent with CFTC Regulation 4.25(a)(7)(i)(F). (See NFA Compliance Rule 2-29(b)(5).) Furthermore, the promotional material must state that past results are not necessarily indicative of future results. (See NFA Compliance Rule 2-29(b)(4).)

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9053 - FOREX TRANSACTIONS

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The Commodity Exchange Act (CEA or Act) gives the Commodity Futures Trading Commission (CFTC or Commission) jurisdiction over certain off-exchange foreign currency transactions offered to or entered into with retail customers.

As described below, NFA Bylaw 306 creates a Forex Dealer Member category for NFA Members who act as counterparties to forex transactions with retail customers. This category allows NFA to exercise appropriate regulatory jurisdiction over the retail forex activities of these Members.

NFA Bylaw 1507(b) defines forex as foreign currency futures and options and any other agreement, contract, or transaction in foreign currency that is offered or entered into on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis that are:

- offered to or entered into with persons that are not eligible contract participants as defined in Section 1a(18) of the Act (retail customers); and
- not executed on or subject to the rules of a contract market, a derivatives transaction execution facility, a national securities exchange registered pursuant to Section 6(a) of the Securities Exchange Act of 1934, or a foreign board of trade.¹

Bylaw 1507(b) also excludes the following from the forex definition if the transaction is not a futures or options contract:

- securities (other than security futures products);
- any contract of sale that results in actual delivery within two days; and
- any contract of sale that creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business.

Given the differences between off-exchange forex transactions and traditional exchange-traded futures and options, NFA's Board of Directors has adopted Compliance Rule 2-36 and this Interpretive Notice to establish specific requirements for forex transactions, Forex Dealer Members and their Associates. ~~the Board of Directors does not believe that it is appropriate to apply the full array of NFA's futures rules to forex transactions. Therefore, rather than simply incorporating forex transactions into the definition of "futures," NFA adopted NFA Compliance Rule 2-36 to govern these transactions.~~

In developing its forex requirements, NFA's primary concern was to ensure that they provide adequate protection for retail customers without imposing undue burdens on NFA Members. NFA also believes that its requirements should, where consistent with customer protection, promote innovation and competition. In order to provide Members with as much flexibility as possible, NFA has chosen to deal with a number of issues by providing guidance under NFA Compliance Rule 2-36 instead of by adopting additional rules.

NFA Compliance Rule 2-36 sets out the general standards that apply to Forex Dealer Members and their Associates in connection with forex transactions. Subsection (b) prohibits Forex Dealer Members and their Associates from engaging in fraudulent activities, subsection (c) requires Forex Dealer Members and their Associates to observe high standards of commercial honor and just and equitable principles of trade in connection with their forex business, subsection (d) prohibits Members from accepting forex orders or accounts from, handling a forex transaction for or on behalf of, receiving compensation for forex transactions from, or paying compensation for forex transactions to any non-Member of NFA that is required to be registered with the Commission as a FCM, RFED, IB, CPO, or CTA in connection with its forex activities, subsection (e) requires Forex Dealer Members and their Associates with supervisory duties to supervise their employees and agents, subsection (f) requires Forex Dealer

Members to provide customers (at account opening and annually thereafter) with written information regarding NFA's BASIC, subsection (g) provides that the communication with the public and promotional material used by a Forex Dealer Member or its Associate must comply with all of the requirements of NFA Compliance Rule 2-29 and the Interpretive Notices related to this rule, ~~Compliance Department may require a Forex Dealer Member to file copies of all promotional material with NFA for NFA's review and approval before it is used~~, subsection (h) requires Members to comply with ~~Compliance Rule 2-29 with respect to any promotional material that includes a measurement or description or makes reference to hypothetical forex performance results~~, subsection (i) requires Forex Dealer Members to notify NFA prior to commencing customer business, subsection (j) requires Forex Dealer Members to designate a Chief Compliance Officer and subsection (l) requires Members and Associates to obtain specific customer information and provide required risk disclosure at the time of account opening. Compliance Rule 2-39 extends these provisions to other Members and their Associates who solicit, introduce or manage forex accounts.

This notice has three sections. The first section explains who qualifies as a Forex Dealer Member under NFA Bylaw 306, the second section provides additional guidance about the requirements in Compliance Rule 2-36, and the third section covers other miscellaneous requirements.

* * *

B. COMPLIANCE RULE 2-36

As noted above, this section provides additional guidance on what Compliance Rule 2-36 requires. Certain sections specifically refer to Forex Dealer Members. All other provisions of this notice also apply to Members and their Associates who solicit, introduce or manage forex accounts.

* * *

3. *Communications with the Public and Promotional Material - No Member or Associate shall make any communication with potential or current customers that is not in accordance with the requirements set forth under NFA Compliance Rule 2-29 and the Interpretive Notices related to this rule.* ~~operates as a fraud or deceit; uses a high-pressure approach; or implies that forex transactions are appropriate for all persons.~~

Promotional material used by the Member or Associate shall not:

- ~~• Deceive the public or contain any material misstatement of fact or omit a fact that makes the promotional material misleading;³~~
- ~~• Include any statements of opinion unless they are clearly identified as such and have a reasonable basis in fact;~~
- ~~• Mention the possibility of profit unless accompanied by an equally prominent statement of the risk of loss;~~

- ~~Include any reference to actual past trading profits without mentioning that past results are not necessarily indicative of future results;~~
- ~~Include any statistical or numerical information about past performance of actual accounts unless the Member can demonstrate that the performance is representative of actual performance of all reasonably comparable accounts for the same period (calculated in accordance with the formula in CFTC Regulation 4.35(a)(6) and NFA Compliance Rule 2-34); or~~
- ~~Include testimonials unless they are representative of all reasonably comparable accounts, the material prominently states that the testimonial is not indicative of future performance or success, and the material prominently states that they are paid testimonials (if applicable).~~

Further, the Forex Dealer Member and its Associates must also comply with the following requirements, which are exclusive to communications relating to forex transactions:

No Member or Associate may represent that forex funds deposited with a Forex Dealer Member are given special protection under the bankruptcy laws. No Member or Associate may represent or imply that any assets necessary to satisfy its obligations to customers are more secure because the Member keeps some or all of those assets at a regulated entity in the United States or a money center country.

No Member or Associate may represent that its services are commission free without prominently disclosing how it is compensated in near proximity to that representation.

No Member or Associate may represent that a customer will have direct access to the interbank-market because the Member is actually the counterparty to every customers' forex transactions. Similarly, no Member or Associate that is straight through processing orders can suggest that they are not the counterparty to the customers' trade (i.e., the FDM is simply acting as a middleman between the customer and the Prime Broker in the interbank market).

No Member or Associate may represent that it offers trading with "no-slippage" or that it guarantees the price at which a transaction will be executed or filled, unless:

- It can demonstrate that all orders for all customers have been executed and fulfilled at the price initially quoted on the trading platform when the order was placed^{4,3} and
- No authority exists, pursuant to a contract, agreement, or otherwise, to adjust customer accounts in a manner that would have the direct or indirect effect of changing the price at which an order was executed.^{5 4}

Members and Associates may not solicit customers based on the leverage available unless they balance any discussion regarding the advantages of leverage with an equally prominent contemporaneous disclosure that increasing leverage increases risk.

Members may also be subject to discipline for promotional material promoting forex trading systems developed by third parties. For example, a Member has direct responsibility for misleading promotional material if the Member prepares or distributes it; has agency responsibility if the trading system developer is an agent of the Member under established principles of agency law; and has supervisory responsibility if the Member fails to supervise its own employees when linking to a third-party trading system developer's website, recommending a third-party's trading system, or entering into a referral agreement with a third-party system developer.

~~No Member shall use or directly benefit from any radio or television advertisement that recommends specific forex transactions or describes the extent of any profit obtained in the past or that can be obtained in the future unless the member submits the advertisement to NFA's Promotional Material Review Team for its review and approval at least 10 days prior to its first use or such shorter period as NFA may allow.⁶~~

~~Every Member should adopt and enforce written procedures to supervise communications with potential and current customers and promotional material. A supervisory employee that is, or is under the ultimate supervision of, a listed principal who is also an NFA Associate should review and approve all promotional material and make a written record of such review and approval.⁷~~

~~All promotional material should be maintained by each Member and be available for examination for the periods specified in the recordkeeping section of this notice, measured from the date of last use.~~

* * *

5. BASIC Disclosure - Members must provide forex customers with information on NFA's BASIC system.

NFA Compliance Rule 2-36(g) requires Forex Dealer Members to provide customers with written information regarding NFA's Background Affiliation Status Information Center (BASIC), including the website address⁸. Forex Dealer Members may comply with this requirement by providing customers with a copy of NFA's brochure entitled "Background Affiliation Status Information Center: An Information Resource for the Investing Public," which is available in print and on NFA's website at www.nfa.futures.org. This information must be provided when the customer first opens an account and at least once a year thereafter.

Forex Dealer Members may provide the information electronically but must do it in a way that ensures each customer is aware of it. For example, merely having the information on the Member's website is not adequate, but sending customers an e-mail including a link to that information and explaining what the link is would be sufficient in most circumstances.

C. OTHER REQUIREMENTS

This section of the notice provides guidance on dues, capital requirements, and security deposits. These requirements apply only to Forex Dealer Members.

* * *

3. Financial Requirements Section 11(b)

Section 11(b) prohibits a Forex Dealer Member from including assets held by an affiliate or an unregulated person in the firm's current assets for purposes of determining its adjusted net capital under CFTC Regulation 5.7(b)(2)(v)(A). This means an FDM may not count any part of those assets for capital purposes.⁵⁹

* * *

¹ The Board of Directors has declared that these transactions are a proper subject of NFA regulation and oversight under Article XVIII, paragraph (k).

² See, for example, Interpretive Notice 9019 – Compliance Rule 2-9: Supervision of Branch Offices and Guaranteed IBs, NFA Manual paragraph 9019; Interpretive Notice 9037 – NFA Compliance Rules 2-9, 2-10, 2-29, 2-36 and 2-39 : Supervisory Procedures For E-Mail Guidance on the Use and Supervision of Websites, Social Media and Other Electronic Communications, NFA Manual paragraph 9037; Interpretive Notice 9046 – Compliance Rule 2-9: Supervision of the Use of Automated Order-Routing Systems (the principles included in this Interpretive Notice apply to forex activities), NFA Manual paragraph 9046. ~~These interpretive notices do not directly apply to forex activities, but the principles included in these notices are equally applicable to those activities.~~

³ ~~Through interpretive notices issued under NFA Compliance Rule 2-29, NFA has provided Members with guidance on what activities are deceptive and misleading. See, for example, NFA Compliance Rule 2-29: Deceptive Advertising, NFA Manual paragraph 9033; NFA Compliance Rule 2-29: Deceptive Advertising, NFA Manual paragraph 9034; Compliance Rule 2-29: High Pressure Sales Tactics, NFA Manual paragraph 9038; and NFA Compliance Rules 2-29 and 2-9: NFA's Review and Approval of Certain Radio and television Advertisements, NFA Manual paragraph 9039. Although these interpretive notices do not directly apply to forex activities, the principles included in them with regard to what is deceptive or misleading are equally applicable to those activities.~~

³⁴ The Forex Dealer Member is not required to give the customer a price that is no longer reflected on the platform at the time the order reaches it. The Forex Dealer Member is not responsible for transmission delays outside its control. If an a Forex Dealer Member, however, advertises "no-slippage" or that it guarantees fill prices, it must prominently disclose that transmission delays might result in customer orders being executed at a price other than that seen by the customer.

⁴⁵ This includes *force majeure* provisions.

⁶ ~~Submission of promotional materials for NFA review is not a substitute for a Member's own responsibility to review promotional material. NFA staff will not independently verify the accuracy of statements made in an advertisement; that responsibility remains with the Member. Submitting promotional material to NFA will not provide a "safe harbor" from NFA actions for Members if misstatements or omissions of material fact are discovered subsequently or NFA otherwise later determines that the material is in violation of any applicable standards.~~

~~⁷ Under traditional legal principles, Members can also be liable for promotional material promoting forex trading systems developed by third parties. For example, a Member has direct responsibility for misleading promotional material if the Member prepares or distributes it; has agency responsibility if the system developer is an agent of the Member under established principles of agency law; and has supervisory responsibility if the Member fails to supervise its own employees when linking to a third-party trading system developer's web site, recommending a third-party's trading system, or entering into a referral agreement with a third-party system developer. See Interpretive Notice titled "NFA Bylaw 1101, Compliance Rules 2-9 and 2-29: Guidelines Relating to the Registration of Third-Party Trading System Developers and the Responsibility of NFA Members for Promotional Material That Promotes Third-Party Trading System Developers and their Trading Systems," NFA Manual, paragraph 9055.~~

~~⁸ Forex Dealer Members can comply with this requirement by providing customers with a copy of NFA's brochure entitled "Background Affiliation Status Information Center: An Information Resource for the Investing Public," which is available in print and on NFA's website at www.nfa.futures.org.~~

~~⁹ Where the CFTC's requirements for holding current assets are more stringent, those requirements apply.~~

~~* * *~~

~~9055 - NFA BYLAW 1101, COMPLIANCE RULES 2-9 AND 2-29: GUIDELINES RELATING TO THE REGISTRATION OF THIRD-PARTY TRADING SYSTEM DEVELOPERS AND THE RESPONSIBILITY OF NFA MEMBERS FOR PROMOTIONAL MATERIAL THAT PROMOTES THIRD-PARTY TRADING SYSTEM DEVELOPERS AND THEIR TRADING SYSTEMS~~

~~* * *~~

~~³ See also Interpretive Notice 9037 – NFA's interpretive notice entitled "NFA Compliance Rules 2-9, 2-10, 2-29, 2-36 and 2-39: Supervisory Procedures For E-Mail Guidance on the Use and Supervision of Websites, Social Media and Other Electronic Communications" (paragraph 9037).~~

~~* * *~~

~~9063 - USE OF ON-LINE SOCIAL NETWORKING GROUPS TO COMMUNICATE WITH THE PUBLIC RESERVED~~

~~On-line social networking groups have changed the way people make trading decisions. A number of NFA Members sponsor blogs, chat rooms, and forums (also called message or bulletin boards), and some use sites like Facebook or Twitter for business purposes. Associates may also sponsor or participate in these groups. Unfortunately, these on-line communities provide opportunities for posters to spread unsubstantiated rumors and intentional misrepresentations. The form of communication does not change the obligations of Members and Associates who host or participate in these groups, and electronic communications must comply with Compliance Rules 2-9, 2-29, 2-36, and 2-39.~~

~~NFA's interpretive notice entitled "NFA Compliance Rule 2-9: Supervisory Procedures for E-Mail and the Use of Web Site," (NFA Manual, ¶ 9037) provides guidance on how NFA's promotional material and supervision rules relate to e-mail and web sites but~~

does not specifically address other types of electronic communications.⁴ This notice discusses a Member or Associate's responsibilities in connection with on-line social networking facilities such as blogs, chat rooms, forums, Facebook, and Twitter.

Obviously, any electronic content that can be viewed by the general public, or even by a more closed community that includes current and potential customers, can be promotional material. For example, blogs dealing with commodity futures or options are promotional material when written by an NFA Member or Associate, and forex blogs are promotional material when written by a Member or Associate subject to the forex rules. Therefore, content generated by the Member or Associate is subject to the requirements of NFA Compliance Rules 2-29, 2-36, or 2-39. The same is true for futures, options, or forex content written by a Member or Associate and posted on a third party's site.

The issue becomes more complicated for user-generated comments responding to a Member or Associate's blog and for Members and Associates who host chat rooms or forums. What is their responsibility for posts from customers or others over whom the Member or Associate has no direct control? When inadequately monitored, social networking sites may contain misleading information, lure customers into trades that they would not normally make, or be used in an attempt to manipulate prices.

If a Member or Associate hosts a blog, a chat room, or a forum where futures or forex are discussed, the Member or Associate is required to supervise the use of that community. This requires, at a minimum, that the Member or Associate regularly monitor the content of the sites it hosts, take down any misleading or otherwise fraudulent posts, and ban users for egregious or repeat violations. Not only are these actions required by NFA's supervision rules, they are both common sense and common practice. Similar requirements apply to Facebook and other sites that allow others to post to the Member or Associate's "wall" or other assessable area.

Audio pod-casts and videos on the Internet—whether on the Member or Associate's Web site or on an independent site such as You Tube—are similar to radio and television advertisements. If they make specific trading recommendations or refer to profits that have been obtained in the past or can be achieved in the future, NFA Compliance Rule 2-29(h) requires the Member or Associate to submit them to NFA for approval ten days prior to use.

Members should have policies regarding employee conduct. These policies could require employees to notify the employer if they participate in any on-line trading or financial communities and provide screen names so that the employer can monitor employees' posts periodically. Alternatively, the policy could simply prohibit participation in such communities. The Member must, of course, take reasonable steps to enforce whatever policies it adopts.

⁴The interpretive notice also states that Members are responsible for supervising their employees and agents who decide whether to include a hyperlink to another web site. While Members are not necessarily

accountable for the content on the hyperlinked site, they are responsible for monitoring that content and removing the hyperlink if they have reason to believe the content is misleading. This includes hyperlinks to third-party blogs, chat rooms, and forums.

EXPLANATION OF PROPOSED AMENDMENTS

As described more fully below, NFA's Board has approved amendments to several NFA Rules and Interpretive Notices to clarify that their applicability is limited to FCM, IB, CPO and CTA Members (and some instances FDMs), better reflect current technology and business practices and implement consistent requirements for the use of hypothetical performance in promotional materials directed exclusively to qualified eligible persons ("QEPs"). In particular, the Board amended NFA Compliance Rule 2-29 to clarify that this rule is limited to FCM, IB, CPO and CTA Members but to also specifically expand the scope to all their commodity interest (not just futures-related) activities. The Board also amended the definition of promotional material to incorporate commodity interests, technological advancements (e.g., internet broadcasts and electronic communications) and to clarify that promotional material includes any standardized materials concerning a commodity interest account, agreement or transaction. The proposal also modifies Compliance Rule 2-29(h) currently applicable to radio and television advertisements to specify that this provision applies to all forms of audio and video promotional material used by FCM, IB, CPO and CTA Members. Additionally, Compliance Rule 2-36(g) will be amended to specify that FDMs and Associates of FDMs must comply with Compliance Rules 2-29(a)(1), (b)(1), (c)-(h) and the Interpretive Notices related to these provisions.

The proposed amendments also modify the existing relief from the hypothetical performance requirements with respect to promotional material directed exclusively to persons who meet the standards of a QEP under CFTC Regulation 4.7. Under the proposed amendments, Members operating pursuant to the exemption provided in CFTC Regulation 4.7 will now be specifically required to comply with the disclaimer requirements set forth in NFA Compliance Rule 2-29(c)(1) and (2), except that for certain extracted and composite performance, the Member may provide the specified disclaimer or other language that appropriately describes the performance shown and the limitations of such performance (new subsections (c)(7) and (c)(8)). These Members will also be required to comply with certain requirements set forth in the NFA Interpretive Notice entitled *Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results* (e.g., requirements related to extracted performance and composite performance).

The Board also approved amendments to the following thirteen Interpretive Notices to correspond with the amendments to NFA Compliance Rules 2-29 and 2-36.

- 9003 – *NFA Compliance Rule 2-29: Communications with the Public and Promotional Material* to clarify certain requirements set forth in the Interpretive Notice and add new provisions addressing testimonials, hypothetical results and statements of opinion.

- 9009 – *Compliance Rules 2-29: Review of Promotional Material Prior to Its First Use* to clarify that the voluntary promotional material review program is only available to FCM, IB, CPO and CTA Members and to more accurately reflect current submission and review processes.
- 9025 – *Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results* to clarify the disclosure requirements (e.g., requirements related to labels, assumptions and disclaimers when using hypothetical performance.)
- 9033 – *Compliance Rule 2-29: Deceptive Advertising*; and 9034 – *NFA Compliance Rule 2-29: Deceptive Advertising* combined into a single Interpretive Notice and updated to cover commodity interests and identify additional deceptive practice.
- 9037 – *Compliance Rule 2-29: Supervisory Procedures for E-mail and the Use of Web Sites* and 9063—*Use of On-Line Social Networking Groups to Communicate with the Public* combined and updated to apply to all commodity interests and all electronic communications. Supervisory and record retention requirements are also clarified.
- 9038 – *Compliance Rule 2-29: High-Pressure Sales Practices* to more directly address the use of electronic communications that convey an undue sense of urgency.
- 9039 – *Compliance Rules 2-29 and 2-9: NFA's Review and Approval of Certain Radio and Television Advertisements* to encompass all forms of audio or video content and more accurately reflect current technology, including internet broadcasts and downloadable media.
- 9053 – *Forex Transactions* to align with the revisions to NFA Compliance Rule 2-36 and to clarify that FDMs may be held responsible for promotional materials related to third-party trading systems; prohibit FDMs and their Associates from representing that a customer will have direct access to the inter-bank market; and to prohibit FDMs and their Associates that are straight through processing orders from suggesting that the FDM is not the counterparty to a customer's trade.
- Cross references and other conforming changes are made to 9042 (*Compliance Rule 2-9: Special Supervisory Requirements for Members Registered as Broker-Dealers under Section 15(b)(11) of the Securities Exchange Act of 1934*), 9043 (*NFA Compliance Rule 2-29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products*) and 9055 (*NFA Bylaw 1101, Compliance Rules 2-9 and 2-29: Guidelines Relating to the Registration of Third-Party Trading System Developers and the Responsibility of NFA Members for*

Promotional Material that Promotes Third-Party Trading System Developers and their Trading Systems).

NFA staff presented these proposed amendments to the FCM, IB and CPO/CTA Advisory Committees. The Advisory Committees supported the proposed amendments. As stated earlier, NFA's Board unanimously approved the proposed amendments on August 15, 2019.

As mentioned earlier, NFA is invoking the "ten-day" provision of Section 17(j) of the CEA. NFA intends to issue a Notice to Members establishing an effective date for the proposed amendments to NFA Compliance Rules 2-29 and 2-36 and the following thirteen Interpretive Notices entitled: 9003 – *NFA Compliance Rule 2-29: Communications with the Public and Promotional Material*; 9009 – *NFA Compliance Rule 2-29: Review of Promotional Material Prior to Its First Use*; 9025 – *Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results*; 9033 – *NFA Compliance Rule 2-29: Deceptive Advertising*; 9034 – *NFA Compliance Rule 2-29: Deceptive Advertising*; 9037 – *NFA Compliance Rule 2-9: Supervisory Procedures for E-Mail and the Use of Web Sites*; 9038 – *NFA Compliance Rule 2-29: High-Pressure Sales Practices*; 9039 – *NFA Compliance Rules 2-29 and 2-9: NFA's Review and Approval of Certain Radio and Television Advertisements*; 9042 – *Compliance Rule 2-9: Special Supervisory Requirements for Members Registered as Broker-Dealers Under Section 15(b)(11) of the Securities Exchange Act of 1934*; 9043 – *NFA Compliance Rule 2-29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products*; 9053 – *Forex Transactions*, 9055 – *NFA Bylaw 1101, Compliance Rules 2-9 and 2-29: Guidelines Relating to the Registration of Third-Party Trading System Developers and the Responsibility of NFA Members for Promotional Material that Promotes Third-Party Trading System Developers and Their Trading Systems*; and 9063 – *Use of On-Line Social Networking Groups to Communicate with the Public*, as early as ten days after receipt of this submission by the Commission, unless NFA is notified that the Commission has determined to review the proposal for approval.

Respectfully submitted,



Carol A. Wooding
Vice President and General Counsel