

April 21, 2025

Via Email (secretary@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 Interpretive Notice 9083 entitled:
*Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member
Supervisory Obligations for Associated Persons* and Amendments to
Other Impacted Interpretive Notices

Dear Mr. Kirkpatrick:

Pursuant to Section 17(j) of the Commodity Exchange Act ("CEA"), as amended, National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("CFTC" or "Commission") the proposed Interpretive Notice 9083 entitled *NFA Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons* ("AP Interpretive Notice" or "Notice"), and NFA also submits proposed amendments to other Interpretive Notices impacted by this AP Interpretive Notice: Interpretive Notice 9019 entitled *Compliance Rules 2-9, 2-36 and 2-51: Supervision of Branch Offices and Guaranteed IBS*; Interpretive Notice 9037 entitled *NFA Compliance Rules 2-9, 2-10, 2-29, 2-36 and 2-39: Guidance on the Use and Supervision of Websites and Social Media*; and Interpretive Notice 9053 entitled *Forex Transactions* (collectively "impacted Interpretive Notices"). On February 21, 2025, NFA's Board of Directors ("Board") unanimously approved the adoption of the proposed AP Interpretive Notice as well as amendments to the other impacted Interpretive Notices.

NFA is invoking the "ten-day" provision of Section 17(j) of the CEA and plans to make the proposed AP Interpretive Notice and the amendments to the impacted Interpretive Notices effective as early as ten days after receipt of this submission by the Commission unless the Commission notifies NFA that the Commission has determined to review the proposal for approval.

**PROPOSED INTERPRETIVE NOTICE AND AMENDMENTS TO OTHER IMPACTED
INTERPRETIVE NOTICES**

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

INTERPRETIVE NOTICES

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9083 – COMPLIANCE RULES 2-9(a) and (d), 2-36(e) and 2-51(d): MEMBER SUPERVISORY OBLIGATIONS FOR ASSOCIATED PERSONS

INTERPRETIVE NOTICE

NFA Compliance Rule 2-9(a) places a continuing responsibility on each Member futures commission merchant (FCM), commodity trading advisor (CTA), commodity pool operator (CPO), and introducing broker (IB) to diligently supervise its employees and agents in all aspects of their commodity interest activities. NFA Compliance Rule 2-9(d) and 2-49, which adopts by reference CFTC Regulation 23.602, places the same supervisory responsibilities on swap dealer and major swap participant Members (collectively, SD Members) regarding their swap activities. NFA Compliance Rule 2-36(e) places identical supervisory obligations on NFA forex dealer members (FDMs) for their forex activities and NFA Compliance Rule 2-51(d) extends these supervisory obligations to all NFA Members with respect to their digital asset commodity activities.

NFA recognizes that, given the differences in the type, size and complexity of Members' business operations including but not limited to their customers and counterparties, technological resources, markets and products traded, trading methodologies (e.g., block and voice brokered transactions), trading venue access and location of their APs, Members must be given an appropriate degree of flexibility to determine what constitutes diligent supervision over their APs' activities. As in all areas of supervision, however, NFA expects that Member firm AP supervisory programs will vary, and firms have flexibility to develop and implement policies and procedures for supervising their APs' activities tailored to their particular operations.

Nevertheless, NFA believes it is important to provide Members with specific guidance and minimum standards related to AP supervision. Accordingly, this Interpretive Notice is designed to provide guidance, as well as establish the minimum components of a Member's AP supervisory program needed to comply with NFA's existing AP supervisory requirements. Of course, each Member should design, implement and tailor, as necessary, its program to its business activities, risks and circumstances, and may amend or supplement existing supervisory policies and procedures to address AP supervision.

All Members, however, in designing their program must keep in mind their ongoing responsibility to ensure that they are appropriately supervising each AP. After

implementing their AP supervisory framework, Members also have an ongoing obligation to ensure that the framework's measures and practices are routinely assessed and appropriately tailored to mitigate the firm's risks. Importantly, each Member's supervisory program should be designed to ensure that its APs' relevant commodity interest and digital asset commodity activities comply with all applicable NFA Rules and CFTC Requirements (NFA and CFTC Requirements). This overarching principle applies regardless of whether the Member's AP(s) work from a Member's main office(s), a branch office or other non-firm location.¹ Moreover, if a Member through its supervision practices or otherwise identifies any concerning issues with an AP's conduct, the firm should consider whether it needs to modify the manner in which it supervises the specific AP and potentially other APs engaging in similar firm activities. Further, if applicable, a Member should also consider whether it is necessary to implement any enhanced or different supervisory measures to diligently supervise APs that work remotely from any non-firm location(s) (e.g., personal residence).

The areas set forth below identify the minimum components a Member must consider when establishing and implementing a framework to satisfy its supervisory obligations over its APs under existing NFA and CFTC Requirements. A failure to adhere to the requirements in this Interpretive Notice may be deemed a violation of NFA Compliance Rules 2-9(a), 2-36(e) and/or 2-51(d), as applicable.

Written Supervisory Program

Each Member must adopt and implement written policies and procedures reasonably designed to ensure that its APs' commodity interest and digital asset commodity activities comply with all applicable NFA and CFTC Requirements. For each AP activity, the policies and procedures must identify the specific supervisory procedures the firm will use to identify potential areas of non-compliance; how it will appropriately escalate and resolve instances of non-compliance; the frequency with which the firm conducts the specific tasks outlined in the supervisory procedures; and the records that will be prepared and maintained to demonstrate that the supervisory measures are implemented, assessed and appropriately tailored to the firm's risks.

¹ NFA Interpretive Notice 9002 entitled *Registration Requirements: Branch Offices* requires a Member firm, other than a swap dealer, to list as a branch office on its Form 7-R any location other than the Member's main business address from which APs engage in activities requiring registration. NFA recognizes that advances in technology have made working from home and other flexible shared workspaces a more viable option. As a result, in August 2021, NFA's Board of Directors adopted changes to this Notice to amend the definition of branch office to specifically exclude subject to conditions locations where one or more APs from the same household work or rent/lease from the definition of branch office and make it clear that Members subject to branch office listing requirements may permit APs to work from these types of remote locations, without listing the location as a branch office.

NFA recognizes that a Member may fulfill, in part, its supervisory responsibilities over its APs' activities by having a third-party service provider(s) or vendor(s) (Third-Party Service Provider) assist in performing certain functions that would otherwise be undertaken by the Member itself to comply with NFA and CFTC Requirements.² If a Member utilizes a Third-Party Service Provider, the Member remains responsible for complying with NFA and CFTC Requirements and may be subject to discipline if a Third-Party Service Provider's performance causes the Member to fail to comply with those NFA and CFTC Requirements. To mitigate the risks associated with outsourcing, a Member's written supervisory policies and procedures should detail its usage of a Third-Party Service Provider(s) to assist in supervising its APs' activities.

Qualified AP Supervisory Personnel

A Member must ensure that its supervisory personnel are appropriately qualified to carry out their AP supervisory functions. NFA understands that Member personnel in various firm operational areas (e.g., compliance, risk management, sales and trading or other business unit) may carry-out some or all the identified AP supervisory functions or assist in doing so.³ A Member's written policies and procedures should identify what areas of the firm are responsible for each AP supervisory function and identify by title or position the person(s) ultimately responsible for performing each function.

AP Qualification Due Diligence

Before permitting an individual to engage in AP activities on behalf of the Member, a Member must conduct due diligence to ensure that the individual is qualified and eligible for the position. Members should consider information obtained through this screening process (e.g., experience level, prior disciplinary issues) in determining whether to hire⁴ a prospective AP and the scope of supervision necessary to adequately supervise those hired. In most instances, when possible, due diligence procedures should include:

² See NFA Interpretive Notice 9079 entitled *NFA Compliance Rules 2-9 and 2-36: Members' Use of Third-Party Service Providers*, which details a Member's supervisory responsibilities relating to outsourcing to a Third-Party Service Provider.

³ NFA understands that some Members may use personnel from other functions (e.g., a business and/or compliance area) to carry out some of the required activities in this Notice. NFA acknowledges that a person does not become an AP simply by the fact that the person carries out one or more of these tasks.

⁴ For purposes of this Notice, the term "hire" or "hired" also means to designate an existing or new employee as an AP.

- Conducting a background check or other similar screening process that complies with the applicable laws and regulations in the jurisdiction where the AP is employed or located (including laws and regulations regarding the creating or maintenance of records reflecting the AP's personal information);
- Confirming a prospective AP's educational and employment information in accordance with the Member's hiring policy;
- Inquiring about any prior or pending disciplinary matters involving derivatives or other regulators and, if any are identified, conducting a review of them. If a prospective AP was previously registered as an AP, a Member must review information related to the prospective AP's disciplinary and registration history available on NFA's BASIC system (See *NFA Interpretive Notice 9010 – Information Available from NFA Regarding Background of Prospective Employees* for additional information) and/or ORS as appropriate.⁵ Where appropriate, Members should also consider reviewing other regulatory databases (e.g., FINRA's BrokerCheck);
- For prospective APs that are required to complete CFTC Form 8-R, review the form to ensure that it is complete, obtain documentation to support any "yes" answers to the disciplinary questions and review those "yes" answers for potential disqualifying conduct;⁶
- For a prospective AP of an SD (who are not required to register or complete the Form 8-R), screen the individual for a statutory disqualification(s); and
- For SD Members, independently confirm a designated AP's representation that NFA's swaps proficiency requirements were completed at a prior employer.

⁵ For example, FCM, IB, CPO, CTA and FDM Members should consult ORS to determine if a prospective AP has worked for a Disciplined Firm and whether that information is relevant to imposing any additional training or supervisory methods over the AP. See *NFA Interpretive Notice 9021 entitled NFA Compliance Rules 2-9 and 2-36: Enhanced Supervisory Requirements for FCMs, IBs, FDMs, CPOs and CTAs*.

⁶ Members are entitled to any non-public registration records regarding a prospective employee. For example, each applicant for registration must complete the disciplinary history portion of the Form 8-R and must supply a detailed explanation of any "yes" responses to those questions. Although the detailed answers are treated as non-public information, the information is available to a prospective Member employer under NFA Registration Rule 701.

A Member should require its APs to notify the Member of any new disciplinary, criminal or other matter that may require disclosure.

Pre-Trade Communications with Customers and Counterparties⁷, and Related Internal Communications.

NFA Compliance Rule 2-10(a) (incorporating CFTC Regulation 1.35) requires FCM, FDM and certain IB Members to maintain records of all oral and written pre-trade communications (including internal communications) that lead to the execution of a commodity interest (or related cash forward) transaction, whether transmitted by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media. NFA Compliance Rule 2-49 (incorporating CFTC Regulation 23.202) imposes the same requirement on SD Members. Compliance Rule 2-10(a) also requires all other IB Members and certain CPO and CTA Members to maintain records of written pre-trade communications. Pre-trade communications required to be maintained under NFA Compliance Rule 2-10 or 2-49 will be referred to as Required Communications)^{8, 9} In order to comply with Compliance Rules 2-10(a) and 2-49 with respect to Required Communications, FCM, IB, CPO, CTA, FDM and SD Members must have appropriate written policies and procedures in place to ensure that they are properly capturing and maintaining these records.

Moreover, these Required Communications provide a Member with relevant information regarding the manner in which its AP(s) interact with customers and counterparties and are ideally suited to help a Member identify any instances in which an AP may be acting in a manner that is not in compliance with NFA and CFTC Requirements or the Member's policies and procedures. Therefore, Members should be appropriately incorporating a review of these communications in their supervisory oversight of their APs.¹⁰

⁷ For purposes of this Interpretive Notice, counterparty means any person that is a counterparty or prospective counterparty to a swaps transaction.

⁸ Pre-trade records include a firm's communications with customers, counterparties and between and among APs and firm personnel concerning quotes, solicitations, bids, offers, instructions, trading and prices that lead to the execution of a trade.

⁹ A Member not subject to the pre-trade oral communication recordkeeping requirements in CFTC Regulation 1.35 should consider whether it may be appropriate to create, review and maintain records of oral communications when designing a supervisory program that ensures it is properly supervising its APs' activities.

¹⁰ SD Members' APs are not required to be registered with the CFTC. SD Members have an obligation to continually identify all individuals who fall within the AP definition (i.e., persons who are involved in the solicitation or acceptance of swaps, or the supervision of persons so engaged). SD Members typically keep an updated list of individuals that they have designated as APs.

Additional guidance on these requirements is set forth below.

Capturing and Retaining Required Communications. NFA Members must have measures in place that are reasonably designed to comply with NFA's recordkeeping requirements related to Required Communications. For Members subject to the oral recordkeeping requirement, Members must require their AP(s) to conduct oral Required Communications only on equipment or applications that can capture and retain the oral Required Communications. Further, Members should require their AP(s) to engage in written Required Communications only on equipment or applications that can capture and retain them. If a Member permits an AP to use a personal device to engage in Required Communications, the firm must ensure that it is able to capture and retain those communications.¹¹ In general, the Member does not meet its recordkeeping requirements by having an AP send screenshots of Required Communications done on personal devices.¹² A Member's policies and procedures should specify what types of electronic systems, channels, equipment and applications are approved for use, how the firm will retain the Required Communications and prohibit an AP's use of any communication methods that are not captured and retained by the firm.

Except for emergency or exigent circumstances, a Member should prohibit AP(s) from using unapproved communication methods, devices, systems, equipment or applications (e.g., personal cell phones and email, private messaging applications) (Off-Channel Communication Method) for conducting commodity interest business, since the Member may not be able to meet its obligation to capture and retain Required Communications. A Member should consider requiring its AP(s) to complete attestations at least annually¹³ to demonstrate compliance with NFA's and the CFTC's recordkeeping requirements and the firm's policies regarding the use of Off Channel Communication Methods.

¹¹ For example, if an AP utilizes a firm sponsored application on a personal device, the firm should have the ability to capture and retain the Required Communications on the firm sponsored application.

¹² There may be occurrences when an AP's customer or a swaps counterparty contacts the AP on a personal device or other unforeseen circumstances that cause an AP to use his/her personal device. In those limited instances, obtaining screen shots of written communications is appropriate. However, NFA expects Members to require their APs to inform clients that they should not contact them on personal devices unless the firm has approved their use because it can comply with NFA's and the CFTC's recordkeeping requirements.

¹³ A Member should require more frequent attestations (e.g., quarterly) if it has previously experienced regulatory issues associated with its APs' use of Off Channel Communication Methods.

Moreover, a Member should have processes in place designed to ensure that the communication methods, equipment, devices, systems and applications they use to capture Required Communications are functioning properly and can identify system outages within a reasonable time frame.

Review of Required Communications. To the extent possible, a Member must have supervisory measures in place to surveil its APs' Required Communications relating to commodity interest transactions that are reasonably designed to identify potential violations of applicable NFA and CFTC Requirements and the Member's own policies and procedures. A Member's supervisory policies must outline a methodology (e.g., frequency and scope) to periodically review its APs' Required Communications. The methodology should be risk based and consider several factors, including: a Member's overall volume of trading activity and that of its APs and trading desks; the firm's communication methods (e.g., whether an AP(s) solicits telephonically, by email or by a messaging application); and any risks applicable to a particular trading desk or AP including those associated with an AP's experience level, customer or counterparty complaints, new product types, and violations of a Member's internal policies and an AP's disciplinary history.

Further, for Members with APs that conduct commodity interest business in multiple languages, the Member must adopt a reasonable, risk-based methodology for conducting surveillance in those languages (e.g., the supervisor is fluent in the language, utilizing technology that translates the communication or other comparable method).

A Member is responsible for reviewing its Required Communications and its policies and procedures should identify which firm area(s) is responsible for conducting the reviews and require that the reviews' details and results be documented.¹⁴ A Member may manually review and/or use automated tools and processes (e.g., E-Discovery or other key word search applications) to review its APs' Required Communications to identify communications that potentially may not comply with NFA and CFTC Requirements.¹⁵ Additionally, Members should utilize Required Communications to determine if the communications are complete and comply with NFA and CFTC Requirements and should also consider whether conducting a trade reconstruction would help the firm identify other missing Required Communications. Further, if the Required Communications identify potential manipulative behavior and market abuses, then the Member should review the trading activity associated with the

¹⁴ NFA recognizes that some firms, especially larger firms, may rely on enterprise-wide personnel outside of the Member firm to conduct these reviews.

¹⁵ Although some firms may incorporate real-time surveillance of AP communications in their supervisory procedures, real-time surveillance alone is not sufficient, especially since the Member is not able to review the other side of the communication.

Required Communications, consider reconstructing the trading activity and consider whether it is appropriate to expand the scope of its testing to identify other potentially problematic behavior.

NFA understands that for some Members, Required Communications reviews may be one component of the Member's program to detect potential non-compliance issues. Nevertheless, when reviewing Required Communications, a Member should review the Required Communications for instances where the reviewed communications:

- Operate as a fraud or deceit, are not fair or balanced, or are otherwise violative of NFA Compliance Rule 2-29, as applicable;
- Indicate potential manipulative behavior or market abuse (e.g., spoofing, front-running, flying prices, wash trades, and cross-product manipulation);
- Disclose a customer or counterparty's identity or information without consent or fail to disclose that a Member or its affiliate is acting as counterparty;
- Display instances of non-compliance with applicable disclosure requirements or a Member's internal policies; and
- Discuss unreported customer or counterparty complaints.

A Member firm must document its review of Required Communications, how it investigated a potential violation of NFA and CFTC Requirements and the investigation's resolution. The firm's policies and procedures must also set forth the parameters describing how the firm determines which flagged communications must be investigated, describe the circumstances in which a potential violation(s) of NFA and CFTC Requirements identified during its review of Required Communications is escalated to the Member's compliance personnel or other appropriate supervisory personnel, to whom the potential violation(s) is escalated and steps the firm will take to resolve the potential violation. In addition, upon request in any inquiry, examination or investigation, a Member must promptly produce to NFA Required Communications and the results of its review of such Required Communications—not just those Required Communications that may contain potential violations of NFA and CFTC Requirements.

A Member's review of Required Communications may indicate that its APs are using Off-Channel Communication Methods if, for example, portions of an AP's communications are missing, there is a noticeable decrease in an AP's use of approved communication applications or there are references in the Required Communications to

using other methods or devices to communicate.¹⁶ Moreover, a Member's policies should contain an escalation process by which an AP's material use of Off-Channel Communication Methods or the existence of other material alleged misconduct (e.g., fraud, customer/counterparty harm and abuse, manipulative or abusive market activity) will be escalated to the firm's appropriate senior management.

A Member should periodically review the effectiveness of its supervisory measures relating to the review of Required Communications. If a Member utilizes automated tools and systems to review these communications, then the firm should periodically assess and calibrate these systems to ensure that they are designed to identify communications that potentially violate NFA and CFTC Requirements and maintain documentation that evidences it has done so.

Order Handling and Trading Activities.

A Member must have supervisory measures in place to review and monitor its APs' order handling and trading activities¹⁷ for commodity interest and digital asset commodity transactions that are reasonably designed to identify potential trading misconduct and market abuses. These measures should be appropriately tailored to address the risks posed by a firm's size, complexity and the scope of its operations, and they may differ based on the Member firm type and its trading activity. A Member's supervisory policies must outline a methodology (e.g., frequency and scope) to periodically review its APs' order handling and trading activities.¹⁸ A Member may utilize a manual review process and/or automated trade surveillance tools and systems including those that rely upon algorithms and/or artificial intelligence to review and analyze AP trading and order handling activities.¹⁹

¹⁶ For example, if a Member's review of Required Communications using a key word search application or otherwise found an AP making statements to a customer or counterparty that refer to "call me" or "text me" maybe indicative of the AP using Off-Channel Communication Methods that circumvent the Member's supervisory oversight.

¹⁷ Activities include both pre-and-post trading.

¹⁸ This Interpretive Notice describes several different trade records that can be reviewed relating to APs' order handling and trading activities. Different types of reviews may warrant different scopes and frequencies. Additionally, whether a Member conducts reviews manually or via an automated system, exceptions and alerts generated as part of these reviews may need to be calibrated/adjusted based on factors including those relating to a specific customer types, markets or instruments.

¹⁹ NFA understands that some Members may conduct all or a portion of these reviews outside of their AP supervisory framework using personnel from other functions (e.g., a business and/or compliance area). In those instances, a Member's policies and procedures should identify what areas of the firm are responsible for these reviews and, if necessary, identify by title or position the person(s) responsible for performing them.

A Member firm must document its review of trading and order handling activity, how it investigated a potential violation of NFA and CFTC Requirements and the investigation's resolution. Moreover, a Member's policies should contain an escalation process by which an AP's material alleged misconduct (e.g., fraud, customer/counterparty harm and abuse, manipulative or abusive market activity) will be escalated to the firm's appropriate senior management. If a review identifies a potential violation(s) of NFA and CFTC Requirements, then a Member's compliance personnel, or other appropriate supervisory personnel, must be notified and involved in appropriately escalating and resolving the potential violation(s). Upon request in any inquiry, examination or investigation, a Member must promptly produce to NFA trading records relating to its commodity interest and digital asset commodity transactions.

A Member's review of its APs' order handling and trading activities should be reasonably designed to identify potential trading misconduct and market abuses. If a Member identifies potential trading misconduct and market abuses, then the Member should also review any Required Communications associated with the transaction(s) and consider reconstructing the trading activity. To identify trading anomalies and abuses, a Member's supervisory framework may include measures to:^{20, 21}

- Review error and suspense accounts, expected and actual daily profit and loss reports and the mark-to-market of positions to identify fraudulent or manipulative behavior;
- Monitor post trade activities (e.g., bunched order allocations, position transfers and suspense accounts) to detect unusual and/or fraudulent activity;
- Review trade discrepancies and trade data for evidence of market abuse, including but not limited to frontrunning, spoofing, off-market trades, cross-product manipulation, and excessive mark-ups and/or mark-downs as well as potential patterns relating to this activity;
- Monitor firm and/or trading desk risk limits to identify potential violations of the firm's risk and trading limits;

²⁰ This list is not intended to be all-inclusive. A Member may have additional order handling and trading activity review processes in place for areas not included on this list. If a Member has additional processes in place, a Member's policies and procedures should document the processes and its review thereof, which may be examined by NFA.

²¹ Not every item in this list is applicable to each Member firm, and Member firms should tailor their supervisory procedures to the risks applicable to their business. As part of an inquiry, examination and/or investigation, NFA may review a Member's supervisory framework relating to its APs' order handling and trading activities and may recommend that a Member adopt additional processes to supervise this area.

- Review counterparty and customer complaints for instances of alleged trading misconduct;
- Review APs' discretionary accounts to identify potential red flags that may indicate improper or abusive trading;
- Review calculations of commission to equity ratios to identify potential excessive trading or churning;
- Compare trading results among a particular AP's customers to identify red flags, including a potential improper allocation scheme;
- Compare trading results of APs' or firm proprietary accounts or non-customer accounts with APs' customer accounts to identify potential red flags; and
- Review accounts with significant losses, significant commission charges or a large volume of trades to determine if an AP is utilizing/recommending a trading strategy that is not in the AP's customers best interests.

A Member should periodically review the effectiveness of its supervisory measures relating to order handling and trading activities. If a firm utilizes automated tools and systems to monitor these activities, then the firm should calibrate and assess these systems to ensure that they are designed to identify potential trading misconduct or market abuses and maintain documentation that evidences it has done so.

Training²².

A Member must adequately train its APs to ensure that they understand NFA and CFTC Requirements applicable to their job responsibilities, as well as the Member's internal requirements. Before permitting an AP to interact with customers or counterparties, a Member should ensure that the AP has been properly trained on relevant NFA and CFTC Requirements and the firm's relevant internal policies and procedures.²³ Members should provide supplementary training to all APs at regular intervals (e.g., at least annually and more often if the firm becomes aware of behavior that indicates APs are not following the firm's relevant policies and procedures) and should provide training on material changes to NFA or CFTC regulatory requirements or the firm's policies and procedures as soon as practicable.

²² Members should continue to comply with the Ethics Training Requirements set out in NFA Interpretive Notice 9051 entitled: *NFA Compliance Rules 2-9 and 2-36: Ethics Training Requirements*.

²³ FCM, FDM, IB, CPO and CTA Members should require additional training for an AP who has been employed at a Disciplined Firm as defined in NFA Interpretive Notice 9021. The additional training should at the least cover the areas that are the subject of the enforcement action.

Members have flexibility to determine the format of training (e.g., in person, bulletins, virtual). Members must keep documentation evidencing their APs' completion of training and the content of the training.

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9019 - COMPLIANCE RULES 2-9, 2-36 and 2-51: SUPERVISION OF BRANCH OFFICES AND GUARANTEED IBS

NFA Compliance Rule 2-9(a) places a continuing responsibility on every FCM, IB, CPO and CTA Member to diligently supervise its employees and agents in all aspects of their commodity interest activities. Similarly, NFA Compliance Rule 2-36(e) places a continuing responsibility on every FDM to diligently supervise its employees and agents in all aspects of their forex activities. Further, NFA Compliance Rule 2-51 extends these same supervisory obligations to a Member with respect to its digital asset commodity activities. Additionally, NFA Compliance Rule 2-23 provides that a guarantor FCM or RFED (i.e., FDM) is jointly and severally subject to discipline by NFA for violations of NFA Requirements committed by an IB guaranteed by the FCM or FDM, and NFA's Business Conduct Committee has initiated disciplinary action under Rule 2-23 in instances where it appears a guarantor FCM or FDM has failed to supervise its guaranteed IBs.

In order to comply with NFA Compliance Rules 2-9, 2-36, 2-51 and 2-23, as applicable, each FCM, IB, CPO and CTA Member and FDM must diligently supervise the commodity interest and digital asset commodity activities at its branch offices and/or guaranteed IBs. NFA recognizes that given the differences in the size and complexity of Member firm operations, Members must be given some degree of flexibility in determining what constitutes diligent supervision. As in all areas of supervision, NFA expects that Member firm supervisory programs over branch offices and guaranteed IBs will vary, and it is NFA's policy to provide firms with flexibility to develop and implement policies and procedures for supervising branch offices and guaranteed IBs that are tailored to the operations of the particular Member firm. Nevertheless, NFA's Board of Directors previously determined and continues to believe that NFA should provide Member firms with specific guidance and minimum standards related to the supervision of branch offices and guaranteed IBs.

As described more fully below, effective supervisory oversight of branch offices and guaranteed IBs begins with a due diligence review of each branch office, guaranteed IB and their personnel. An effective oversight program of branch offices and guaranteed IBs also includes written supervisory policies and procedures describing a Member's process for performing routine surveillance and supervision, as well as annual

inspections that are documented through a written report. Effective supervision also requires diligent supervision of AP and other personnel carrying out the firm's commodity interest and digital asset commodity business, as applicable. Members should review NFA Interpretive Notice 9083 – Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d) entitled *Member Supervisory Obligations for Associated Persons to understand their obligations for the APs and other personnel working at a branch office or guaranteed IB.* Finally, Members are responsible for ensuring that branch office and guaranteed IB personnel are properly trained to perform their duties.

I. Due Diligence Review

A Member firm should adopt written policies and procedures designed to ensure that a robust due diligence review is performed before it establishes or modifies a branch office or guaranteed IB relationship. At a minimum, the Member firm's due diligence process should include reviewing the business that will be conducted by the potential branch office or guaranteed IB and the background and employment history of its personnel to ensure that they are qualified. A Member firm should also review the disciplinary history of prospective APs, their prior employers and, to the extent applicable, the disciplinary history of the potential branch office or guaranteed IB and its principals. In addition, a Member firm should ensure that one or more individuals at the branch office or guaranteed IB are knowledgeable about and will track developments related to the applicable requirements of the Commodity Exchange Act, CFTC Regulations and NFA Requirements. A Member firm should carefully consider information obtained through the due diligence process to evaluate whether it should establish a branch office or guaranteed IB relationship and to determine the scope of the supervisory oversight it needs to perform with respect to a particular branch office or guaranteed IB.

II. Written Supervisory Policies and Procedures

The starting point for diligently supervising a branch office or guaranteed IB is to adopt and implement written policies and procedures describing the manner in which a Member firm provides supervisory oversight for the commodity interest or digital asset commodity business of its branches and guaranteed IBs. NFA recognizes that Members need some degree of flexibility to implement supervisory policies and procedures that are tailored to the unique needs of their business. On the other hand, to be effective, written supervisory policies and procedures for branch offices and guaranteed IBs must be designed to address applicable regulatory requirements; identify the areas that will be supervised; and describe the specific procedures that the Member firm will implement in each area of supervision to provide adequate supervisory oversight to identify potential misconduct. These policies and procedures should address how it will appropriately escalate and resolve instances of misconduct (including by setting forth parameters describing how the firm determines which

identified findings must be investigated, describe the circumstances in which a potential violation(s) of NFA and CFTC Requirements identified during its review is escalated to other appropriate supervisory personnel, to whom the potential violation(s) is escalated and the steps the firm will take to resolve the potential violations); how often the firm conducts the specific tasks outlined in the supervisory procedures; the identity by title or position of the person(s) ultimately responsible for the specific supervisory function; and the records that will be prepared and maintained to demonstrate that the supervisory procedures are carried out, routinely assessed and appropriately tailored to the risks of the firm.

To assist firms in developing appropriate supervisory policies and procedures, Section II.A of this Interpretive Notice provides a detailed description of several areas that, to the extent applicable, must be addressed in a Member's written supervisory policies and procedures for branch offices and guaranteed IBs.

Effective supervision of branch offices and guaranteed IBs requires both routine supervision and surveillance designed to identify and address potential issues as they arise and annual inspections designed to perform a more comprehensive and detailed review of a branch office or guaranteed IB's activities. NFA recognizes that Member firms may use different routine supervision and surveillance processes. For example, some Member firms may implement automated surveillance tools to help review and analyze account activity while others may utilize a periodic manual review process.

Likewise, Members may elect to perform routine surveillance and supervision at different intervals (e.g., on a real-time, daily, weekly, monthly, quarterly or an as needed basis). A Member firm's policies and procedures should also address ~~when~~ how it will escalate to NFA and/or other appropriate regulators, identified significant findings (e.g., findings related to fraud or customer harm) during its routine supervision and surveillance or annual inspection. As described more fully in Section II.B, Members are also required to perform an annual inspection of each branch office or guaranteed IB.

The personnel who perform routine surveillance and supervision and inspections must be appropriately qualified and knowledgeable of the industry and the nature of the firm's business and should be able to perform their work with an independent and objective perspective. Written supervisory procedures should provide sufficient detail to ensure that the inspection process is performed in a consistent manner and will not vary due to the involvement of different personnel in the inspection process. Third-party vendors may be used to assist in performing routine supervision and surveillance and/or inspections; however, Member firms must perform due diligence to confirm that a vendor is qualified to perform the services they will be providing. Likewise, supervisory personnel at the branch office or guaranteed IB may perform certain supervisory procedures. Member firms remain responsible for all applicable regulatory requirements including any supervisory functions performed by a third-party vendor or

supervisory personnel at a branch office or guaranteed IB. Members should review Interpretive Notice 9079 entitled *NFA Compliance Rules 2-9 and 2-36: Members' Use of Third-Party Service Providers* for more information regarding the use of third-party service providers.

The Member firm should ensure that the appropriate personnel at each branch office and/or guaranteed IB have a copy of and understand the policies and procedures related to their duties. The Member firm should also ensure that all supervisory personnel are knowledgeable of the firm's supervisory requirements. Each branch office and guaranteed IB should have a readily available copy of the Member firm's policies and procedures that govern the operation of their business.

A. Supervisory Procedures for Branch Offices and Guaranteed IBs

Members that supervise a branch office or guaranteed IB should implement written supervisory policies and procedures that are reasonably designed to achieve compliance with all NFA and CFTC requirements applicable to the commodity interest business of its branch offices and guaranteed IBs. Such policies and procedures should specify the manner and frequency of specific supervisory procedures that have been implemented to address each of the following areas, to the extent applicable to the business conducted by the Member and its branch offices or guaranteed IBs.

Registration. Members should review Interpretive Notice 9002 entitled *Registration Requirements; Branch Offices* to determine which firm locations are required to be listed as branch offices (IN 9002). A Member firm's branch offices and guaranteed IBs should hold themselves out to the public in their registered names only, and branch offices should not be separately incorporated entities. Only individuals who are registered as APs and are NFA Associates may conduct sales activities at a branch office or guaranteed IB. Members should implement supervisory procedures that are reasonably designed to ensure that any individual performing AP activities is registered as an AP and that AP activities are only performed from a location that meets the criteria in IN 9002 or a main or branch office of a Member firm. For example, a Member could adopt procedures to monitor or review commission payments to confirm that commissions are only paid to APs that meet the criteria set forth in IN 9002 or who are registered individuals APs located at the main or branch office of a Member firm.

~~**Hiring.** Members should implement supervisory procedures designed to ensure that all prospective employees at a branch office or guaranteed IB are screened and qualified. Such procedures should include inquiring about prior or pending disciplinary matters, reviewing the prospective employee's educational background and contacting prior employers to confirm previous work experience. If a prospective employee is required to complete CFTC Form 8-R (i.e., a new AP), the form should be carefully reviewed with the prospective employee to ensure that he/she provided all required information.~~

~~Additionally, documentation to support any "yes" answers to the Form 8-R Disciplinary Information questions must be obtained and reviewed for potential disqualifying conduct. Policies and procedures should also require APs to notify the branch office, guaranteed IB and/or Member firm if any new circumstances arise that may require an additional disclosure. If a prospective employee was previously registered as an AP, information related to the prospective employee's disciplinary and registration history must be obtained from NFA. The registration and disciplinary history (if any) of the prospective employee's prior employers should also be reviewed. Information obtained through this screening process should be considered by the Member firm, branch office and/or guaranteed IB in determining the scope of supervision necessary to adequately supervise the prospective employee.~~

Promotional Material. Members should adopt supervisory procedures reasonably designed to ensure that any promotional material used by a branch office or guaranteed IB has been reviewed and approved by the appropriate supervisory personnel prior to its first use. In some circumstances, or as a matter of policy, a Member firm may require that all promotional material used by a branch office or guaranteed IB be approved by the main office or guarantor prior to its first use. Member firms may want to consider requiring a guaranteed IB to establish and implement written supervisory procedures to govern the use of promotional material. See *Interpretive Notice 9037—NFA Compliance Rules 2-9, 2-10, 2-29, 2-36 and 2-39: Guidance on the Use and Supervision of Websites and Social Media.* Member firms should also verify that documentation of supervisory reviews and approvals is created and retained and that a branch office or guaranteed IB is not using any promotional material that has not received prior approval

Sales Practices. A Member's supervisory procedures for branch offices and guaranteed IBs should provide for the review of sales solicitation practices. The individuals at the branch office or guaranteed IB responsible for supervising sales solicitations should be identified, and the method by which sales solicitations are supervised should be reviewed for adequacy. The supervisory procedures should outline the branch office or guaranteed IB's methods for reviewing written communications and oral communications, where applicable, in accordance with *NFA Interpretive Notice 9083 – Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons.* Members should ensure that, when appropriate, enhanced supervisory procedures are implemented for APs that have a disciplinary history. Adequate procedures will also incorporate a review of sales solicitations through in-person monitoring or technological means (e.g., listening to phone calls or reviewing electronic communications). When appropriate (e.g., a potential pattern of wrongdoing or observation of unusual account activity), a Member firm should consider interviewing selected customer(s) about the solicitation process and the handling of their account(s).

Customer Information and Risk Disclosure. All Members are required to implement policies and procedures for collecting specific customer information and providing required risk disclosures. A branch office or guaranteed IB's procedures for opening new accounts should specify that appropriate account documentation must be forwarded to the main office of the Member firm or the firm's guarantor. The main office or guarantor should implement policies and procedures for reviewing account documentation to ensure that required risk disclosures were made and acknowledged and that the appropriate supervisory personnel approved the account. Such procedures could include requiring main office or guarantor approval before opening an account and/or contacting customers to verify that they received and understood the risk disclosure document.

Anti-Money Laundering Program. Member firms that are required to develop and implement anti-money laundering programs should ensure that their branch offices and/or guaranteed IBs have adopted and implemented a program that satisfies NFA's anti-money laundering program requirements, which could include adopting and implementing the program of the main office or guarantor.

Handling of Customer Funds. Supervisory policies and procedures for branch offices and guaranteed IBs should be designed to ensure that all records related to customer funds, including copies of checks, are created, retained and reviewed for compliance with applicable regulatory requirements, including as applicable to guaranteed IBs CFTC Regulation 1.57(c). Such policies and procedures should be designed to confirm that any funds accepted from customers are received in the name of the FCM or FDM and that proper procedures for depositing the funds into a qualifying bank account have been established and are followed. In general, third-party payments should not be accepted. If a third-party payment is accepted, it must be scrutinized to ensure that no customers are acting as unregistered FCMs, FDMs or CPOs.

Customer Order Procedures. Members should adopt supervisory procedures that are reasonably designed to achieve compliance with regulatory requirements for handling and recording customer orders and conduct regular reviews of the trading activity in customer accounts. These supervisory procedures should outline the branch office or guaranteed IB's methods for reviewing trading activity in accordance with NFA Interpretive Notice 9083 – Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons. ~~As part of these procedures, the individuals responsible for accepting customer orders should be identified and a sample of order tickets and/or electronic orders should be reviewed. NFA recommends that order tickets be pre-numbered and that the review test to ensure that all order tickets within the chosen samples have been retained. Order tickets may be reviewed through electronic records (e.g., scanned copies of order tickets), provided that such records are sufficient to confirm that all order tickets are properly time stamped and that all information required by CFTC Regulation 1.35 has been captured and retained.~~

~~Likewise, Members should implement policies and procedures designed to ensure that all required records related to electronic orders are captured and retained.~~

~~**Account Activity.** A Member firm should also conduct regular reviews of the trading activity in customer accounts, and, if applicable, the trading activity in personal accounts of APs and principals. A number of procedures can be performed to identify problematic activity and accounts that should be flagged for additional scrutiny. For example:~~

- ~~• Accounts with significant losses, commission charges or a large number of trades should be reviewed to determine if trading strategies that are not appropriate for the customers have been recommended or implemented;~~
- ~~• Unusual or patterns of position transfers or error trades should be investigated to ensure these transactions were legitimate and properly effected;~~
- ~~• Commission to equity ratios should be calculated regularly for discretionary accounts to identify potential excessive trading or churning;~~
- ~~• Trading in the personal trading accounts of APs and principals should be regularly reviewed and compared with the trading in customer accounts to identify potential improper trade allocations or frontrunning; and~~
- ~~• Trading results among a particular AP's customers should be compared to identify potential preferential treatment.~~

~~Written supervisory policies and procedures should be designed to ensure that any potentially problematic account activity is thoroughly reviewed and, when appropriate, escalated to appropriate supervisory personnel.~~

~~**Discretionary Accounts.** NFA Members and Associates are subject to detailed requirements regarding discretionary customer accounts. If a Member firm's branch office or guaranteed IB handles discretionary customer accounts, the Member firm must adopt supervisory policies and procedures reasonably designed to ensure that the branch office or guaranteed IB achieves compliance with these requirements. Trading authorizations granting discretionary authority and all related records should be forwarded to the main office or guarantor. The main office or guarantor should implement policies and procedures to identify discretionary accounts and perform a documented review of the trading activity in those accounts. Member firms should also confirm that all APs exercising discretionary authority have been continually registered for at least two years.~~

~~**Proprietary Trading.** To the extent feasible, a Member's written supervisory policies and procedures should provide for a separation of duties between persons handling customer orders and firm employees or principals trading for the firm's proprietary accounts or their own accounts to prevent the misuse of non-public information or the~~

occurrence of other trading abuses. See NFA Interpretive Notice 9083 – Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons.

Bunched Orders. NFA has adopted specific requirements related to the execution and allocation of bunched orders. Main offices and guarantors should implement supervisory procedures that are reasonably designed to ensure that bunched orders executed by or through a branch office or guaranteed IB achieve compliance with these requirements. For example, a Member firm should review a branch office or guaranteed IB's allocations for bunched orders to confirm that fills are allocated based on a permitted methodology that is applied in an appropriate and consistent manner. A Member's procedures must identify who will conduct the bunched order reviews (no less frequently than quarterly) to ensure the allocation method is fair and equitable over time and must maintain evidence of those reviews.

Customer Complaints. A Member firm should require that its branch offices and guaranteed IBs create and maintain a record of all verbal and written complaints in the form and manner and for the period set forth in CFTC Regulation 1.31. Written supervisory procedures should also require that any customer complaints that meet pre-defined criteria established by the Member (e.g., criteria based on the seriousness of the allegations, monetary amount involved, APs or principals involved, or number of complaints against a certain AP or principal) be sent to the main office or guarantor. In some circumstances, or as a matter of policy, a Member firm may require that all customer complaints be forwarded to the main office or guarantor. A Member firm should also contact any customer that files a written or verbal complaint that alleges serious wrongdoing. In addition, written supervisory procedures should provide that the main office or guarantor will review the status of unresolved complaints and the resolution of each complaint to identify possible rule violations or patterns indicative of problematic behavior.

Information System Security Programs. All NFA Members are required to implement an information systems security program (ISSP). A Member firm must ensure that its branch offices comply with its ISSP and its guaranteed IBs adopt and implement an ISSP that satisfies NFA's requirements.

B. Annual Inspection Requirement

A Member firm that supervises one or more branch offices and/or guaranteed IBs must perform an on-site inspection of every branch office and guaranteed IB on at least an annual (i.e., calendar year) basis. Member firms may implement risk-based procedures to tailor the scope (e.g., areas covered), depth (e.g., number of documents reviewed) and nature (e.g., announced or unannounced) of the inspection based on the specific

risks of the Member and/or a particular branch office or guaranteed IB. There are two exceptions to the annual on-site inspection requirement.

First, Members must promptly perform an on-site inspection of a branch office or guaranteed IB if the Member becomes aware of any indicia of irregularities or misconduct involving the branch office or guaranteed IB, including but not limited to: disciplinary actions, customer complaints that upon inquiry appear bona fide, significant operational issues or irregularities or misconduct identified through routine surveillance or supervision.

Second, Member firms may use a risk-based approach to identify branch offices or guaranteed IBs for which the Member determines it may be appropriate to examine through an on-site inspection every other calendar year. In making this determination, a Member firm should consider a number of factors including, but not limited to the following:

- The amount of revenue generated by the branch office or guaranteed IB;
- The type of business conducted (e.g., hedging v. speculative; discretionary v. non-discretionary);
- Whether the branch office or guaranteed IB solicits new clients or only services existing clients and if it solicits new clients the number of new accounts opened;
- The number of APs;
- The number and nature of customer complaints received;
- The previous training, experience and disciplinary history of the branch office or guaranteed IB and its personnel;
- Whether there has been a change in either ownership or supervisory personnel at the branch office or guaranteed IB;
- Whether a guaranteed IB has one or more branch offices;
- The frequency and nature of problems or concerns that arise from routine surveillance or supervision of the branch office or guaranteed IB's activities; and
- If the branch office or guaranteed IB directly accepts customer funds.

A Member firm must document and retain its rationale if it determines that it is appropriate to examine a branch office or guaranteed IB via an on-site inspection every other calendar year. The Member firm must also inspect remotely the branch office or guaranteed IB during the calendar year in which an on-site inspection is not performed. The Member firm must ensure that it has access to books, records and technology (e.g., video conferencing systems, electronic communications and information related to order and/or trading activity) that will enable it to perform a robust inspection from a remote location.

Inspection Report

Promptly after completing either an on-site or remote inspection, the Member firm should prepare a written report fully describing the inspection, including the scope of the inspection, a summary of the testing performed and any findings or deficiencies identified during the inspection. Any findings or deficiencies should also be discussed with the branch office or guaranteed IB's managers, principals and/or supervisory personnel. The Member firm should also conduct follow-up procedures to ensure that any deficiencies identified during an inspection are promptly corrected. Repeated problems in any particular area should heighten the level of scrutiny and follow-up by the main office or guarantor.

III. Ongoing Training

A Member's supervisory responsibilities include the obligation to ensure that its employees are properly trained to perform their duties. Policies and procedures must be in place to ensure that branch office and guaranteed IB personnel receive adequate training to abide by industry rules and regulations and to properly handle customer accounts and that APs have satisfied ethics training requirements. Employees must be educated on developments and changes in the markets, commodity interest products, rules and regulations, technology and firm policies and procedures applicable to their activities. The formality of a training program will depend on the size of the firm and the nature of its business. The individuals responsible for providing the training must be qualified to do so.

~~Certain APs may require training for soliciting and handling customer accounts. If an AP has previously worked at one or more firms disciplined by NFA or the CFTC for sales practice fraud and has therefore received his or her training from one or more such firms, then the Member firm may have to provide the AP with specialized training in proper sales practices.~~

This Interpretive Notice is intended to specify minimum supervisory standards for branch offices and guaranteed IBs. A failure to adhere to the requirements specified in this Interpretive Notice will be deemed a violation of NFA Compliance Rules 2-9, 2-36 and/or 2-51 as applicable.

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

INTERPRETIVE NOTICE

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 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, FDM, IB, CPO and CTA Members establish appropriate content standards and supervisory oversight of websites, social media and other internet-based forums ~~electronic communications~~ used to conduct commodity interest business.

~~Websites, Social Media and other Internet-Based Forums~~

~~Both Members, and~~ their employees and agents have may use websites, social media and other internet-based forums (e.g., blogs, chat rooms, etc.) to promote and conduct their business with customers. Any communication related to a commodity interest account, agreement or transaction that is posted by or on behalf of an FCM, FDM, 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, FDM, 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, FDM, 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~~ and 2-36. These supervisory procedures must:

- ~~Require that an appropriate supervisor prior review and approval of~~ approve (in writing) a Member's a website, social media page or forum used in connection with the Member's commodity interest business prior to first use. ~~of a Member by an appropriate supervisor and must~~
- ~~Ensure~~ Require that each substantive change to or new version of such a website, social media page or other internet-based forum is be reviewed and approved (in writing) 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).
- Require a Member to designate appropriate supervisory personnel to review and approve any content posted to its website prior to first use.
- Require a Member to establish procedures that address the use of social media pages and other internet based forums, including which individuals are permitted to post on behalf of the Member and whether those posts must be approved by appropriate supervisory personnel prior to publication. These procedures should also address any employees or agents who post on their personal social media pages or internet based forums to solicit commodity interest business on behalf of the Member.
- Require a Member to retain a record of each version of its website, social media page or internet based forum and a record of the supervisor's approval of that content (whether done on a pre-publication basis for a website or on a post-use basis for content posted on a social media page or internet based forum). If the Member's procedures permit the firm to review and approve content posted on a social media page or internet-based forum on a post-use basis, that review and approval must be timely. Members are also required to retain records of any information or messages posted by its employees or agents or individuals not affiliated with the Member.

~~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.~~

Unless the website, social media page or internet-based forum limits access to a particular target audience, through a login mechanism or other means, the Member's review procedures should take into consideration the fact that the content is available to the public. Personal websites, social media pages or other internet-based forums of

Associates, employees or agents 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. Consequently, the Member's procedures must be adequate to enable it to properly review 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 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 (but maintain a record of the removed 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.

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.

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 site, page or forum. Member firms should bear in mind, though, that their supervisory obligations under Rule 2-9, ~~and Rule 2-29,~~ and Rule 2-36 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. Members' 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 a virtually infinite chain of links. 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.

Electronic Communications

~~An FCM, IB, CPO or CTA Member's duty to supervise the use of 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 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 electronic communications must:~~

- ~~• be in writing;~~
- ~~• identify by title or position the person responsible for conducting the review;~~
- ~~• specify how and with what frequency electronic communications will be reviewed and how that review will be documented;~~
- ~~• categorize the type of 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, sampling, or using automated tools or key word searches to identify potentially problematic electronic communications between Associates, employees or agents and 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. On the other hand, firms dealing with individual, retail customers might choose to use an automated review, key word search and review a larger sample of or even all electronic communications. Similarly, a firm may wish to conduct a comprehensive review of employees' and agents' electronic communications if they have a disciplinary history involving problems with customers or were employed by or associated with 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 electronic communication systems other than the firm's systems. 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 electronic communications as its own records and must ensure that the firm is capable of adequately retaining, reviewing and supervising these records. Given the supervisory problems that could arise, some firms may choose not to permit their employees and agents to communicate with the public outside of work through an 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 electronic communications may constitute promotional material. 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 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 electronic communication by appropriate supervisory personnel. Additionally, this type of 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 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 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.~~

Failure to comply with the requirements in this Interpretive Notice will be deemed a violation of NFA Compliance Rules 2-9, 2-10, 2-29, 2-36 and/or 2-39, as applicable.

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9053—FOREX TRANSACTIONS

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B. COMPLIANCE RULE 2-36

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2. *Supervision* - Members and their Associates having supervisory responsibilities must diligently supervise the Member's forex business, including the activities of the Member's Associates and agents. Members must establish, maintain, and enforce written supervisory procedures.

NFA has provided Members with guidance on minimum standards of supervision through interpretive notices issued under NFA Compliance Rule 2-9.² In these interpretive notices NFA recognized that, given the differences in the size of and complexity of the operations of NFA Members, there must be some degree of flexibility in determining what constitutes "diligent supervision" for each firm. This principle also applies to the supervision of a Member's forex business.

Although Members have the flexibility to design procedures that are tailored to their own situation, an adequate program for supervision ~~would~~ should include procedures for supervising APs in accordance with NFA Interpretive Notice 9083 entitled *Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons* and performing day-to-day monitoring of the firm's operations. These procedures ~~would~~ should include:

- ~~screening prospective Associates to ensure that they are qualified and to determine the extent of supervision the person would require if hired;~~
- screening persons with whom the Member intends to do forex business to determine if they are required to be registered with the Commission and, if so, to ensure that they are Members of NFA;
- monitoring communications with the public, including sales solicitations and web sites, and approving promotional material;

² See, for example, Interpretive Notice 9019 – *Compliance Rule 2-9: Supervision of Branch Offices and Guaranteed IBs*; Interpretive Notice 9037 – *NFA Compliance Rules 2-9, 2-10, 2-29, 2-36 and 2-39: Guidance on the Use and Supervision of Websites, and Social Media and Other Electronic Communications*; 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.)*

- reviewing the information obtained from and the information provided to customers solicited by the firm and its employees to ensure that the necessary account information has been obtained and the appropriate information provided; and
- handling and resolving customer complaints;
- reviewing disclosures given to customers to ensure they are understandable, timely, and provide sufficient information;
- reviewing and analyzing the forex activity in customer accounts, including discretionary customer accounts; and
- handling customer funds, including accepting security deposits, if applicable.

* * *

EXPLANATION OF PROPOSED INTERPRETIVE NOTICE AND AMENDMENTS TO OTHER IMPACTED INTERPRETIVE NOTICES

NFA's Board has adopted Interpretive Notice 9083 entitled *NFA Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons* to provide Members with one comprehensive Interpretive Notice addressing all material areas of AP supervision and to specifically address Member requests for more guidance related to certain supervision areas including written and oral communications with customers and counterparties and order handling and trading activities. The AP Interpretive Notice is premised on NFA Compliance Rules 2-9(a), 2-9(d), 2-36(e) and 2-51(d), each of which require a Member to diligently supervise its employees and agents in all aspects of their commodity interest, swap, forex or digital asset commodity activities, as applicable.

NFA developed the AP Interpretive Notice working closely with NFA Members, NFA Member Advisory Committees and industry trade groups to identify industry best practices and other essential and flexible elements that are necessary to implement a satisfactory AP supervisory program. The AP Interpretive Notice requires a Member to adopt and implement written policies and procedures designed to ensure that its APs' commodity interest and digital asset commodity activities comply with all applicable NFA and CFTC Requirements. The AP Interpretive Notice acknowledges that Member programs will vary based on the individual Member's business and other factors but sets forth certain minimum components that a Member must consider when establishing and implementing its supervisory framework.

The AP Interpretive Notice requires Members to have policies and procedures that address the following areas:

- Ensuring Qualified AP Supervisory Personnel;

- Conducting AP Qualification Due Diligence;
- Pre-Trade Communications with Customers and Counterparties and Related Internal Communications;
- Order Handling and Trading Activities; and
- Training

In adopting the AP Interpretive Notice, NFA's Board determined that the additional guidance would not only benefit Members by providing requested guidance, but also support a more efficient examination process for both Members and NFA.

NFA's Board also approved minor amendments to several other impacted Interpretive Notices, which were designed to eliminate duplicative language in NFA's existing Interpretive Notices that included AP supervision guidance. Finally, the Board approved incorporating NFA Compliance Rule 2-51(d) into NFA's Interpretive Notice entitled *Supervision of Branch Offices and Guaranteed IBs* to clarify that the Interpretive Notice's requirements also apply to a Member's digital asset commodity activities.

NFA's FCM, SD, IB, and CPO/CTA Advisory Committees supported both the adoption of *Interpretive Notice 9083—Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons* and amendments to the other impacted Interpretive Notices, which were unanimously approved by NFA's Board. 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 AP Interpretive Notice and amendments to the impacted Interpretive Notices as early as ten days after receipt of this submission by the Commission, unless the Commission notifies NFA that the Commission has determined to review the proposal for approval.

Respectfully submitted,



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