

February 28, 2023

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 NFA Compliance Rule 2-51:
Requirements for Members and Associates Engaged in Activities Involving
Digital Asset Commodities

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 adoption of NFA Compliance Rule 2-51: Requirements for Members and Associates Engaged in Activities Involving Digital Asset Commodities. On February 16, 2023, NFA's Board of Directors ("Board") unanimously approved the adoption of the proposed rule.

NFA is invoking the "ten-day" provision of Section 17(j) of the CEA and plans to make NFA Compliance Rule 2-51 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 RULE
(additions are underscored)

NATIONAL FUTURES ASSOCIATION

* * *

Compliance Rules

Rule 2-51. REQUIREMENTS FOR MEMBERS AND ASSOCIATES ENGAGED IN ACTIVITIES INVOLVING DIGITAL ASSET COMMODITIES

(a) Fraud and Related Matters

No Member or Associate engaging in activities involving any digital asset commodity shall:

- (i) Cheat, defraud, or deceive, or attempt to cheat, defraud or deceive any other person involved in those activities;
- (ii) Make a communication related to a digital asset commodity that operates as a fraud or deceit; employs or is part of a high-pressure approach; or makes any statement that trading in digital asset commodities is appropriate for all persons;
- (iii) Willfully make or cause to be made a false report, or willfully enter or cause to be entered a false record in or in connection with any transaction involving a digital asset commodity;
- (iv) Disseminate, or cause to be disseminated, false or misleading information, or a knowingly inaccurate report, that affects or tends to affect the price of any digital asset commodity;
- (v) Engage in manipulative acts or practices regarding the price of any digital asset commodity; or
- (vi) Embezzle, steal, or purloin, or knowingly convert to its own use or the use of another, any money, securities, digital assets or other property received from or accruing to any person in connection with a transaction involving a digital asset commodity.

(b) Just and Equitable Principles of Trade

Members and their Associates shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business involving any digital asset commodity.

(c) Disclosure and Related Matters

Members engaged in activities involving digital asset commodities must comply with the applicable requirements set forth in NFA Interpretive Notice 9073 entitled *Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities.*

(d) Supervision

Each Member engaged in digital asset commodity activities must diligently supervise its employees and agents in the conduct of their digital asset commodity activities for or on behalf of the Member. Each Associate who has supervisory duties over a Member's digital asset commodity activities shall diligently exercise such duties in the conduct of that Associate's digital asset commodity activities for or on behalf of the Member.

(e) Scope

For purposes of this Rule, the term digital asset commodity or commodities means Bitcoin and Ether, which have related commodity interests certified by a registered entity for listing under Part 40 of CFTC Regulations.

EXPLANATION OF PROPOSED RULE

Well over 100 NFA Member firms have reported to NFA that they engage in business activities related to digital assets, both in commodity interest and spot markets. However, with the exception of NFA's Interpretive Notice 9073, which sets forth limited disclosure requirements, NFA does not have any rules that specifically address its Members' digital asset activities in the spot markets. If an NFA Member firm were to commit fraud or similar misconduct in respect to its spot digital asset activities, NFA would likely lack jurisdiction to discipline the firm or take other action to protect the public. NFA's Board concluded that this jurisdictional limit places NFA in an untenable position and, as discussed below, determined to adopt Compliance Rule 2-51.

Specifically, NFA's Board unanimously approved Compliance Rule 2-51, *Requirements for Members and Associates Engaged in Activities Involving Digital Asset Commodities*. Compliance Rule 2-51 would impose anti-fraud, just and equitable principles of trade, and supervision requirements on NFA Members and Associates that engage in digital asset commodity activities, including spot or cash market activities. The Rule would also require NFA Members to make the disclosures required by the above-mentioned Interpretive Notice.

Compliance Rule 2-51 would extend only to digital assets that are commodities. In this way, the Rule's scope would align with the Commission's own anti-fraud jurisdiction over the spot commodity markets. For the avoidance of doubt, paragraph (e) of the Rule defines "digital asset commodities" to mean Bitcoin and Ether (sometimes styled "ether"). As noted in the Rule itself, these are the only two digital assets that have related commodity interests certified by a registered entity for listing under Part 40 of the CFTC Regulations. They are also the two digital assets that have been most widely treated as commodities. If other digital assets are identified as commodities in the future, then NFA could amend the Rule to cover them.

In adopting NFA Compliance Rule 2-51, the Board noted that it is modeled after Compliance Rule 2-2, NFA's anti-fraud rule governing exchange-traded futures and swaps transactions, and Compliance Rule 2-36, NFA's anti-fraud rule governing retail forex. Additionally, proposed Compliance Rule 2-51 also includes a provision similar to NFA Compliance Rule 2-4 for exchange traded futures and swaps and Compliance Rule 2-36(c) for retail forex, requiring Members to observe high standards of commercial honor and just and equitable principles of trade with respect to their activities involving those products, as well as a supervision requirement similar to Compliance Rules 2-9 and 2-36(c).

The Board also noted that NFA took a similar approach in the early 2000s when the Board adopted and the Commission approved Compliance Rule 2-36 to address the activities of firms that were registering as FCMs to conduct retail forex activities. NFA lacked jurisdiction over these Members' activities since NFA's Rules were generally limited to exchange traded futures activities.

In reaching its decision to adopt Compliance Rule 2-51, the Board also considered the views of NFA's Member Advisory Committee and FDM firms. Specifically, NFA's FCM, IB, CPO/CTA, and Swap Participant Advisory Committees supported the adoption of Compliance Rule 2-51. Although NFA does not have an FDM Advisory Committee, staff sought input on this proposed rule from NFA's FDM Member firms. While none of the FDMs objected to the proposed rule and indicated general support, two firms expressed concern over the scope of the rule.

Mr. Christopher J. Kirkpatrick

February 28, 2023

As mentioned earlier, NFA is invoking the "ten-day" provision of Section 17(j) of the CEA. NFA intends to make Compliance Rule 2-51 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.

Respectfully submitted,

A handwritten signature in black ink that reads "Carol A. Wooding". The signature is written in a cursive, flowing style.

Carol A. Wooding
Senior Vice President
and General Counsel