

March 5, 2020

Via Federal Express and E-mail (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 Amendments to NFA Compliance Rule 2-29: Communications with the Public and Promotional Material and Interpretive Notice 9003 – *NFA Compliance Rule 2-29: Communications with the Public and Promotional Material*

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 Rule 2-29 and the related Interpretive Notice entitled *NFA Compliance Rule 2-29: Communications with the Public and Promotional Material*. NFA's Board of Directors ("Board") unanimously approved the proposed amendments at its meeting on February 20, 2020.

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 underscoring and deletions are ~~stricken through~~)

COMPLIANCE RULES

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

* * *

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

* * *

(b) Content of Promotional Material

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

* * *

(5) includes any specific numerical or statistical information about the past performance of any actual accounts (including rate of return) unless:

(i) 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 commission, fees and expenses (see Interpretive Notice 9003 for a limited exception); and

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INTERPRETIVE NOTICES

* * *

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

* * *

IV. Section-by-Section Analysis

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Section (b) Content of Promotional Material

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

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Subsection (b)(5) also provides that the rate of return must be presented net of all fees and expenses¹ and must 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, 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.

A CTA Member that is also an SEC Registered Investment Adviser and/or its Associate may present past performance results, including the rate of return, to an eligible contract participant (ECP) on a gross basis in a non-public, one-on-one presentation, if the CTA Member provides the ECP client with a written disclosure that the performance results are presented on a gross basis and do not reflect the deduction of fees and expenses, which will reduce the client's returns, and offers to provide the client with the performance results net of any fees and expenses agreed upon by the CTA Member and the ECP client at or prior to exercising discretion over the client's account.

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¹ Fees and expenses that are not required to participate in a trading program (e.g., non-mandatory custodial or administrative fees) need not be reflected in the performance presentation.

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EXPLANATION OF PROPOSED AMENDMENTS

In August 2019, NFA's Board approved amendments to NFA Compliance Rule 2-29 and Interpretive Notice 9003 – *NFA Compliance Rule 2-29: Communications with the Public and Promotional Material*, which were submitted to the Commission on August 29, 2019 and became effective on January 1, 2020. The August 2019 amendments to Rule 2-29(b)(5)(ii) specified that past performance used in promotional materials must be presented net of all commissions, fees and expenses. For the reasons discussed below, the proposed amendments provide a limited exception to this requirement for CTA Members that are also registered with the Securities and Exchange Commission ("SEC") as an investment adviser.

After notifying Members of the effective date of the August 2019 changes, NFA received a request to modify the rule for CTA Members that are also registered with the SEC as an investment adviser. The requester noted that this relief was important for situations where the client is able to negotiate the fees with the CTA Member. NFA has reviewed SEC requirements and no-action relief issued to the Investment Company Institute¹, which permits registered investment advisers to present past performance to certain sophisticated parties in one-on-one presentations without showing the impact of fees and expenses, provided that several conditions are met.

¹ SEC Staff No-Action Letter 88-330-CC (Sept. 23, 1988).

The SEC's no-action relief notes that to the extent a client is in the position to bargain with the adviser over fees, information on the impact of the fees associated with the performance results of other clients is not as material.

NFA has determined that it is appropriate to permit CTA Members that are SEC registered investment advisers to present past performance to eligible contract participants (ECPs) on a gross basis in non-public, one-on-one presentations, if the CTA Member provides the ECP client with a written disclosure that the performance results are presented on a gross basis and do not reflect the deduction of fees and expenses, which will reduce the client's returns, and offers to provide the client with the performance results net of any fees and expenses agreed upon by the CTA Member and the ECP client at or prior to exercising discretion over the client's account. This approach provides CTAs that are also registered investment advisers with some flexibility in marketing a managed account program to ECP clients, while still ensuring that ECP clients have the opportunity to view past performance results showing the impact of the agreed upon fees and expenses.

NFA staff presented these proposed amendments to the CPO/CTA Advisory Committee. The Advisory Committee supported the proposed amendments. As stated earlier, NFA's Board unanimously approved the proposed amendments on February 20, 2020.

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 Rule 2-29 and Interpretive Notice 9003 – *NFA Compliance Rule 2-29: Communications with the Public and Promotional Material*; 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
Senior Vice President and
General Counsel