

**NATIONAL FUTURES ASSOCIATION  
BEFORE THE  
BUSINESS CONDUCT COMMITTEE**

FILED  
SEP 29 2022  
NATIONAL FUTURES ASSOCIATION  
LEGAL DOCKETING

In the Matter of: )  
)  
VBI COMPANY )  
(NFA ID #312310), )  
)  
and )  
)  
PETER MARK VANDEN BERGE )  
(NFA ID #245943), )  
)  
)  
Respondents. )

NFA Case No. 22-BCC-013

**COMPLAINT**

Having reviewed the investigative report submitted by the Compliance Department of National Futures Association (NFA) and having found reason to believe that NFA Requirements are being, have been, or are about to be violated and that the matter should be adjudicated, NFA's Business Conduct Committee (Committee) issues this Complaint against VBI Company (VBI) and Peter Mark Vanden Berge (Vanden Berge).

**ALLEGATIONS**

**JURISDICTION**

1. At all times relevant to this Complaint, VBI was a registered introducing broker (IB) Member of NFA. As such, VBI was and is required to comply with NFA Requirements and is subject to disciplinary proceedings for violations thereof.
2. At all times relevant to this Complaint, Vanden Berge was a registered associated person (AP) and listed principal of VBI, and an NFA Associate. As

such, Vanden Berge was and is required to comply with NFA Requirements and is subject to disciplinary proceedings for violations thereof. VBI is liable for violations of NFA Requirements committed by Vanden Berge during his activities on behalf of VBI.

### **BACKGROUND**

3. VBI became a registered IB and NFA Member on August 30, 2001. The firm is located in Sioux Falls, South Dakota and operates five branch offices.
4. In addition to being an AP and principal of VBI and an NFA Associate, Vanden Berge is the firm's president and the only individual responsible for supervising the firm's APs and its operations.
5. NFA commenced an examination of VBI in August 2019, which found that the firm was not complying with NFA and CFTC recordkeeping requirements involving oral communications.
6. After the 2019 examination, Vanden Berge represented to NFA that he had implemented corrective action that would allow VBI to comply with these requirements. However, when NFA conducted a subsequent examination of the firm in 2021, NFA found that VBI was still not in compliance.
7. As alleged in more detail below, both of NFA's examinations found that VBI and Vanden Berge failed to implement policies and procedures to ensure the firm complied with NFA and CFTC recordkeeping requirements.
8. Further, Vanden Berge provided numerous and often contradictory excuses to justify VBI's lack of compliance with those requirements and, in doing so,

repeatedly provided NFA with materially false and misleading information regarding VBI's failure to comply with its recordkeeping obligations.

9. In addition to these violations, NFA's 2019 and 2021 examinations also found that VBI and Vanden Berge failed to diligently supervise the firm's operations and employees.

#### **APPLICABLE RULES**

10. NFA Compliance Rule 2-10(a) requires Members to maintain adequate books and records necessary and appropriate to conduct their business including, without limitation, the records required to be kept under CFTC Regulations 1.18, 1.32 through 1.37, and 1.71 for the period required under CFTC Regulation 1.31.
11. CFTC Regulation 1.35 requires IBs to keep full, complete, and systematic records of all transactions relating to their business of dealing in commodity interests. The Regulation also requires IBs that have generated over the preceding three years more than \$5 million in aggregate gross revenues from their activities as an IB to keep all written and oral communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest whether transmitted by telephone, voicemail, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media.
12. CFTC Regulation 1.35(a)(9) provides, in pertinent part, that a registrant may petition the CFTC to establish an alternative compliance schedule to maintain oral pre-trade communications if the registrant can demonstrate that it is technologically or economically impracticable to comply with the Regulation and

the registrant seeks to comply with the requirement to record oral communications within a reasonable period beyond the date by which compliance is otherwise required. The Regulation further provides that the CFTC shall act on a request for an alternate schedule within 30 days from the time such request is received, or it shall be deemed approved.

13. CFTC Regulation 1.31 requires, in pertinent part, IBs and other CFTC registrants that are required to retain oral communications to keep regulatory records of oral communications for a period of not less than one year from the date of the communication.
14. On March 17, 2020, due to the COVID-19 pandemic (COVID), the CFTC issued a No-Action Letter, which provided that it would not recommend an enforcement action against an IB or other CFTC registrant if the firm's APs were unable to record oral conversations, provided the firms: 1) created and maintained a written record of the oral communication, including date, time and an identification of those participating in the communication, in accordance with Regulation 1.35; and 2) collected any written materials relevant to the content of the oral communication, including notes or other contemporaneous or subsequently created transcripts or summaries, and maintain them pursuant to Regulation 1.31 (hereafter referred to as the Oral Recordkeeping Relief or Relief). The Relief was initially scheduled to expire on June 30, 2020, but the Commission subsequently extended the Relief twice, and it finally expired on March 31, 2021.
15. NFA issued similar relief to IBs (and other NFA membership categories) for complying with the applicable recordkeeping requirements of NFA Compliance

Rule 2-10. In granting this relief, NFA indicated that Members complying with the terms of the CFTC's Oral Recordkeeping Relief would be considered in compliance with NFA's related requirements.

16. NFA Compliance Rule 2-2(f) provides that no Member or Associate shall willfully submit materially false or misleading information to NFA or its agents.
17. NFA Compliance Rule 2-9(a) requires each NFA Member to diligently supervise its employees and agents in the conduct of their commodity interest activities for or on behalf of the Member. The Rule further provides that each Associate with supervisory duties shall diligently exercise such duties in the conduct of that Associate's commodity interest activities on behalf of the Member.

#### **COUNT I**

#### **VIOLATIONS OF NFA COMPLIANCE RULE 2-10: FAILURE TO COMPLY WITH CFTC REGULATIONS 1.31 AND 1.35 BY FAILING TO MAINTAIN REQUIRED ORAL AND WRITTEN PRE-TRADE COMMUNICATIONS.**

18. The allegations contained in paragraphs 1 through 15 are realleged in paragraph 18.
19. During the 2019 examination of VBI, NFA determined that, based on the preceding three-year period, the firm's gross revenue exceeded the \$5 million threshold as of January 1, 2017. Therefore, as of that date, VBI was required to retain all oral and written pre-trade communications.
20. Notwithstanding that, Vanden Berge told NFA that Regulation 1.35 did not apply to VBI because the commissions that VBI paid to its APs were not considered revenue since VBI had "no legal right" to those commissions. However, the

Regulation contains no language which permits a firm to "exclude" certain types of revenue.

21. As result of these findings, NFA staff issued an examination report to VBI which cited the firm for its failure to comply with NFA Compliance Rule 2-10(a) and warned that the exam findings constituted a serious violation of NFA's Rules.
22. In response to these findings, in December 2019, Vanden Berge provided NFA with an invoice that evidenced that VBI had purchased a hardware device which would allow VBI to record its APs' telephones. Later, in April and June 2020, Vanden Berge and another registered AP of VBI both represented in emails to NFA that VBI was "finishing up" installing the hardware and planned to schedule inspections of its branch offices to ensure individuals at those locations were complying with the recordkeeping requirements and recording their telephone conversations.
23. NFA began another examination of VBI on May 17, 2021 and, at the outset, determined that the firm's revenue continued to exceed the \$5 million threshold. Therefore, VBI was still obligated to maintain records of all pre-trade communications.
24. Despite this, when NFA asked Vanden Berge to produce copies of VBI's oral pre-trade communications, he said VBI had none because the CFTC had granted the firm relief from the requirement, pursuant to Regulation 1.35(a)(9).
25. NFA reviewed VBI and Vanden Berge's September 25, 2020 request to the CFTC for recordkeeping relief and determined the request was deficient in that it failed to set forth any alternative compliance schedule and instead asserted that

VBI should not have to comply because it had a strong supervisory program and APs who understood the rules and regulations of the industry.

26. When NFA asked Vanden Berge for evidence that the CFTC had approved VBI's request, he indicated he "assumed" it had because he had not received a response since the Regulation provides that a request is "deemed approved" unless acted upon by the Commission within 30 days.
27. Vanden Berge claimed that he transmitted the September 25, 2020 letter to the CFTC by U.S. Mail, without any tracking and during the time period when many offices, including the CFTC, were operating on a virtual basis due to COVID. Commission staff also informed NFA that the CFTC had no record of having received VBI's request.
28. NFA told Vanden Berge that, based on its understanding of the Regulation and conversations with Commission staff, VBI's request to the CFTC was unfounded and, as a result, VBI should have been complying with Regulation 1.35 all along. Subsequently, CFTC staff also contacted Vanden Berge and reiterated that VBI was required to comply with the Regulation.
29. Since Vanden Berge claimed that VBI made its request to the CFTC on September 25, 2020, NFA asked Vanden Berge for evidence of VBI's compliance with Regulation 1.35 from December 2019 (*i.e.*, when Vanden Berge represented he had installed hardware to record oral communications) through September 2020 (*i.e.*, around the time Vanden Berge "assumed" the CFTC had granted VBI's request).

30. While Vanden Berge claimed VBI was recording oral communications from December 2019 through February 2020, he was unable to provide evidence VBI had actually done so because he claimed to have deleted the recordings after the required one-year retention period passed.
31. However, Vanden Berge's claim is contradicted by VBI's "Client Interaction Policy" (Policy), which provided that VBI would retain recordings for "at least 3 years..."
32. When NFA confronted Vanden Berge in May 2021 regarding this inconsistency, he claimed VBI ceased using the Policy in March 2020, even though VBI provided NFA with a signed copy of the Policy in June 2020 as corrective action to the 2019 exam findings and never indicated the Policy was no longer in use.
33. From March through September 2020, Vanden Berge represented that VBI stopped recording oral communications due to COVID and relied on the CFTC's Oral Recordkeeping Relief.
34. However, as alleged in paragraph 22, NFA exchanged several emails with Vanden Berge and another VBI AP during April and June 2020 when the CFTC's Relief was in effect. None of these email exchanges mentioned that VBI had stopped recording oral communications and was relying on the Relief. Rather, the emails represented that VBI was nearly finished installing the recording hardware and planned to schedule visits to its branch offices to ensure its APs were fully complying with Regulation 1.35.
35. Notwithstanding the above, as to whether VBI was relying on the Oral Recordkeeping Relief or was in fact recording oral communications, Vanden



Berge managed to confuse the matter even further when he provided additional contradictory information to NFA.

36. Namely, as alleged in paragraph 32, when NFA questioned Vanden Berge regarding VBI's compliance with the recordkeeping requirements in May 2021 (during the 2021 exam), he initially claimed that VBI had availed itself of the Relief as of March 2020 and ceased recording oral communications (in spite of the fact that in April and June 2020 both he and another VBI AP represented that VBI had implemented its recording hardware).
37. Thereafter, in April 2022, upon further questioning from NFA, Vanden Berge claimed that three VBI branch office locations had recorded oral communications after the 2019 exam through September 2020.
38. Moreover, if VBI relied on the CFTC's Oral Recordkeeping Relief, then Vanden Berge failed to implement appropriate policies and procedures to ensure that VBI's APs complied with the conditions set forth in the Relief.
39. To qualify for the Relief, VBI's APs should have created a written record that included the date, time, names of those participating, and the subject matter of those oral communications, as described in paragraph 14 above.
40. Instead, Vanden Berge believed it was sufficient to rely on VBI's broker order logs, its activity runs, and FCM customer account statements—records that did not contain all the information required under the terms of the Relief and which the firm maintained separately and not as one centralized record. Further, VBI was already required to create and maintain these records under Regulation 1.35. As a result, VBI and Vanden Berge took no affirmative steps to ensure the

firm's APs complied with the conditions set forth in the CFTC's Oral Recordkeeping Relief.

41. Vanden Berge also represented to NFA that VBI did not retain APs' text messages because "text is not widely used" to solicit and/or execute business with customers.
42. Yet again though, Vanden Berge's representation to NFA about the limited use of texts is contradicted by VBI's September 25, 2020 letter to the CFTC, where he claimed that "some of [VBI's] APs send hundreds of texts per day between themselves and clients."
43. Further, regardless of the number of text messages between VBI's APs and their customers, there is no *de minimis* exception in Regulation 1.35 and, therefore, VBI should have created and maintained those records too.
44. As alleged above, from January 1, 2017 through the present, VBI was required to have maintained oral and written pre-trade communications. Notwithstanding this, by Vanden Berge's own admission, VBI failed to maintain oral pre-trade communications from January 2017 through December 2019 and from March 2020 to August 2021 (or, alternatively, failed to comply with the CFTC's Oral Recordkeeping Relief from March 2020 through March 2021).
45. Additionally, VBI failed to maintain certain written pre-trade communications (*i.e.*, texts) from January 2017 to August 2021.
46. By reason of the foregoing acts and omissions, VBI is charged with violating NFA Compliance Rule 2-10(a) by failing to comply with CFTC Regulations 1.31 and 1.35.

## COUNT II

### **VIOLATIONS OF NFA COMPLIANCE RULE 2-2(f): WILLFULLY SUBMITTING MATERIALLY FALSE OR MISLEADING INFORMATION TO NFA OR ITS AGENTS.**

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47. The foregoing paragraphs are realleged as if fully stated herein.
48. Throughout NFA's interactions with Vanden Berge regarding VBI's failure to comply with its communication recordkeeping obligations, Vanden Berge consistently provided NFA with contradictory information and used any available excuse to explain VBI's lack of compliance.
49. First, in the 2019 exam, Vanden Berge claimed VBI did not have revenues that exceeded the \$5 million threshold after excluding AP commissions. However, there is no language in the Regulation that permits a firm to exclude certain types of revenue and, at a minimum, such claim demonstrates that Vanden Berge disregarded VBI's regulatory obligations as an NFA Member.
50. Thereafter, in the 2021 exam, Vanden Berge claimed VBI was not required to keep oral communications because the CFTC had granted the firm relief from doing so—either as a result of the Oral Recordkeeping Relief or under subsection (a)(9) of Regulation 1.35. However, these claims are contradicted by NFA's evidence.
51. With regard to the Oral Recordkeeping Relief, Vanden Berge never told NFA that VBI was availing itself of that Relief—despite the fact that during the period the Relief would have been in effect both he and another VBI AP represented that the firm was complying with Regulation 1.35.

52. Further, with regard to the relief under Regulation 1.35(a)(9), VBI's request was completely deficient in that it provided no grounds on which the Commission could have even considered an alternative compliance schedule. Moreover, even though Vanden Berge supposedly made the request to the CFTC during September 2020 (when most offices were operating virtually), Vanden Berge sent the request to the CFTC by regular U.S. Mail rather than submit the request by email.
53. For all these reasons, Vanden Berge had no reasonable basis on which to conclude that the Commission had granted VBI's request, and he was reckless to have "assumed" it had done so.
54. In addition, Vanden Berge provided NFA with more contradictory information when attempting to explain why VBI did not retain text messages sent by VBI's APs to their customers.
55. As described above in paragraphs 41 and 42, while Vanden Berge represented to NFA that VBI's APs rarely used text messages, he told the CFTC that those same APs sent hundreds of text messages a day.
56. As also alleged above, over the past few years, Vanden Berge has provided NFA with a number of excuses for the firm's communication recordkeeping deficiencies and, in doing so, has provided NFA with materially false and misleading information regarding whether VBI ever complied with its communication recordkeeping obligations for nearly five years.
57. Vanden Berge's actions are willful if he made them with a reckless disregard for the truth. Even if Vanden Berge incorrectly believed that any of his excuses were

accurate, he was reckless in reaching these conclusions since in some instances he provided NFA with other contradictory information (e.g., informing NFA that the firm rarely used text messages when the firm's letter to the CFTC indicated that VBI's APs sent hundreds of text messages a day), and in other instances his excuses were clearly inconsistent with the regulatory requirements (e.g., deducting AP commissions from the firm's gross revenue).

58. By reason of the foregoing acts and omissions, VBI and Vanden Berge are charged with violating NFA Compliance Rule 2-2(f) for willfully providing NFA or its agents with false or misleading information.

### **COUNT III**

#### **VIOLATIONS OF NFA COMPLIANCE RULE 2-9(a): FAILURE TO DILIGENTLY SUPERVISE VBI'S OPERATIONS.**

59. The foregoing paragraphs are realleged as if fully stated herein.
60. Under NFA Compliance Rule 2-9(a), VBI is required to diligently supervise its employees and agents in the conduct of their commodity interest activities for or on behalf of the firm. The Rule also requires Vanden Berge to diligently exercise his supervisory duties in the conduct of his commodity interest activities on behalf of the firm.
61. As alleged above, Vanden Berge is the firm's sole listed principal, its president and the only individual responsible for supervising the firm's operations and its APs.
62. Despite the fact that VBI was required to have complied with the requirements set forth in CFTC Regulations 1.31 and 1.35 since January 1, 2017, VBI allegedly only created records of its APs' oral communications for a brief three-

month period (December 2019 through February 2020) and never created or maintained records of certain written communications. The nearly five-year period in which these deficiencies persisted (*i.e.*, from January 2017 to August 2021) evidences VBI and Vanden Berge's failure to diligently supervise the firm's employees and operations to ensure required communication records were created and maintained.

63. Providing numerous and often contradictory excuses to justify VBI's lack of compliance with the recordkeeping requirements further illustrates VBI and Vanden Berge's failure to supervise.
64. By reason of the foregoing acts and omissions, VBI and Vanden Berge are charged with violating NFA Compliance Rule 2-9(a) for their failure to diligently supervise the operations of VBI.

### **PROCEDURAL REQUIREMENTS**

#### **ANSWER**

You must file a written Answer to the Complaint with NFA within thirty (30) days of the date of the Complaint. The Answer shall respond to each allegation in the Complaint by admitting, denying or averring that you lack sufficient knowledge or information to admit or deny the allegation. An averment of insufficient knowledge or information may only be made after a diligent effort has been made to ascertain the relevant facts and shall be deemed to be a denial of the pertinent allegation.

The place for filing an Answer shall be:

National Futures Association  
300 S. Riverside Plaza  
Suite 1800  
Chicago, Illinois 60606  
Attn: Legal Department – Docketing

E-Mail: [Docketing@nfa.futures.org](mailto:Docketing@nfa.futures.org)

Failure to file an Answer as provided above shall be deemed an admission of the facts and legal conclusions contained in the Complaint. Failure to respond to any allegation shall be deemed an admission of that allegation. Failure to file an Answer as provided above shall be deemed a waiver of hearing.

**POTENTIAL PENALTIES, DISQUALIFICATION, AND INELIGIBILITY**

At the conclusion of the proceedings conducted in connection with this Complaint, the Committee may impose one or more of the following penalties:

- (a) expulsion or suspension for a specified period from NFA membership;
- (b) bar or suspension for a specified period from association with an NFA Member;
- (c) censure or reprimand;
- (d) a monetary fine not to exceed \$500,000 for each violation found; and
- (e) order to cease and desist or any other fitting penalty or remedial action not inconsistent with these penalties.

The allegations in this Complaint may constitute a statutory disqualification from registration under Section 8a(3)(M) of the Commodity Exchange Act. A respondent in this matter who applies for registration in any new capacity, including as an AP with a new sponsor, may, after opportunity for hearing, be denied registration or conditionally registered based on the pendency of this proceeding.

Pursuant to CFTC Regulation 1.63, penalties imposed in connection with this Complaint may temporarily or permanently render a Respondent who is an individual ineligible to serve on disciplinary committees, arbitration panels and governing boards of a self-regulatory organization, as that term is defined in CFTC Regulation 1.63.

**NATIONAL FUTURES ASSOCIATION  
BUSINESS CONDUCT COMMITTEE**

Dated:

9/29/2022

By:

Chris L. Wolff  
Chairperson

Ecs/Complaints/2022:Complaint\_VBI, Vanden Berge (9.27.22) (Final)