



# A Guide to Communications with the Public and Promotional Material for FCMs, FDMs, IBs, CPOs and CTAs

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**May 2020 Revisions:** Updated to incorporate amendments to NFA Compliance Rules 2-29 and 2-36 and their related Interpretive Notices that went into effect January 1, 2020 and April 22, 2020.

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## Table of Contents

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Table of Contents .....	2
Introduction and Purpose .....	5
Rule Provisions .....	6
General Standards .....	6
Definition of Promotional Material.....	6
<i>Additional Examples of Promotional Material</i> .....	6
Factual Statements.....	7
Statements of Opinion .....	7
Possibility of Profit .....	7
Actual Past Trading Profits .....	7
Past Performance .....	7
Testimonials.....	7
Hypothetical Results .....	8
Additional Product Specific Requirements .....	8
Review and Approval of Promotional Material .....	9
General Standards .....	10
Deceptive and Misleading Communication .....	10
Use of High Pressure .....	10
Appropriateness of Trading .....	11
Content of Communication.....	12
Balance Profit Potential with Risk of Loss .....	12
Statements of Opinion .....	13
Performance .....	13
<i>Use of Past Results</i> .....	13
<i>Annual Rates of Return</i> .....	14
<i>Pro-forma Performance</i> .....	15
<i>Hypothetical Performance</i> .....	15
<i>Extracted Performance</i> .....	18
Deceptive Communications .....	19
<i>Proprietary Accounts</i> .....	19
<i>Profit Projections</i> .....	20
<i>Leverage Examples</i> .....	20
<i>Claims Regarding Seasonal Trades</i> .....	20
<i>Claims Using Historic Price Moves or Outdated Information</i> .....	21
<i>Use of Third-Party Index Performance</i> .....	21
<i>Cherry Picking</i> .....	22

<i>Testimonials</i> .....	22
Ratings and Rankings by Outside Sources .....	22
<i>Trading Championships</i> .....	23
Electronic Media .....	24
Audio and Video Promotional Materials .....	24
<i>Live Advertisements</i> .....	24
Website, Social Media Page, Other Internet-Based Forum and Electronic Communications .....	25
<i>Disclaimers</i> .....	25
<i>Hyperlinks</i> .....	25
<i>CPO and CTA Websites</i> .....	26
Seminars .....	27
Sales Training .....	27
Options Trading .....	28
Option Related Communications .....	28
<i>Long Options</i> .....	28
<i>Short Options</i> .....	28
<i>Using Cash, Futures Market or Forex Data to Sell Options</i> .....	28
Security Futures Products .....	30
Mandatory Requirements .....	30
Past Performance .....	31
Participation in a Trading Program .....	31
Statistics and Charts .....	31
Past Trade Recommendations .....	32
Current Trade Recommendations .....	32
Research Reports .....	33
Forex .....	34
Forex Related Communications and Promotional Material .....	34
Additional Website Disclosure Obligations for FDMs .....	35
Virtual Currency Derivatives and Virtual Currency Products .....	37
Disclosure Obligations for FCMs and IBs .....	37
<i>Virtual Currency Derivatives</i> .....	37
<i>Underlying or Spot Virtual Currencies</i> .....	37
Disclosure Obligations for CPOs and CTAs .....	37
<i>Virtual Currency Derivatives</i> .....	38
<i>Underlying Spot Virtual Currency Products</i> .....	38
Disclosure Obligations for Any Other Activities in Underlying or Spot Virtual Currencies .....	39
Supervisory Procedures .....	41
Websites, Social Media and other Internet-Based Forums .....	41

Electronic Communications .....	42
Responsibility for Promotional Material Produced by Others.....	45
Member Responsibility .....	45
Purchasing Leads .....	45
Article Reprints .....	45
User-Generated Comments Related to Social Networking Groups .....	46
NFA Review and Filing of Promotional Material .....	47
Mandatory Pre-Approval.....	47
Voluntary Pre-Review Program.....	47
Filing of Promotional Material .....	47
General Questions about Promotional Material or Rule 2-29 .....	47
Sources of Additional Information .....	48
Additional NFA References .....	48

## Introduction and Purpose

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NFA Compliance Rules 2-29 (Rule 2-29) and 2-36 (Rule 2-36) deal with all forms of communication with the public by NFA Member FCMs, FDMs IBs, CPOs, CTAs, (hereinafter referred to as Members), and their Associated Persons (APs). Rule 2-29 covers communications with the public by NFA Member FCMs, IBs, CPOs, CTAs, and their APs, while Rule 2-36 covers communications with the public by NFA Member FDMs and their APs. The rules were drafted and approved by committees of NFA Members and were developed to ensure that Members observe the highest ethical standards when communicating with the public. However, the rules are not meant to stifle the use of fair and effective marketing tools. Both rules are continually interpreted by the NFA Member Business Conduct Committee and NFA's Hearing Committee (Committees).

Since some of the rules' provisions are stated in general terms, Members may understandably seek more specific guidance on some points. The best source for that guidance can be found in the decisions NFA's Committees have made in specific disciplinary cases and NFA's Interpretive Notices.

The purpose of this guide is to provide Members with additional guidance in preparing their promotional material. It outlines the major parameters of Rules 2-29 and 2-36 and summarizes how NFA's Committees have applied the rules to recurring fact patterns. The information set forth in this guide is not intended to be all-inclusive. It is important to note that more stringent guidelines will be imposed on those Members previously named in disciplinary actions and the individuals associated with such Members.

This guide has been formatted to provide the rule provisions first which is then followed by sections that provides Members with detailed guidance as to requirements of the rules.

## Rule Provisions

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### General Standards

- May not be deceptive or misleading;
- May not use high-pressure sales tactics;
- May not be part of a high-pressure approach; and
- May not say or imply that commodity interest trading, which includes forex trading, is appropriate for everyone.

### Definition of Promotional Material

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

### ***Additional Examples of Promotional Material***

- Sales or educational literature distributed to the public, whether prepared by the Member, its employees, other NFA Members or non-Members;
- Seminar presentations and any advertising designed to encourage attendance at such seminars;
- Material used on the Internet, such as websites, social media, podcasts, videos, forums and ranking services;
- Newsletters, reports and hotlines;
- Standardized phone solicitations, including "cold calls"; and
- A prepared sales script, whether actually followed in making sales presentations or developed solely for training purposes.

## Factual Statements

- Must be true; and
- Members must be able to support the accuracy of each statement.

## Statements of Opinion

- Must be identifiable as opinions and
- Must have a reasonable basis in fact.

## Possibility of Profit

- Must be accompanied by an equally prominent discussion of the risk of loss.

## Actual Past Trading Profits

- Must be accompanied by a statement that past results are not necessarily indicative of future results.

## Past Performance

- Must be representative of the actual performance of all reasonably comparable accounts for the same time period;
- Must be net of all commissions, fees and expenses (see Use of Past Results section on page [13](#) for a limited exception); and
- Rate of return figures must be calculated in a manner consistent with [CFTC Regulation 4.25](#) for commodity pools, [CFTC Regulation 4.35](#) and [NFA Compliance Rule 2-34\(a\)](#) for figures based on separate accounts.

## Testimonials

- Must be representative of all reasonably comparable accounts;
- Must prominently state that the testimonial is not indicative of future performance or success; and
- Must prominently state that it is a paid testimonial (if applicable).

## Hypothetical Results

- Cannot be presented for any trading program that has at least three months of actual client or proprietary trading results;
- Must include comparable information regarding the past performance of all customer accounts directed by the Member pursuant to a power of attorney or letter of direction over the past five years; and
- If the Member has less than one year of experience directing customer accounts, past performance of the Member's proprietary trading for the past five years must be included in the material.
- Promotional material that is directed exclusively to Qualified Eligible Persons (QEPs) as defined under CFTC Regulation 4.7 is exempt from each of the above requirements. However, under circumstances where excluding the performance of actual customer accounts would cause the material to be misleading, client performance would still need to be shown, regardless of the intended audience.
- Must be accompanied by prescribed statements regarding hypothetical performance results, as well as by the material assumptions that were made in creating the hypothetical performance results. These requirements apply regardless of the intended audience.

## Additional Product Specific Requirements

- Members and their APs that offer security futures products must adhere to additional promotional material requirements as discussed in detail in the Security Futures Products section on page [30](#).
- Members and APs must also comply with additional promotional material requirements related to forex transactions as discussed in detail in the Forex section on page [34](#).
- Members and APs must also comply with additional requirements that are exclusive to communications related to virtual currency derivatives (i.e., futures, options and cleared swaps) and virtual currency products as discussed in detail in the Virtual Currency Derivatives and Virtual Currency Products section on page [37](#).



## Review and Approval of Promotional Material

- Members must have written supervisory procedures for promotional material produced and used by APs and employees.
- Supervisory personnel must document the review and approval of all promotional material in writing before it is used.
  - Supervisory personnel includes an officer, general partner, sole proprietor, branch office manager or other supervisory employee other than the individual who prepared such material (unless the material was prepared by the only individual qualified to review and approve such material).
- If the material specifically refers to security futures products, the review and approval must be done by a designated security futures principal.
- Promotional material, along with a record of the review and approval and any supporting materials for any results, must be maintained on file for a period of five years from the date of last use and in a readily accessible location during the first two years of the five year period.

### **Additional NFA References:**

- [NFA Interpretive Notice 9003](#): NFA Compliance Rule 2-29: Communications with the Public and Promotional Material
- [NFA Interpretive Notice 9009](#): NFA Compliance Rule 2-29: Review of Promotional Material Prior to its First Use

## General Standards

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### Deceptive and Misleading Communication

Communications with the public may not be deceptive or misleading. This includes both day-to-day communications and promotional material. In general, day-to-day communications are spontaneous communications that respond to a particular person's needs and concerns, while promotional material is prepared or thought out in advance. A communication may be deceptive or misleading even if no customer or potential customer is actually deceived.

Whether a communication is deceptive or misleading depends on the content and the overall impression it makes, regardless of whether it is a day-to-day communication or promotional material. Statements that are deceptive in promotional material are generally deceptive in day-to-day communications as well. However, the standards for holding a Member or AP responsible for those statements are different for the two types of communications.

- A Member or AP is held responsible for deceptive and misleading statements in day-to-day communications if the Member or AP intended to mislead or made the statement recklessly. NFA's Committees have consistently found that Members and APs act recklessly when they make statements that they should know are false or misleading.
- A different standard applies for promotional material because the Member or AP has the opportunity to think about the content before using the material. A Member or AP can be held responsible if it should have reasonably been able to determine that the promotional material is likely to deceive the public. This means that a Member or AP must conduct a reasonable inquiry into any affirmative statements and must review the overall impact of the promotional material. A Member or AP can also be held responsible for factual omissions if the Member or AP knew about the omitted fact and the omission makes the promotional material misleading.

### Use of High Pressure

Members and APs may not use high-pressure sales tactics or make communications that are part of a high-pressure sales approach. The following are some, but not all, of the tactics that NFA Committees have found to involve high pressure:

- An AP rushing a customer through account opening forms and glossing over the risk disclosure in haste to open the account;
- An AP inundating a customer with multiple communications designed to provide a sense of urgency to open an account to avoid missing out on predicted market movements;

- The use of electronic communications with bolded, capitalized, or highlighted text or subject lines in an attempt to convey a false urgency to a customer;
- Threatening or intimidating customers; and
- Telephone calls, emails, instant messages and/or text messages made at unusual hours and with unusual frequency, which annoy and harass a customer into opening an account.

### Appropriateness of Trading

Communications with the public may not state or imply that commodity interest trading is appropriate for everyone. NFA Committees have found that using testimonials from unsophisticated customers, stating "anyone can do it, my mother can do it," and calling trades "no-brainers" violate this provision.

### **Additional NFA References**

- [NFA Interpretive Notice 9003](#): NFA Compliance Rule 2-29: Communications with the Public and Promotional Material
- [NFA Interpretive Notice 9033](#): NFA Compliance Rule 2-29: Deceptive Advertising
- [NFA Interpretive Notice 9038](#): NFA Compliance Rule 2-29: High Pressure Sales Tactics

## Content of Communication

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### Balance Profit Potential with Risk of Loss

NFA Compliance Rules 2-29 and 2-36 require any mention of the possibility of profit to be accompanied by an equally prominent discussion of the risk of loss. The rule requires that profit and loss be emphasized proportionately.

In addition, when Members and APs solicit customers to trade forex, they may not solicit based on the leverage available unless they balance any discussion regarding leverage by closely preceding or following it with an equally prominent disclosure that increasing leverage increases risk.

A discussion of profit may take many forms, including:

- Past performance results;
- Graphs depicting the growth of an account;
- Discussion of opportunity; and
- Statements or images that imply or infer profit.

Evaluating balance requires a Member to analyze the overall piece. These factors may be a part of the final determination, so Members should consider them when developing promotional material:

- Font size of the risk disclaimer vs. the remainder of the text – a risk disclaimer that is not as prominent as the rest of the text may be viewed as downplaying the risk of loss.
- The number of times profit is addressed vs. the number of times risk of loss is addressed – a five page piece of promotional material that contains several references to profit potential or opportunity with only one risk statement at the bottom of each page may be considered unbalanced.
- The manner in which risk is addressed – a risk disclaimer must address the significant risk of loss that is unique to commodity interest trading.
  - "Commodity trading involves substantial risk of loss" is an appropriate disclaimer, whereas "All trading involves risk" is not as it fails to address the risk of loss that is unique to the commodity industry.
  - Furthermore, the discussion addressing risk should stand alone and should not include qualifiers. For example, the following disclaimer is not acceptable, "Commodity trading involves substantial risk of loss. However, it is less risky than investing in swaps."

On the other hand, it is not enough to make sure that the font sizes are the same or that the material contains the same number of references to profit and loss. For example, a piece of promotional material that contains five references to extremely large profits is not balanced by five references to the fact that there is some risk. Furthermore, merely including a performance disclaimer, such as "past results are not necessarily indicative of future results," may not suffice in balancing promotional material that discusses actual or potential profits.

## Statements of Opinion

Statements of opinion may be included in promotional material as long as the following criteria are met:

- Statements are **clearly identified** as opinions and
- Members are able to support that their opinions have a reasonable basis in fact.

The extent of the support required depends on the nature of the opinion. Certain opinions by their nature may not be susceptible to ironclad documentation, but Members should always be able to demonstrate at least a reasonable basis for their claims.

## Performance

### ***Use of Past Results***

Members often use their clients' past trading results to demonstrate the effectiveness of a trading strategy or program. Use of this information is generally acceptable as long as the following guidelines are met:

- Performance is representative of all customer accounts trading the program or strategy;
- Performance is presented net of all commissions, fees and expenses<sup>1</sup>;
  - **Note:** 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

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<sup>1</sup> 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.

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.

- Performance is accompanied by a statement that past results are not necessarily indicative of future results;
- The material is balanced with regard to the risk of loss involved in trading commodity interests;
- The material does not omit information that would render the performance data misleading;
- The material discloses all relevant costs, including commissions, pip spreads and fees applicable to the trading strategy or program; and
- Full disclosure is made about the results. For example,
  - References to such things as "average rate of return" generally require a significant amount of disclosure; and
  - Presenting an "average" or "cumulative" return when the individual returns for the period have wide fluctuations is considered misleading.

### ***Annual Rates of Return***

NFA Compliance Rules 2-29, 2-36, and their related Interpretive Notices require rate of return (ROR) figures to be calculated in a manner consistent with CFTC regulations:

- ROR should be net of all commissions, fees and expenses;
- ROR should be computed on a compounded monthly basis<sup>2</sup>; and
- ROR should be calculated by dividing net performance by beginning net asset value.

The CFTC allows three variations of this method. These variations are:

- Time Weighting for Additions and Withdrawals;
- Only Accounts Traded; and
- Compounded ROR.

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<sup>2</sup> For programs where net performance does not affect the nominal account size, and therefore profits are not reinvested, the CTA should sum the monthly performance returns instead of compounding them when calculating the annual return, the peak-to-valley draw-down percentage and the net lifetime ROR.

Each of these alternative methods is fully explained in [Appendix B to Part 4](#) of the CFTC's regulations and in [NFA Interpretive Notice 9054](#): Compliance Rule 2-34: CTA Performance Reporting and Disclosures.

Members should select the method that most accurately depicts client performance. Furthermore, once a method is selected, it should be used consistently unless it produces misleading results.

### ***Pro-forma Performance***

Pro-forma performance is performance that has been adjusted to account for the commissions and fees the Member charges. Pro-forma performance must be ***clearly labeled*** as "Pro-Forma" and should include complete information on the pro-forma adjustments made.

**Note:** Members who charge negotiable fees should use the most representative or the maximum fees possible when presenting pro-forma performance.

The following performance should be presented with pro-forma adjustments for fees and expenses:

- Proprietary performance and
- Performance for client accounts that were charged no fees.

### ***Hypothetical Performance***

NFA Compliance Rules 2-29, 2-36, and their related Interpretive Notices regarding the use of hypothetical performance results have specific requirements for material that contains hypothetical data. The purpose of these requirements is to ensure that the audience realizes the results are in fact hypothetical and therefore have significant limitations that should be considered.

NFA considers the following data to be hypothetical:

- A trade or series of trades that were not actually executed for one account,
- Paper or simulated trading,
- Combining the performance of several advisors who have not traded together, and
- Applying arithmetic calculations to actual performance (e.g., modifying actual results for a different leverage level).

It is misleading to refer to results as "*real-time*" simply because a system was tested using a live data-feed. Similarly, it is misleading to refer to hypothetical results as "*pro-forma*." These results should be ***prominently labeled*** "hypothetical" and should adhere to all of the

hypothetical requirements.

Members or APs who use hypothetical performance results must comply with the following requirements:

- Hypothetical results must be **clearly labeled** as hypothetical. Hypothetical performance should be calculated the same way as actual performance.
- Hypothetical results may not be used for any trading program that has at least three months of actual client or proprietary performance.<sup>3</sup>
- The basis for the hypothetical results and the underlying theory that generated them must be demonstrated to NFA upon request.
- Hypothetical performance for a new trading program must be for a program that is significantly different from other programs with actual results.
- The actual past performance of all customer accounts directed by the Member pursuant to a power of attorney over the past five years must be included in the material.<sup>4</sup>
- If a Member has less than one year of experience directing client accounts, past performance of all proprietary accounts for the last five years must be included in the material.<sup>5</sup>
- The material must include a discussion of all of the assumptions that were made in preparing the hypothetical results.<sup>6</sup> Such assumptions, at a minimum, must include:
  - Initial investment amount;
  - Whether profits were reinvested or distributed;
  - Commissions and fees that were charged; and
  - A general discussion of how the performance was calculated (e.g., based on settlement prices, real-time pricing).

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<sup>3</sup> This requirement does not apply to promotional material directed exclusively to QEPs.

<sup>4</sup> This requirement does not apply to promotional material directed exclusively to QEPs. However, in certain circumstances where there are dramatic differences between hypothetical results and actual client results, NFA may still deem failure to include actual trading results in the material directed to QEPs to be misleading, and a violation of NFA Compliance Rule 2-29(b)(2).

<sup>5</sup> This requirement does not apply to promotional material directed exclusively to QEPs.

<sup>6</sup> For promotional material directed exclusively to QEPs, the Member is required to provide the material assumptions only in those instances where the material assumptions differ from the disclosed features of the offered trading program.



- The following disclaimers should immediately precede or immediately follow hypothetical performance results:

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

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

Members or APs who have less than one year of experience directing client accounts or trading proprietary accounts must also include this statement:

**(THE MEMBER) HAS HAD LITTLE OR NO EXPERIENCE IN TRADING ACTUAL ACCOUNTS FOR ITSELF OF FOR CUSTOMERS. BECAUSE THERE ARE (LITTLE OR) NO ACTUAL TRADING RESULTS TO COMPARE TO THE HYPOTHETICAL RESULTS, CUSTOMERS SHOULD BE PARTICULARLY WARY OF PLACING UNDUE RELIANCE ON THESE HYPOTHETICAL PERFORMANCE RESULTS.**

- However, Members or APs who use hypothetical performance records which show what a multi-advisor account or pool could have achieved if assets had been allocated among certain advisors should replace the above disclaimer with the following<sup>7</sup>:

**THIS COMPOSITE PERFORMANCE RECORD IS HYPOTHETICAL AND THESE TRADING ADVISORS HAVE NOT TRADED TOGETHER IN THE MANNER SHOWN IN THE COMPOSITE. HYPOTHETICAL PERFORMANCE RESULTS HAVE MANY INHERENT LIMITATIONS, SOME OF WHICH ARE DESCRIBED BELOW. NO REPRESENTATION IS BEING MADE THAT ANY MULTI-ADVISOR MANAGED**

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<sup>7</sup> Hypothetical performance that is directed exclusively to QEPs and includes a measurement or description of or makes reference to a composite performance record, showing what a multi-advisor account portfolio or pool could have achieved in the past if assets had been allocated among particular trading advisors must be accompanied by either the hypothetical disclaimer that follows as required under NFA Compliance Rule 2-29(c)(2) or other language that appropriately describes the performance shown and the limitations of such performance.

ACCOUNT OR POOL WILL OR IS LIKELY TO ACHIEVE A COMPOSITE PERFORMANCE RECORD SIMILAR TO THAT SHOWN. IN FACT, THERE ARE FREQUENTLY SHARP DIFFERENCES BETWEEN A HYPOTHETICAL COMPOSITE RECORD AND THE ACTUAL RECORD SUBSEQUENTLY ACHIEVED.

ONE OF THE LIMITATIONS OF A HYPOTHETICAL COMPOSITE PERFORMANCE RECORD IS THAT DECISIONS RELATING TO THE SELECTION OF TRADING ADVISORS AND THE ALLOCATION OF ASSETS AMONG THOSE TRADING ADVISORS WERE MADE WITH THE BENEFIT OF HINDSIGHT BASED UPON THE HISTORICAL RATES OF RETURN OF THE SELECTED TRADING ADVISORS.

THEREFORE COMPOSITE PERFORMANCE RECORDS INVARIABLY SHOW POSITIVE RATES OF RETURN. ANOTHER INHERENT LIMITATION ON THESE RESULTS IS THAT THE ALLOCATION DECISIONS REFLECTED IN THE PERFORMANCE RECORD WERE NOT MADE UNDER ACTUAL MARKET CONDITIONS AND THEREFORE, CANNOT COMPLETELY ACCOUNT FOR THE IMPACT OF FINANCIAL RISK IN ACTUAL TRADING. FURTHERMORE, THE COMPOSITE PERFORMANCE RECORD MAY BE DISTORTED BECAUSE THE ALLOCATION OF ASSETS CHANGES FROM TIME TO TIME AND THESE ADJUSTMENTS ARE NOT REFLECTED IN THE COMPOSITE.

Furthermore, if the Member or AP has less than one year of experience allocating assets among particular trading advisors, then the disclaimer must also contain the following statement:

**(THE MEMBER) HAS HAD LITTLE OR NO EXPERIENCE ALLOCATING ASSETS AMONG PARTICULAR TRADING ADVISORS. BECAUSE THERE ARE (LITTLE OR) NO ACTUAL ALLOCATIONS TO COMPARE TO THE PERFORMANCE RESULTS FROM THE HYPOTHETICAL ALLOCATION, CUSTOMERS SHOULD BE PARTICULARLY WARY OF PLACING UNDUE RELIANCE ON THESE RESULTS.**

### ***Extracted Performance***

Extracted performance, in which a Member highlights the performance of one component of a trading program, is only permitted in the following circumstances:

- A CPO's or CTA's disclosure document designates the specific percentage of assets committed to the component being highlighted (e.g., if a pool's disclosure document states that 25% of the fund's assets are dedicated to trading financial futures, the CPO may present the extracted performance of the financial futures component).
- For managed account programs directed by an FCM or IB, the FCM or IB must have previously provided to customers a written report or similar document which designated the percentage of assets that would be committed toward a particular component of the overall trading program.

- Trading results of the overall program are disclosed in an equally prominent manner.
- The extracted performance is accompanied by the applicable hypothetical disclaimer(s) outlined in the [Hypothetical Performance](#) section above.

Extracted performance that is directed exclusively to QEPs does not need to meet the above requirements. However, such performance must be accompanied by either the hypothetical disclaimer required under NFA Compliance Rule 2-29(c)(1) or other language that appropriately describes the performance shown and the limitations of such performance.

- Any extracted results, regardless of intended audience, must be **clearly labeled** as such.

### **Additional NFA References**

- [NFA Interpretive Notice 9003](#): NFA Compliance Rule 2-29: Communications with the Public and Promotional Material
- [NFA Interpretive Notice 9025](#): Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results
- [NFA Interpretive Notice 9043](#): Compliance Rule 2-29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products
- [NFA Interpretive Notice 9054](#): Compliance Rule 2-34: CTA Performance Reporting and Disclosures

### Deceptive Communications

The following practices can be highly misleading, and may only be used if Members and APs are able to demonstrate that, based on the actual performance of their customers, the claims they are making are not misleading.

### ***Proprietary Accounts***

Members and APs who disclose the past performance of their personal trading accounts should also comply with the following:

- Proprietary performance data should not be combined with client performance data unless the material **clearly discloses** what performance is that of clients and what performance is proprietary;
- Proprietary assets should not be included when reporting client assets under management;

- The results must be **clearly labeled** as proprietary;
- The results should be pro-forma adjusted to reflect the commissions and fees that clients will incur; and
- Any differences between proprietary trading and client trading must be fully explained.

### ***Profit Projections***

Statements such as, "turn \$10,000 into \$40,000," are misleading unless the Member or AP can demonstrate to NFA that this is representative of its overall customer performance.

Also, highlighting the tremendous profits that will result from projected price movements that are characterized, directly or indirectly, as conservative estimates when, in fact, such price movements would be dramatic is deceptive and misleading.

### ***Leverage Examples***

Many Members and APs use examples to demonstrate the leverage that is available in commodity interest trading. Promotional material that utilizes the term "leverage" must include a thorough discussion of the relationship between margin and the product being traded.

In addition, the following guidelines should be considered when using leverage examples:

- Using option-related leverage examples to promote long options, when a Member's or AP's customer base does not routinely exercise options, is misleading.
- Using leverage examples that suggest that prospective customers are likely to earn large profits when past performance does not support this claim, is considered misleading.
- Including disclaimers which indicate that the examples are mathematical in nature and are not intended to imply that customers have achieved or may achieve similar results, will still be considered misleading if the thrust of the ad conveys the opposite message.
- Using an arbitrary leverage level factor (e.g., depicting returns that are based on the cash portion of a partially funded investment) different from the level at which the trading program being advertised trades in order to inflate rate of return information or reduce drawdowns is misleading.

### ***Claims Regarding Seasonal Trades***

Some Members and APs utilize promotional material which emphasizes that the seasonal nature of supply and demand drives prices higher or lower. These discussions can be

misleading and violate NFA Compliance Rules 2-29 and 2-36 when:

- They fail to mention that futures prices have already factored in the seasonal aspects of supply and demand;
- The communication cites historic data which appears to demonstrate that certain trades produce dramatic profits year in and year out; or
- Actual customers have not experienced the types of profits touted in the material.

### ***Claims Using Historic Price Moves or Outdated Information***

Communications that include a record-setting historic price move with a suggestion that the same record-setting move is likely to occur again are misleading. By suggesting that a similar move is imminent, customers are misguided into thinking they can double, triple or quadruple their investments in a short period of time.

The following practices are also misleading:

- Using historic data for products other than the one being marketed (e.g., using data from the cash market to sell futures or from an at-the-money option to sell out-of-the-money options);
  - **Note:** Including price data or price charts for products other than the product being marketed is permissible and can add some value to promotional material, if this data is shown in an educational manner only and with a complete discussion of the relationship between the different products.
- Using historic data for the same product if the information does not include commissions and fees comparable to those charged by the Member; and
- Suggesting that a significant price move is a conservative move.

Members and APs also should avoid using outdated information to support current claims. The practice of suggesting that such outdated information is relevant, given current market conditions, is highly misleading.

### ***Use of Third-Party Index Performance***

Members and APs have used the performance of a third-party index as a way to promote the benefits of managed futures even though it is not representative of the Member's or AP's trading program or performance results. These discussion can be misleading and violate NFA Compliance Rules 2-29 and 2-36 when:

- Third-party index performance is used in lieu of or more prominently than the Member's own trading performance;

- Inappropriate or misleading comparisons are drawn between the Member's or AP's trading program and the performance of a third-party index; or
- Third-party index performance is used without disclosing the basis and limitations associated with the index and/or a statement that the customer is unable to invest directly in the index.

### ***Cherry Picking***

Cherry picking is the process of highlighting the performance of isolated accounts or isolated trades within an account. This practice can be highly misleading. Therefore:

- Performance of one particular account (e.g., a model account) may not be presented unless that performance is representative of all reasonably comparable accounts.
- Similarly, performance of specific trades within an account may not be presented unless those returns are representative of the account's overall performance.

### ***Testimonials***

Use of client testimonials that are not representative of the Member's or AP's overall customer performance or how that customer account performed overall is misleading.

In addition, a testimonial must:

- Prominently state that the testimonial is not indicative of future success and
- Prominently state that it is a paid testimonial (if applicable).

### **Additional NFA References**

- [NFA Interpretive Notice 9003](#): NFA Compliance Rule 2-29: Communications with the Public and Promotional Material
- [NFA Interpretive Notice 9033](#): NFA Compliance Rule 2-29: Deceptive Advertising

### Ratings and Rankings by Outside Sources

There are a number of magazines, newsletters, and other services which evaluate, rate or rank the performance of managed accounts and pools. A Member or AP utilizing these ratings or rankings must:

- Ensure proper disclosure is made about the basis and limitations of such ratings/rankings. Examples of possible disclosures include:

- "only advisors or pool operators that submitted their performance data were rated,"
  - "only advisors with \$\_\_\_\_\_ under management were rated,"
  - "only public pools were considered," or
  - "only \_\_\_\_\_ number of entrants participated in the contest."
- Be able to demonstrate that all rate of return calculations, even those of outside rating services, are calculated in a manner consistent with [CFTC Regulation 4.25](#), [CFTC Regulation 4.35](#), and [NFA Compliance Rule 2-34\(a\)](#), as applicable.
  - Have all of the necessary data available to support performance results and other numeric information.
  - Ensure that the ratings or results are balanced with an equally prominent discussion of the risk of loss.
  - Include a statement that past results are not necessarily indicative of future results.

A Member or AP cannot state or imply that the ratings or rankings presented are officially sanctioned by the commodities industry.

### ***Trading Championships***

Members and APs who participate in trading championships may only promote their performance results if full disclosure is made of all material differences between the program followed in the contest and the program being used to trade customer accounts. Examples of such differences include:

- Markets traded,
- Leverage used,
- Margin rates and
- Commission and fees.

## Electronic Media

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### Audio and Video Promotional Materials

Members who use or directly benefit from any promotional material that uses audio or video content that is disseminated or directed to the public to make specific trade recommendations or to refer to past or potential profits are required to submit the advertisements to NFA for review and approval at least ten (10) days prior to use.<sup>8</sup>

Audio or video content must be pre-approved if the promotional material:

- Highlights particular markets more than others;
- Provides an opinion regarding the anticipated direction of a particular market or markets;
- Represents that a potential opportunity exists in a particular market or markets regardless of whether the discussion is purely subjective or based upon factual data; or
- Provides the implication of opportunity through the use of adjectives such as "hot" or "explosive."

Characteristics that would not, by themselves, require an advertisement to be submitted include:

- A general discussion of the services the firm provides and the markets traded and
- Factual market data that does not highlight potential opportunity.

These lists are not intended to be exhaustive. Promotional material that does not contain any of the characteristics listed above may still require pre-approval. NFA will continue to look at these types of promotional material on a case-by-case basis.

### ***Live Advertisements***

Members who conduct live advertisements that would otherwise require pre-approval must adhere to the following requirements:

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<sup>8</sup> Submission of promotional materials for NFA review is not a substitute for a Member's own responsibility to review promotional material. NFA staff will not independently verify the accuracy of statements made in an advertisement; that responsibility remains with the Member. Submitting promotional material to NFA will not preclude NFA from raising compliance issues with the content of the promotional material or instituting a disciplinary action if misstatements, omissions of material fact or other violations of NFA rules are subsequently identified.



- A script or detailed outline must be submitted to NFA at least ten days prior to the broadcast and
- A recording of the actual advertisement must be submitted to NFA immediately after broadcasting.

### **Additional NFA References**

- [NFA Interpretive Notice 9039](#): NFA Compliance Rules 2-29 and 2-9: NFA's Review and Approval of Certain Audio and Video Advertisements
- [NFA Interpretive Notice 9053](#): Forex Transactions

### Website, Social Media Page, Other Internet-Based Forum and Electronic Communications

In many instances, electronic communications may constitute promotional material. Electronic communications directed to the public to solicit business constitutes advertising and is subject to the same rules as any other form of promotional material. For example, an e-mail, text message, or instant message sent to targeted individuals or groups is considered promotional material if the ultimate purpose is to solicit funds or orders.

Therefore, a Member's electronic communications procedures must be designed to ensure that this type of electronic communication complies with NFA's promotional material content and review requirements. This requires, among other things, the prior review and approval of the material by the appropriate supervisory personnel.

The following guidelines should be considered when using electronic communications:

#### ***Disclaimers***

Members may not downplay or hide disclaimers by requiring users to go through an additional step to read them. Therefore, when promoting performance data, trading programs, or trading systems, all applicable disclaimers must immediately precede or follow the discussion.

#### ***Hyperlinks***

Members can be held responsible for the content of a hyperlinked site if:

- There is an agency relationship between the Member and the firm/site it is linked to;
- The Member benefits, either directly or indirectly, from the link; or

- The Member has reason to know that a site it is linked to contains misleading information.

### ***CPO and CTA Websites***

While CPOs and CTAs are not required to make their disclosure documents available on their websites, a CPO or CTA should still consider including a link from its website to its disclosure document as it helps ensure that appropriate risk disclosure is provided to the potential client.

## Seminars

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Some Members conduct educational seminars for their customers and the investing public. Since these seminars constitute promotional material, they must comply with the requirements of NFA Compliance Rules 2-29 and 2-36. As such, Members must prepare and maintain on file a detailed script or outline of each seminar. In addition, since NFA may require Members to substantiate that the script or outline was followed, we strongly encourage Members to maintain an audio or video recording of the event on file.

## Sales Training

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Members use many different methods to train their APs on both industry issues and sales techniques. One such method is to provide APs with a script or outline of a telephone conversation with a potential customer. While use of these scripts is not prohibited, Members must ensure that they comply with the requirements of NFA Compliance Rules 2-29 and 2-36 and their related Interpretive Notices. Claims that the scripts are, "for training purposes only" will not relieve Members of their responsibility for the scripts' content.

Members have been found to violate NFA rules by training APs to use high-pressure sales tactics or make misleading statements.

## Options Trading

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### Option Related Communications

While NFA does not prescribe standardized disclosures for promotional material featuring options, Members and APs must ensure discussions of options trading adequately disclose the risks associated options trading and price data/price charts used are not misleading:

#### ***Long Options***

Communications that indicate option trading involves:

- Limited risk or
- No margin calls

Will be considered misleading unless it adequately discloses that such characteristics apply to long options only. Furthermore, the communication should clearly disclose that the risk of loss is limited to the premium paid on the option plus commissions and fees.

Using the term "limited risk" to imply that the likelihood of loss is limited is highly misleading. Any discussion of limited risk must make it clear that the term refers to the amount of the loss but not the likelihood of loss.

#### ***Short Options***

Conversely, promotional material that solicits for short options should adequately disclose that sellers are:

- Subject to margin calls and
- Exposed to virtually unlimited risk.

#### ***Using Cash, Futures Market or Forex Data to Sell Options***

It is generally misleading to use cash, futures market or forex data to sell options. For example, promotional material for options should not:

- Include futures or forex price charts unless accompanied by option price charts;
- Use futures, options and forex charts with different time periods;
- Imply that options prices move in tandem with cash, futures or forex prices;
- Use price data for at-the-money options to sell out-of-the money options; or

- Use price data that does not include commissions and fees comparable to those charged by the Member.

#### **Additional NFA References**

- [NFA Interpretive Notice 9033](#): NFA Compliance Rule 2-29: Deceptive Advertising

## Security Futures Products

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Compliance Rule 2-29(j) applies to promotional material that specifically refers to security futures products.

Compliance Rule 2-29(j) is applicable to material used by NFA Member FCMs and IBs who have notice registered as broker-dealers and their APs. NFA's rules regarding security futures products are quite extensive. As such, an overview of Compliance Rule 2-29(j) follows.

### Mandatory Requirements

All promotional material for security futures products must adhere to the following:

- Must prominently identify the Member;
- Must include the date the material was first used;
- Must provide contact information for obtaining a copy of the [Risk Disclosure Statement for Security Futures Products](#);
- Must state that security futures products are not suitable for all customers;
- Must be reviewed and approved in writing, by a designated security futures principal prior to first use;
- If the material only includes a general description of the security futures products that is being solicited, then the name of the Member and contact information for obtaining a copy of the Risk Disclosure Statement for Security Futures Products is not required if the material is accompanied or preceded by the disclosure statement for security futures product; and
- Promotional material designed to reach a public audience through mass media (e.g., newspapers, magazines, radio, television or other electronic media) must be submitted to NFA for review and approval at least ten days prior to first use.
  - **Note:** Promotional material whose only reference to security futures products is in a listing of the firm's services does not have to be submitted to NFA for review and approval.

Promotional material for security futures products cannot:

- Include a statement suggesting that security futures positions can be liquidated at any time; or

- Include a cautionary statement, caveat or disclaimer that is not legible, that attempts to disclaim responsibility for the content of the promotional material or the opinions expressed in the material, that is misleading, or that is otherwise inconsistent with the content of the material.

In addition to the various general requirements, promotional material that incorporates any of the following topics must adhere to the additional requirements discussed below.

### Past Performance

Promotional material for security futures products may not contain any discussion of past performance unless accompanied or preceded by the Risk Disclosure Statement for Security Futures Products. This means that most forms of mass media advertising cannot discuss past performance.

### Participation in a Trading Program

FCMs, IBs and their APs who use promotional material to solicit for trading programs that include security futures products must disclose the following:

- The cumulative past performance of all of the Member's customers who have traded the program. The past performance data must comply with the following requirements:
  - Performance must be calculated in a manner consistent with [CFTC Regulation 4.35](#) and [NFA Compliance Rule 2-34\(a\)](#);
  - Members and APs must maintain records showing how the performance was calculated; and
  - A designated security futures principal must determine that the performance data is accurate and representative of all reasonably comparable accounts.
- If the Member does not have any customers who have traded the program, the promotional material must state that the trading program is unproven and must include all of the information required by section (c) of Compliance Rule 2-29 and [NFA Interpretive Notice 9025](#). See Hypothetical Results on page [8](#) and Hypothetical Performance on page [15](#) for details.

### Statistics and Charts

Promotional material that incorporates charts and statistics regarding security futures products must adhere to the following:

- Must disclose the source of any statistical data or illustrations, unless otherwise obvious; and
- Must state that supporting documentation will be furnished upon request for all claims, comparisons, recommendations, statistics or other technical data.

### Past Trade Recommendations

A Member may not use promotional material that refers to past trade recommendations in security futures products, the underlying securities, or derivatives thereof unless the promotional material describes all other recommendations made for similar products (e.g. type, kind, grade or classification of securities) over the past year. The following information must be disclosed:

- The name of each security recommended;
- The date of each recommendation;
- The specific nature of each recommendation (e.g., buy/sell, limit order, GTC);
- The price at the time of the recommendation;
- The price or price range within which the recommendation was to be acted upon;
- The date and price at the end of the recommendation period, or when liquidation was suggested; and
- The general market conditions during the period covered.

### Current Trade Recommendations

Promotional material that includes specific trade recommendations for security futures products must adhere to the following guidelines:

- The Member must have a reasonable basis for the recommendation;
- The material must contain contact information for obtaining the list of prior recommendations described under Past Trade Recommendations above; and
- The material must disclose all material conflicts of interest created by the Member's activities in the underlying security, including the following, if any:
  - The Member and/or its officers or partners own options, rights, or warrants to purchase any of the securities of the issuer whose securities underlie the



security futures product being recommended, unless the ownership is nominal;  
and

- Within the last three years, the Member was manager or co-manager of a public offering of any securities of the issuer whose securities underlie the security futures product being recommended.

## Research Reports

Research reports for the *underlying* securities are not considered promotional material under NFA Compliance Rule 2-29. However, research reports that mention security futures products or strategies that include them are considered promotional material and, therefore, must fully comply with the rule.

## Additional NFA References

- [NFA Interpretive Notice 9025](#): Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results
- [NFA Interpretive Notice 9037](#): NFA Compliance Rules 2-9, 2-29, 2-36 and 2-39: Guidance on the Use and Supervision of Websites, Social Media and other Electronic Communications
- [NFA Interpretive Notice 9043](#): NFA Compliance Rule 2-29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products
- [NFA Interpretive Notice 9050](#): NFA Compliance Rule 2-30(b): Risk Disclosure Statement for Security Futures Contracts
- [Risk Disclosure Statement for Security Futures Products](#)

### Forex Related Communications and Promotional Material

Members and APs must also comply with the following requirements, which are exclusive to communications related to forex transactions:

- No Member or AP may represent that forex funds deposited with a Forex Dealer Member (FDM) are given special protection under bankruptcy laws or represent or imply that any assets necessary to satisfy its obligations to customers are more secure because that Member keeps some of all of those assets at a regulated entity in the United States or a money center country.
- No Member or AP may represent that its services are commission free without prominently disclosing how it is compensated in near proximity to that representation.
- No Member or AP may represent that a customer will have direct access to the interbank-market because the FDM is actually the counterparty to every customers' forex transactions.
- No Member or AP that is straight-through processing orders can suggest that they are not the counterparty to the customers' trades. For example, they cannot say that the FDM is simply acting as a middleman between the customer and the prime broker in the interbank market.
- No Member or AP may represent that it offers trading with "no-slippage" or that it guarantees the price at which a transaction will be executed or filled, unless:
  - It can demonstrate that all orders for all customers have been executed and fulfilled at the price initially quoted on the trading platform when the order was placed<sup>9</sup>; and
  - No authority exists, pursuant to the contract, agreement, or otherwise, to adjust customer accounts in a manner that would have the direct or indirect effect of changing the price at which an order was executed.<sup>10</sup>
- Members and APs may not solicit customers based on the leverage available unless they balance any discussion regarding the advantages of leverage by closely

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<sup>9</sup> The FDM is not required to give the customer a price that is no longer reflected on the platform at the time the order reaches it. The FDM is not responsible for transmission delays outside its control. If the FDM, however, advertises "no-slippage" or that it guarantees fill prices, it must prominently disclose that transmission delays might result in customer orders being executed at a price other than that seen by the customer.

<sup>10</sup> This includes *force majeure* provisions.

preceding or following it with an equally prominent disclosure that increasing leverage increases risk.

- Members and APs may not represent that they can either guarantee against any customer losses or that they can guarantee only limited customer losses.

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

#### Additional Website Disclosure Obligations for FDMs

NFA Compliance Rule 2-36(n) also requires each FDM make the following financial information readily available on its website and update such information as is necessary, but no less frequently than on an annual basis:

- The name, title, business background, areas of responsibility and the nature of the duties of each person that is a listed principal of the FDM;
- A discussion of the significant types of business activities and product lines engaged in by the FDM, and the approximate percentage of the FDM's assets and capital used in each type of activity;
- A discussion of the FDM's business on behalf of its customers, including types of customers, markets and currencies traded, international businesses, prime brokers and/or liquidity providers used, and the FDM's policies and procedures concerning the choice of bank depositories, custodians and counterparties to permitted transactions under CFTC Regulation 1.25;
- A discussion of the material risks associated with the FDM acting as a counterparty to eligible contract participants (ECP) as defined in Section 1a(18) of the Act, including any risks created by the FDM's affiliates and other ECPs acting as dealers;
- A discussion of any pending or completed material administrative, civil, enforcement or criminal complaints or actions filed against the FDM during the last three years;
- A summary schedule of the FDM's adjusted net capital; net capital and excess net capital; all computed in accordance with CFTC Regulation 5.7 and reflecting balances as of the month-end for the most recent 12 months;

- The Statement of Financial Condition and all related footnotes that are part of the FDM's most current certified annual report pursuant to CFTC Regulation 1.16;
- The total customer liability as reported each day to NFA on the Forex Financial Report for the last 12 months; and
- The disclosure, displayed in a prominent manner, required by CFTC Regulation 5.5(e) for each of the most recent four calendar quarters during which the FDM maintained retail forex customer accounts.

Furthermore, if the FDM amends any of the above referenced financial information, then the FDM must clearly notate what has been amended.

Additionally, each FDM must inform customers of their ability to request the transaction data outlined in NFA Rule 2-36(o) by a notice prominently displayed on the FDM's website, each customer's trading platform and each customer transaction confirmation statement.

#### **Additional NFA References**

- [NFA Interpretive Notice 9053](#): Forex Transactions

## Virtual Currency Derivatives and Virtual Currency Products

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While NFA does not prescribe standardized disclosures for promotional material featuring either virtual currencies or virtual currency derivatives (i.e., futures, options and cleared swaps), Members and APs must comply with the following requirements, which are exclusive to communications related to virtual currency derivatives and virtual currency products:

### Disclosure Obligations for FCMs and IBs

#### ***Virtual Currency Derivatives***

FCM and IB Members must provide [NFA's Investor Advisory—Futures on Virtual Currencies Including Bitcoin](#) and the [CFTC Customer Advisory: Understand the Risk of Virtual Currency Trading](#) to any customer that engages in a virtual currency derivative transaction with or through the FCM or IB Member. The advisories must be provided to a customer at or before the time the customer first engages in a virtual currency derivatives transaction with or through the FCM or IB Member.

**Note:** For introduced accounts, the above referenced advisories may be provided by either the FCM or IB Member.

#### ***Underlying or Spot Virtual Currencies***

Additionally, FCM and IB Members' promotional material soliciting for underlying or spot virtual currencies must prominently display the following disclosure:

**[NAME OF NFA MEMBER] IS A MEMBER OF NFA AND IS SUBJECT TO NFA'S REGULATORY OVERSIGHT AND EXAMINATIONS. HOWEVER, YOU SHOULD BE AWARE THAT NFA DOES NOT HAVE REGULATORY OVERSIGHT AUTHORITY OVER UNDERLYING OR SPOT VIRTUAL CURRENCY PRODUCTS OR TRANSACTIONS OR VIRTUAL CURRENCY EXCHANGES, CUSTODIANS OR MARKETS.**

FCM and IB Members must provide these advisories and disclosures described above to customers in writing or electronically in a prominent manner designed to ensure a customer is aware of them. It is not sufficient to merely display the advisories and disclosures on a Member's website. Rather, Members should consider including the advisories and disclosure language in a risk disclosure booklet that is distributed to customers or sending customers an e-mail including links to the advisories and disclosure language and explaining what the links are. These distribution methods would be sufficient if they are designed to achieve customer awareness and the disclosure language is prominently displayed.

### Disclosure Obligations for CPOs and CTAs

CPO and CTA Members should carefully consider the risks arising from their activities in

virtual currency derivatives and virtual currencies and customize their disclosure documents, offering documents, and promotional material to address the unique risks related to their specific activities.

### ***Virtual Currency Derivatives***

NFA does not prescribe standardized disclosure language for CPO and CTA Members engaging in virtual currency derivatives transactions in a pool, exempt pool or managed account program. Rather, CPO and CTA Members' disclosure documents, offering documents and promotional material must address the number of unique features of virtual currency derivatives which may include, but is not limited to:

- Virtual currency derivatives may experience significant price volatility and the initial margin for virtual currency derivatives may be set as a percentage of the value of a particular contract, which means that margin requirements for long positions can increase if the price of the contract rises;
- Some FCMs may pose restrictions on customer trading activity in virtual currency derivatives, such as requiring additional margin, imposing position limits, prohibiting naked shorting or prohibiting give-in transactions; and
- The rules of certain designated contract markets impose trading halts that may restrict a market participant's ability to exit a position during a period of high volatility.

The risks associated with the unique features of engaging in virtual currency derivatives should be disclosed and the impact these risks may have on the trading program's performance should be explained.

### ***Underlying Spot Virtual Currency Products***

NFA does not prescribe standardized disclosure language for CPOs and CTAs engaging in underlying or spot virtual currency transactions in a pool or managed account program. Instead, CPO and CTA Members that engage in these transactions must address the following areas in their disclosure documents, offering documents, and promotional material (see additional details about each area in [NFA Interpretive Notice 9073](#) referenced below:

- Unique Features of Virtual Currencies
- Price Volatility
- Valuation and Liquidity
- Cybersecurity
- Opaque Spot Market

- Virtual Currency Exchanges, Intermediaries and Custodians
- Regulatory Landscape
- Technology
- Transaction Fees

In addition, any CPO or CTA Member engaging in the underlying or spot virtual currency transaction in a commodity pool, exempt pool or managed account program must prominently display the following language in its disclosure document, offering document, and promotional material:

**[NAME OF NFA MEMBER] IS A MEMBER OF NFA AND IS SUBJECT TO NFA'S REGULATORY OVERSIGHT AND EXAMINATIONS. [NAME OF NFA MEMBER] HAS ENGAGED OR MAY ENGAGE IN UNDERLYING OR SPOT VIRTUAL CURRENCY TRANSACTIONS IN A [COMMODITY POOL OR MANAGED ACCOUNT PROGRAM]. ALTHOUGH NFA HAS JURISDICTION OVER [NAME OF NFA MEMBER] AND ITS [COMMODITY POOL OR MANAGED ACCOUNT PROGRAM], YOU SHOULD BE AWARE THAT NFA DOES NOT HAVE REGULATORY OVERSIGHT AUTHORITY FOR UNDERLYING OR SPOT MARKET VIRTUAL CURRENCY PRODUCTS OR TRANSACTIONS OR VIRTUAL CURRENCY EXCHANGES, CUSTODIANS OR MARKETS. YOU SHOULD ALSO BE AWARE THAT GIVEN CERTAIN MATERIAL CHARACTERISTICS OF THESE PRODUCTS, INCLUDING LACK OF A CENTRALIZED PRICING SOURCE AND THE OPAQUE NATURE OF THE VIRTUAL CURRENCY MARKET, THERE CURRENTLY IS NO SOUND OR ACCEPTABLE PRACTICE FOR NFA TO ADEQUATELY VERIFY THE OWNERSHIP AND CONTROL OF A VIRTUAL CURRENCY OR THE VALUATION ATTRIBUTED TO A VIRTUAL CURRENCY BY [NAME OF NFA MEMBER].**

Disclosure Obligations for Any Other Activities in Underlying or Spot Virtual Currencies

NFA Compliance Rule 2-22 prohibits a Member from, among other things, stating or implying that it has been sponsored, recommended or approved by NFA. To provide clear disclosure about the lack of NFA's regulatory oversight with regard to underlying or spot virtual currencies, any CPO or CTA Member engaging in these activities (other than those described above) must provide its customer or counterparty with the following disclosure language and prominently display the disclosure in any promotional materials related to the Member's other activity in virtual currencies:

**[NAME OF NFA MEMBER] IS A MEMBER OF NFA AND IS SUBJECT TO NFA'S REGULATORY OVERSIGHT AND EXAMINATIONS. HOWEVER, YOU SHOULD BE AWARE THAT NFA DOES NOT HAVE REGULATORY OVERSIGHT AUTHORITY OVER UNDERLYING OR SPOT VIRTUAL CURRENCY PRODUCTS OR TRANSACTIONS OR VIRTUAL CURRENCY EXCHANGES, CUSTODIANS OR MARKETS.**

### **Additional NFA References**

- [NFA Interpretive Notice 9073](#): Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities



## Supervisory Procedures

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Members must have written supervisory procedures for promotional material produced and used by APs and employees. NFA Compliance Rule 2-9 requires Members and APs 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. Supervisory procedures must include the supervision of electronic communications used to conduct commodity interest business. These procedures should be similar to those required for non-electronic communications.

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. Supervisory procedures must be implemented to monitor the use these various forms of electronic communications as these platforms provide opportunities to spread unsubstantiated rumors, intentional misrepresentations and engage in other conduct that is inconsistent with NFA rules. This includes the use of websites, social media, other internet-based forums (e.g., blogs, chat rooms), as well as, e-mail and other electronic communications (e.g., instant messaging, text messaging, messaging services provided by a social networking site).

The information below is intended to provide guidance to help Members establish appropriate content standards and supervisory oversight of websites, social media and other electronic communications used to conduct commodity interest business.

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

Any communication related to a commodity interest account, agreement or transaction that is posted by or on behalf of a Member on a website, social media page or another internet-based forum (e.g., blogs, chat rooms) 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 a Member or AP that is posted on a website, social media page or other communication platform maintained by a third party.

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.

Supervisory procedures for websites, social media, and other internet-based forums:

- Must require prior review and documented approval by an appropriate supervisor before going "live";

- Must ensure that substantive changes to or new versions of the material is reviewed and approved prior to first use;
- Should prohibit or describe how the Member will supervise any features that cannot be reviewed in advance (e.g., streaming script containing real-time market news); and
- Should take into consideration the fact that content that does not limit access to a particular target audience, through a login mechanism or other means, is available to the public.

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.

The following issues should also be considered when developing supervisory procedures for websites, social media and other internet-based forums:

- Providing a means for identifying the time frame in which a particular version of a website, social media or other internet-based forum was in use;
- Enabling the review of employees' and agents' personal websites and social media profiles as those 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;
- Specifying when and how hyperlinks to other websites will be reviewed; and
- Explaining how posts made by participants that are not affiliated with the Member will be monitored.

## Electronic Communications

A 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. 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.

Each Member must 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 for the use of electronic

communications must:

- Be in writing;
- Identify, by title or position, the person responsible for reviewing electronic communications;
- 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.

Procedures for reviewing electronic communications should be developed based on the size, structure, and nature of a firm's business operations. In addition, the following issues should be considered:

- The nature of the communication;
- The relative sophistication of the recipients; and
- The training and background of the Member's employees and agents.

A firm dealing with sophisticated or institutional customers might choose to sample a relatively small but representative amount of electronic correspondence. On the other hand, a firm dealing with relatively unsophisticated, retail customers should review a larger sample of or even all outgoing electronic communications. Similarly, firms who employ APs with prior disciplinary history should scrutinize those APs' electronic communications.

At a minimum, a firm's supervisory procedures should address the following:

- Whether employees and agents can use electronic communication systems (e.g., Facebook, Twitter, LinkedIn) other than the firm's;
- How the review will be documented, including the review of electronic communications other than the firm's systems;
- How frequently incoming and outgoing electronic communications will be reviewed;
- Whether certain types of electronic communications will require a pre-review or post-review; and
- How Members will educate and train employees on the firm's policies and procedures.

**Note:** If a Member permits them to use other systems for business purposes, whether on their work or home computer, the Member's procedures must treat these off-system electronic communications as its own records and must ensure that the Member is capable of adequately retaining, reviewing and supervising these records. If Members 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, the 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.

### **Additional NFA References**

- [NFA Interpretive Notice 9037](#): NFA Compliance Rules 2-9, 2-29, 2-36 and 2-39: Guidance on the Use and Supervision of Websites, Social Media and other Electronic Communications

## Responsibility for Promotional Material Produced by Others

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### Member Responsibility

Members are responsible for all of the promotional material they use. This includes:

- All material distributed by the Member, whether prepared by the Member itself, its employees, other NFA Members or non-Members and
- All material distributed on the Member's behalf.

**Note:** This includes electronic communications used by firm APs; see the [Electronic Communications](#) section above for further information.

In addition:

- Members cannot avoid responsibility for promotional material by claiming to be unaware of its content or appearance and
- Failure to review promotional material is a violation of NFA Compliance Rule 2-29(e) and 2-36(e).

Members who prepare promotional material on behalf of other Members may also be held liable for any misinformation the material includes. Therefore, Members who prepare promotional material for other Members must exercise good judgment and do their due diligence when preparing the material. For example, a Member relying on performance data supplied by a CTA should at least compare that data to the CTA's most recent disclosure document to obtain some level of comfort that the data is accurate.

### Purchasing Leads

Prior to utilizing lead lists, Members should be able to demonstrate the following:

- The advertisements used to generate the leads were not fraudulent or misleading and
- The advertisement utilized by the lead provider to generate the leads complies with NFA Compliance Rule 2-29.

### Article Reprints

Members who use articles from industry publications become responsible for the content of the articles and must ensure they comply with NFA Compliance Rules 2-29 and 2-36. For example:

- Many articles do not necessarily balance a discussion of profit potential with an equally prominent discussion of the risk of loss. As a result, Members must amend the articles appropriately. Acceptable amendments include stamping the material with appropriate risk disclosures or distributing the articles with other material that adequately discusses the risk of loss.
- Members are responsible for the accuracy of any numeric or statistical information contained in the articles.
- Members must be able to support any performance data cited in the articles.
- If the articles mention hypothetical performance results, the required hypothetical disclaimers must be included.
- If performance is discussed, it must be representative of the client accounts of the Member itself.

#### User-Generated Comments Related to Social Networking Groups

If a Member or AP hosts a blog, a chat room, or a forum where commodity interests are discussed, the Member or AP is required to supervise the use of that community. This requires, at a minimum, that the Member or AP regularly monitor the content of the sites it hosts, take down any misleading or otherwise fraudulent posts, and ban users for egregious or repeat violations. Similar requirements apply to Facebook and other sites that allow others to post to the Member or AP's "wall" (timeline) or other accessible area.

#### **Additional NFA References**

- [NFA Interpretive Notice 9039](#): NFA Compliance Rules 2-29 and 2-9: NFA's Review and Approval of Certain Audio and Video Advertisements

## NFA Review and Filing of Promotional Material

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### Mandatory Pre-Approval

As mentioned earlier, certain types of audio and video advertising must be submitted to NFA for review and approval 10 days prior to their first use. Firms subject to special supervisory requirements under NFA Compliance Rule 2-9(b) must also submit their promotional material for pre-approval.

### Voluntary Pre-Review Program

NFA offers Members a voluntary program to review promotional material prior to its first use. NFA will normally review submissions within 14 calendar days. Members will be notified by email when the review is complete and will be instructed to access the Promotional Material Filing System to view any comments or to obtain notification that no further comments were noted and the material may be used.

During the pre-review process, NFA will provide valuable guidance to Members in areas such as balance and the proper use of disclaimers. However, NFA will not verify the accuracy of the material. Submitting promotional material to NFA will not preclude NFA from raising compliance issues with the content of the promotional material or instituting a disciplinary action if misstatements, omissions of material fact or other violations of NFA rules are subsequently identified. The use of this program in no way lessens the requirement that Members review, approve, and supervise the use of their promotional material. A Member may not rely on or attempt to use NFA's review to meet its promotional material supervisory obligations under NFA Compliance Rule 2-29 and 2-36.

To take advantage of this pre-review program, the material must be submitted to NFA at least 14 days prior to its intended use.

### Filing of Promotional Material

Any promotional material filed for review must be submitted electronically through NFA's [Promotional Material Filing System](#) which can be easily accessed through the Electronic Filing Systems link on NFA's website. Before an individual can file promotional material through the filing system, the Member's security manager must provide the individual certain permissions to file promotional material on behalf of the firm. Such permissions can be added through the [Online Registration System](#) (ORS). See NFA's [ORS User Guide](#) for more information on how to grant users access to NFA's systems.

### General Questions about Promotional Material or Rule 2-29

Contact NFA's Information Center at (312) 781-1410 or (800) 621-3570 or through [information@nfa.futures.org](mailto:information@nfa.futures.org). Inquires will be forwarded to the appropriate personnel for response.

## Sources of Additional Information

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### Additional NFA References

Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581  
(202) 418-5000  
[www.cftc.gov](http://www.cftc.gov)

FIA  
2001 Pennsylvania Avenue, N.W.  
Suite 600  
Washington, D.C. 20006  
(202) 466-5460  
[www.fia.org](http://www.fia.org)

Managed Funds Association  
2025 M Street, N.W. Suite 800  
Washington D.C. 20036-3309  
(202) 367-1140  
[www.mfainfo.org](http://www.mfainfo.org)

National Introducing Brokers Association  
55 West Monroe Street  
Suite 3330  
Chicago, IL 60603  
(312) 977-0598  
[www.theniba.com](http://www.theniba.com)

NFA  
320 South Canal  
Suite 2400  
Chicago, IL 60606  
(312) 781-1410  
[www.nfa.futures.org](http://www.nfa.futures.org)

U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549  
(202) 942-7040  
[www.sec.gov](http://www.sec.gov)