



A Guide to NFA Compliance Rules 2-29 and 2-36

Communications with the Public and
Promotional Material

April 2015 Revisions: Updated the Hypothetical Performance section to further clarify the requirements that are applicable to promotional material directed to Qualified Eligible Persons (QEP), under Compliance Rule 2-29(c).

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Introduction and Purpose

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 Members or Associated Persons ("APs"). Rule 2-29 covers communications with the public by Members who solicit customers to trade on-exchange futures and options on futures while Rule 2-36 covers communications with the public by Members who solicit retail customers to trade forex. 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 booklet is to provide NFA 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.

Rule Provisions

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 futures or forex trading is appropriate for everyone

Definition 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;
- Advertising; this includes newspapers, magazines, radio, television, and direct or electronic mail;
- Standardized phone solicitations, including “cold calls”;
- Newsletters, reports, circulars, etc.;
- A prepared sales script, whether actually followed in making sales presentations or developed solely for training purposes;
- Material used on the Internet; and
- Hotlines.

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 statement of the risk of loss.

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 be accompanied by prescribed statements regarding hypothetical or simulated performance 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.

Actual Past Trading Profits

- Must state that "*Past results are not necessarily indicative of future results.*"

Past Performance

- Rate of return figures must be calculated in a manner consistent with CFTC Regulation 4.25(a)(7)(i)(F) for commodity pools, CFTC Regulation 4.35(a)(6) and Compliance Rule 2-34(a) for figures based on separate accounts; and
- Must be representative of the actual performance of all reasonably comparable accounts

Additional Requirements for Forex related Promotional Material

- No Member or Associate 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 Associate may represent that its services are commission free without prominently disclosing how it is compensated in near proximity to that representation.

- No Member or Associate 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 placed¹; 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.²
- Members and Associates may not solicit customers based on the leverage available unless they balance any discussion regarding the advantages of leverage with an equally prominent contemporaneous disclosure that increasing leverage increases risk.
- Members and Associates may not represent that they can either guarantee against any customer losses or that they can guarantee only limited customer losses.

Promotional Material for Security Futures Products

In addition to complying with all of the above-mentioned provisions, promotional material for security futures products must adhere to numerous additional requirements. These requirements are discussed in detail, beginning on page 21.

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 before it is used.
- For forex-related promotional material, a supervisory employee that is, or is under the ultimate supervision of, a listed principal who is also an NFA Associate should review and approve all promotional material and make a written record of such review and approval.

¹ 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 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.

² This includes *force majeure* provisions.

- If the material specifically refers to security futures products, the review and approval must be done by a designated securities futures principal.
- Promotional material 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 \(November 1985\)](#)

[NFA Interpretive Notice 9009: NFA Compliance Rule 2-29: Review of Promotional Material Prior to its First Use \(May 1989\)](#)

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

General Standards

Deceptive and Misleading Communications

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 Associate responsible for those statements are different for the two types of communications.

- A Member or Associate is held responsible for deceptive and misleading statements in day-to-day communications if the Member or Associate intended to mislead or made the statement recklessly. NFA's Committees have consistently found that Members and Associates 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 Associate has the opportunity to think about the content before using the material. A Member or Associate 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 Associate must conduct a reasonable inquiry into any affirmative statements and must review the overall impact of the promotional material. A Member or Associate can also be held responsible for factual omissions if the Member or Associate knew about the omitted fact and the omission makes the promotional material misleading.

Use of High Pressure

Members and Associates 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 overnight courier service delivering blank account forms to the customer and waiting while the customer completes the forms;
- An AP actively attempting to dissuade unsophisticated customers from seeking further advice on their investment decisions;
- Threatening or intimidating customers; and
- Phone calls 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 futures 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 \(Revised July 2000\)](#)

[NFA Interpretive Notice 9038: NFA Compliance Rule 2-29: High Pressure Sales Tactics \(June 1996\)](#)

Content of Communication

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* statement of the risk of loss. The rule requires that profit and loss be emphasized proportionately.

In addition, when Members and Associates solicit customers to trade forex, they may not solicit based on the leverage available unless they balance any discussion regarding leverage with an *equally prominent contemporaneous* 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 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 the futures industry. "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 this 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 the required performance disclaimer “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.
- 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.
- The disclaimer, “*Past results are not necessarily indicative of future results*” immediately precedes or follows the performance data.
- The material is balanced with regard to the risk of loss involved in trading futures and options.
- 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.

Annual Rates of Return

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

- Rate of return should be based on 12 consecutive months of performance;
- Rate of return should be computed on a compounded monthly basis; and
- Rate of return 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 Rate of Return.

Each of these alternative methods is fully explained in Appendix B to Part 4 of the CFTC's regulations or NFA Interpretive Notice titled "Compliance Rule 2-34: 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.

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 (i.e., if a pool's disclosure document states that 25 percent of the fund's assets are dedicated to trading financial futures, the CPO may present the extracted performance of the financial futures).
- Extracted results are adequately labeled as such.
- Trading results of the overall program are disclosed in an equally prominent manner.

Pro-forma Performance

Pro-forma performance is performance that has been adjusted to account for the commissions and fees the Member charges. (Members who charge

negotiable fees should use the maximum fees possible when presenting pro-forma performance.) The following performance should be presented pro-forma:

- Proprietary performance
- Performance for client accounts that were charged less than standard fees.

Hypothetical Performance

NFA Compliance Rule 2-29 (as well as Compliance Rule 2-36(i), which requires that Members and Associates who solicit customers to trade forex comply with Compliance Rule 2-29(c)) and the interpretive notice 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.

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

- Hypothetical results must be adequately labeled as hypothetical.
- Hypothetical performance should be calculated the same way as actual performance.
- Members must be able to demonstrate the basis for the hypothetical results and the underlying theory that generated them.

- Hypothetical results may not be used for any trading program that has at least three months of actual client or proprietary performance.
- Members who elect to disclose hypothetical performance for a new trading program must be able to demonstrate that the program is significantly different from other programs with actual results.
- The actual past performance of all accounts directed by the Member pursuant to a power of attorney over the past five years must be included in the material.
- 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.
- The material must include a discussion of all of the assumptions that were made in preparing the hypothetical results. Such assumptions include:
 - Initial investment amount;
 - Whether profits were reinvested or distributed;
 - Commissions and fees that were charged; and
 - The method used to determine purchase and sales prices for each hypothetical transaction.
- The following disclaimers should *immediately* precede or 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 who have less than one year of experience trading client or 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 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:

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 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 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.

Although Compliance Rule 2-29(c) does not specifically apply to promotional material that is directed exclusively to "Qualified Eligible Person (QEP)," as defined in CFTC Regulation 4.7, such promotional material is still held to the standard that the overall impact of the material is not misleading or likely to deceive the public. As a result, in order for the promotional material to meet that standard, Members who are directing material to clients that are QEPs effectively have to comply with most of the specific requirements of Compliance Rule 2-29(c). For example, it would be misleading to include hypothetical results without labeling the results as hypothetical or calculating them using a different method than the one used to calculate actual results, in accordance with Compliance Rule 2-29(b)(5). Similarly, the material assumptions used to compile the performance results must also be described in order for reader to understand what is being presented. Members who are directing material to clients that are QEPs should also be aware that while they are not specifically required to use the disclaimer language in Compliance Rule 2-29(c), they are required to either use the disclaimer set

forth in CFTC Regulation 4.41 or choose the applicable disclaimers outlined in Compliance Rule 2-29(c).

Additional NFA References:

[NFA Interpretive Notices: 9025: NFA Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results](#)

[NFA Notice to Members: I-96-20: Amendments to NFA Compliance Rule 2-29\(c\) and the Interpretive Notice Relating to the Use of Promotional Material Containing Hypothetical Performance Results](#)

Deceptive Communications

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

Proprietary Accounts

Members 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;
- The results must be adequately labeled as proprietary;
- The results should be 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 Associate can demonstrate to NFA that this is representative of its overall customer performance.

Leverage Examples

Many Members use examples to demonstrate the leverage that is available in futures and options 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 customer base does not routinely exercise options, is misleading.

- Using leverage examples, that suggest that prospective customers are likely to earn large profits is considered misleading, when past performance does not support this claim.
- 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.

Claims Regarding Seasonal Trades

Some Members 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 presentation implies that all you have to do is be in the market at the right time to reap the benefits of the supply and demand fundamentals;
- The communication cites historic data which appears to demonstrate that certain trades produce dramatic profits year in and year out; or
- The Member's 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, the Member misguides customers 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);
- 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 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.

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:

- Members may not present the performance of one particular account unless that performance is representative of the Member's overall customer performance.
- Similarly, Members may not present performance of specific trades within an account unless those returns are representative of the account's overall performance.

Testimonials

Many members utilize client testimonials which constitute cherry picking. A testimonial will violate NFA Compliance Rules 2-29 and 2-36 if the testimonial contains performance claims that are not representative of the Member's overall customer performance or not representative of how that customer account performed overall.

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

[NFA Interpretive Notice 9034: NFA Compliance Rule 2-29: Deceptive Advertising](#)

Option-Related Communications

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 “limited risk” includes 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.

Price Data and Price Charts

Examples of option-related communications that NFA considers misleading include communications that:

- Use cash, futures-market or forex data to sell options, e.g.,
 - Option-related promotional material should generally not include futures or forex price charts unless accompanied by option price charts, and
 - Members must ensure that the futures, options and forex charts mirror the same time period;
 - 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.

While including price data or price charts for products other than the product being marketed can add some value to promotional material, this data should be shown:

- In an educational manner only and
- With a complete discussion of the relationship between the different products.

The following is a sample disclaimer that adequately addresses these issues:

FOR CUSTOMERS TRADING OPTIONS, THESE FUTURES AND FOREX CHARTS ARE PRESENTED FOR

INFORMATIONAL PURPOSES ONLY. THEY ARE INTENDED TO SHOW HOW INVESTING IN OPTIONS CAN DEPEND ON THE UNDERLYING FUTURES PRICES; SPECIFICALLY, WHETHER OR NOT AN OPTION PURCHASER IS BUYING AN IN-THE-MONEY, AT-THE-MONEY, OR OUT-OF-THE-MONEY OPTION. FURTHERMORE, THE PURCHASER WILL BE ABLE TO DETERMINE WHETHER OR NOT TO EXERCISE HIS RIGHT ON AN OPTION DEPENDING ON HOW THE OPTION'S STRIKE PRICE COMPARES TO THE UNDERLYING FUTURE'S PRICE. THE FUTURES CHARTS ARE NOT INTENDED TO IMPLY THAT OPTION PRICES MOVE IN TANDEM WITH FUTURES PRICES. IN FACT, OPTION PRICES MAY ONLY MOVE A FRACTION OF THE PRICE MOVE IN THE UNDERLYING FUTURES. IN SOME CASES, THE OPTION MAY NOT MOVE AT ALL OR EVEN MOVE IN THE OPPOSITE DIRECTION OF THE UNDERLYING FUTURES CONTRACT.

Additional NFA References:

[NFA Interpretive Notice 9034: 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 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(a)(7)(i)(f), CFTC Regulation 4.35(a)(6) and Compliance Rule 2-34(c) 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 the disclaimer: “*Past results are not necessarily indicative of future results.*”

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

Trading Championships

Members 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
- Commissions and fees.

Security Futures Products

Compliance Rule 2-29(j) applies to promotional material that specifically refers to security futures products. (Please note that this section of 2-29 does not pertain to promotional material whose only reference to security futures products is in a listing of the firm's services.)

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 Associates. 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 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;
- Must be accompanied by or preceded by the disclosure statement for security futures products. This requirement does not apply to generic promotional material for security futures products if the material includes contact information for obtaining a copy of the required disclosure statement.
- Promotional material designed to reach a public audience through the mass media must be submitted to NFA for review and approval at least ten days prior to first use.

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.

Participation in a Trading Program

FCMs and IBs 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 4.25(a)(7)(i)(F);
 - Members and Associates 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.

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 disclose all material conflicts of interest created by the Member's activities in the underlying security; and
- The material must contain contact information for obtaining the list of prior recommendations described above.

Correspondence

Not all written correspondence is promotional material under NFA Compliance Rule 2-29. However all correspondence involving security futures products must comply with the interpretive notice entitled, "NFA Compliance Rule 2-9: Supervisory Procedures for E-mail and the use of Web Sites." (See the "Electronic Media-E-mail and Web Site" discussion for details.)

Additional requirements also apply. In particular:

- The Member must retain a copy of the correspondence.
- The name of the person who prepared the correspondence must be ascertainable from the retained record.
- The firm's written supervisory procedures must require that a designated security futures principal review correspondence relating to security futures products.

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 Notices 9043: NFA Compliance Rule 2-29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products](#)

Electronic Media

Radio and Television Advertisements, Online Videos, Webinars and Podcasts

Members who use or directly benefit from radio or television advertisements or any other audio or video advertisement distributed through media accessible by the public that makes specific trade recommendations or references 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.³

An electronic advertisement must be pre-approved if:

- The advertisement highlights particular markets more than others;
- The advertisement provides an opinion regarding the anticipated direction of a particular market or markets;
- The advertisement 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
- The advertisement 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. Advertisements that do not contain any of the characteristics listed above may still require pre-approval. NFA will continue to look at these advertisements on a case-by-case basis.

Live Advertisements

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

- A script or detailed outline must be submitted to NFA at least ten days prior to the broadcast; and

³ 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 provide a "safe harbor" from NFA actions for Members if misstatements or omissions of material fact are discovered subsequently or NFA otherwise later determines that the material is in violation of any applicable standards.

- A tape of the actual advertisement must be submitted to NFA prior to broadcasting.

Additional NFA References:

[NFA Interpretive Notices: 9039: NFA Compliance Rule 2-29: NFA's Review and Approval of Certain Radio and Television Advertisements](#)

[NFA Interpretive Notice: Use of On-Line Social Networking Groups to Communicate with the Public.](#)

[NFA Podcast: Use and Supervision of Online Social Networking Communications.](#)

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

Electronic Communications*Sales Solicitations via Electronic Communications*

In some instances, outgoing electronic communications are 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 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 e-mail 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.

Supervisory Procedures

Supervisory procedures must be implemented for futures and forex-related business conducted through the use of electronic communications. These procedures should be similar to those required for non-electronic communications. For forex-related promotional material, a listed principal who is also an NFA Associate must review and approve all promotional material and make a written review of such review and approval.

Electronic Communications

A Member's supervisory procedures for the use of electronic communications must:

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

Procedures for reviewing electronic communications should be developed based on the size, structure and nature of a firm's business. 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 large amount, 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:

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

Websites

Supervisory procedures for websites must:

- Be in writing; and
- Require documented approval by an appropriate supervisor before going "live" or making changes.

The following issues should be considered when developing website procedures:

- Ensuring all changes to the website are subject to review procedures;
- Addressing features unique to electronic communications (i.e. procedures for streaming scripts that contain real-time market news);

- Providing a means for identifying the time frame in which a particular version of a web page was in use;
- Enabling the review of employees' and agents' websites; and
- Specifying when and how hyper-linked sites will be reviewed.

Content Issues Specific to 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 hyper-linked 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

NFA Compliance Rules 2-29, if futures-related, and 2-36, as incorporated by Compliance Rule 2-39, if forex-related, also govern CPO and CTA solicitations on the Internet. A website may not be fraudulent, represent that futures or forex trading is suitable for everyone, be high-pressure in any manner, omit any material information or make any material misstatements which would cause the website to be misleading. The website must be balanced in its discussion of the risks of loss when compared to the discussion of the possibility of profits. Actual past performance must be accompanied by the required disclaimer; hypothetical performance must be properly labeled, include the required disclaimer, and disclose the material assumptions used to compile the data. All performance/rates of return must be calculated in a manner consistent with CFTC Regulations and be representative of all reasonably comparable accounts. Statements of opinion must be clearly identified as such and have a reasonable basis in fact.

The Commodity Futures Trading Commission no longer requires that a CPO or a CTA provide potential investors a copy of their disclosure document prior to or at the time of solicitation. The disclosure document must now be delivered no later than the time the CPO delivers a subscription agreement for the pool for which it is soliciting or a CTA

delivers an advisory agreement for the trading program for which it is soliciting. The change in the Commission's position does not relieve a CTA or CPO of its responsibilities with regard to communications with the public that appear on an electronic medium such as the Internet.

Although delivery of a disclosure document at the time of solicitation is no longer required, it is one of the best methods a CPO or CTA can use to ensure that appropriate risk disclosure is provided to the potential client. Therefore, a CPO or CTA should still consider including a link from its website to its disclosure document. An alternative method of providing appropriate risk disclosure is to include a simple, concise statement highlighting the risks of the investment. This statement should adhere to the following guidelines:

- Disclose that the risk of loss in trading futures, forex or options is substantial; and
- Disclose that Commission rules require delivery of a disclosure document at or prior to the time an advisory or subscription agreement is delivered; and
- Disclose that the disclosure document includes the principal risk factors and costs of participating in the commodity pool or managed account program including the potential impact of fees and expenses, the "break-even point" expressed both as a dollar amount and as a percentage return necessary to recover one's initial investment, if applicable, and the restrictions on redeeming or withdrawing one's investment (for pool documents); and
- Disclose that the Commission has not passed upon the merits of participating in a particular investment or on the adequacy or accuracy of the disclosure document.

In addition, if the CPO or CTA intends to engage in retail forex transactions pursuant to an offered trading program or pool, the statement prepared by the CTA or CPO should adhere to the following guidelines:

- Disclose that trading is not conducted in the interbank market; and
- Disclose that funds deposited with a counterparty will not receive the same protections as funds used to margin or guarantee exchange-traded futures and options contracts, and if the counterparty becomes insolvent and you have a claim for amounts deposited or profits earned, you may be treated as a general unsecured creditor and your claim may not be paid; and

- Where any fee is determined by reference to a base amount including, but not limited to "net assets," "net profits," "net gains," "pips" or "bid-asked spread," the Member should explain how such base amount will be calculated. Where any fee is based on the difference between bid and asked prices on retail forex transactions, the Member should explain how such fee will be calculated.

Additional NFA References

[NFA Interpretive Notice 9037: NFA Compliance Rule 2-9: Supervisory Procedures for E-mail and the use of Web Sites](#)

[NFA Notice to Members I-99-16: Supervisory Procedures for E-Mail and the use of Web Sites](#)

[NFA Interpretive Notice: Use of On-Line Social Networking Groups to Communicate with the Public](#)

[NFA Podcast: Use and Supervision of Online Social Networking Communications](#)

Seminars

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 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 tape of the event on file.

Sales Training

NFA 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 Rules 2-29 and 2-36 and the related Interpretive Notice 9053—Forex Transactions with Forex Dealer Members. 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.

Responsibility for Promotional Material Produced by Others

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. (This includes electronic communications used by firm APs; see the "Electronic Media" section for further information.)

In addition:

- Members cannot avoid responsibility for promotional material by claiming to be unaware of its content or appearance.
- 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
- Radio and television advertisements used to generate leads were submitted to NFA pursuant to NFA Compliance Rules 2-29(h) and NFA Interpretive Notice 9053—Transactions with Forex Dealer Members.

Article Reprints

Members who use articles from industry publications become responsible for the content of the articles and must ensure they comply with 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 the required verbatim 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.
- If the articles mention hypothetical performance results, the required hypothetical disclaimers must be included.
- Members must be able to support any of performance data cited in the articles.
- If performance of individual accounts is discussed, it must be representative of all reasonably comparable accounts.

User-Generated Comments Related to Social Networking Groups

If a Member or Associate hosts a blog, a chat room, or a forum where futures or forex are discussed, the Member or Associate is required to supervise the use of that community. This requires, at a minimum, that the Member or Associate 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 Associate's "wall" or other accessible area.

Review and Filing of Promotional Material Produced by Others

Mandatory Pre-Review

As mentioned earlier, certain types of mass media advertising must be submitted to NFA for review 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-review.

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 21 calendar days and will discuss any comments about the submission with the Member via telephone, e-mail or regular mail. 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 and will not provide a “safe harbor” for Members if misstatements or omissions of material facts are discovered subsequent to this pre-review.

To take advantage of this pre-review program, the material must be submitted to NFA by a supervisory employee who is responsible for the review and approval of promotional material. Additionally, the material must be submitted to NFA 21 calendar days *prior* to its intended use and must indicate that the material is being submitted for pre-review.

Filing of Promotional Material

Promotional material should be submitted to art@nfa.futures.org or:

National Futures Association
Advertising Regulatory Team
Compliance Department
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606-6615

General Questions about Promotional Material or Rule 2-29

- Contact NFA’s Information Center at (800) 621-3570
- Send an e-mail to art@nfa.futures.org

Sources of Additional Information

Your attorney and accountant

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

Futures Industry Association
2001 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20006
(202) 466-5460
www.futuresindustry.org

Managed Funds Association
2025 M Street, N.W.
Suite 800
Washington D.C. 20036-2422
(202) 367-1140
www.mfainfo.org

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

National Futures Association
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606-6615
(312) 781-1410
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

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