

February 26, 2021

**Via Email (secretary@cftc.gov)**

Mr. Christopher J. Kirkpatrick  
Secretary  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, DC 20581

Re: National Futures Association: Proposed NFA Financial Requirements Section 18; Proposed Interpretive Notice entitled *NFA Financial Requirements Section 18 – NFA Pre-Approval of the Use of Subordinated Debt*; and Proposed Amendments to NFA Financial Requirements Sections 1 and 10 and NFA Registration Rule 201

Dear Mr. Kirkpatrick:

Pursuant to Section 17(j) of the Commodity Exchange Act ("CEA"), as amended, National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("CFTC" or "Commission") the proposed adoption of NFA Financial Requirements Section 18; the proposed adoption of the Interpretive Notice entitled *NFA Financial Requirements Section 18 – NFA Pre-Approval of the Use of Subordinated Debt* ("Interpretive Notice"); and the proposed amendments to NFA Financial Requirements Sections 1 and 10 and NFA Registration Rule 201. On February 18, 2021, NFA's Board of Directors ("Board") unanimously approved the adoption of the proposed rule and Interpretive Notice as well as the proposed amendments.

NFA is invoking the "ten-day" provision of Section 17(j) of the CEA and plans to make NFA Financial Requirements Section 18, the Interpretive Notice, and the amendments to NFA Financial Requirements Sections 1 and 10 and NFA Registration Rule 201 effective as early as ten days after receipt of this submission by the Commission unless the Commission notifies NFA that the Commission has determined to review the proposal for approval.

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**PROPOSED RULES AND INTERPRETIVE NOTICE AND AMENDMENTS**  
**(additions are underscored and deletions are ~~stricken through~~)**

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**NATIONAL FUTURES ASSOCIATION**

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**Financial Requirements**

**SECTION 1. FUTURES COMMISSION MERCHANT FINANCIAL REQUIREMENTS.**

(a) Each NFA Member that is registered or required to be registered with the Commodity Futures Trading Commission (hereinafter "CFTC") as a Futures Commission Merchant (hereinafter "Member FCM") must maintain "Adjusted Net Capital" (as defined in CFTC Regulation 1.17) equal to or in excess of the greatest of:

(i) \$1,000,000; provided, however, that if the Member FCM is also a registered swap dealer, the minimum amount shall be \$20,000,000;

(ii) For Member FCMs with less than \$2,000,000 in Adjusted Net Capital, \$6,000 for each remote location operated (i.e., proprietary branch offices, main office of each guaranteed IB and branch offices of each guaranteed IB);

(iii) For Member FCMs with less than \$2,000,000 in Adjusted Net Capital, \$3,000 for each AP sponsored (including APs sponsored by guaranteed IBs);

(iv) For securities brokers and dealers, the amount of net capital specified in Rule 15c3-1(a) of the Regulations of the Securities and Exchange Commission (17 CFR 240.15c3-1(a));

(v) Eight (8) percent of domestic and foreign domiciled customer and non-customer (excluding proprietary) risk maintenance margin/performance bond requirements for all domestic and foreign futures, options on futures contracts and cleared over-the counter derivatives positions excluding the risk margin associated with naked long option positions; plus for a Member FCM that is also a registered swap dealer, two percent of the total uncleared swap margin, as defined in CFTC Regulation 1.17(b)(11);

(vi) For a Member FCM that acts as counterparty to a forex transaction (as forex is defined in Bylaw 1507(b) but excluding the counterparty limitation contained in Bylaw 1507(b)(ii)), \$20,000,000, except that Forex Dealer Members must meet the requirements in Financial Requirements Section 11.

(b) A Member FCM that is also a registered swap dealer may not use an internal model(s) to calculate market and/or credit risk exposure under CFTC Regulation 1.17 without obtaining prior written approval from NFA or CFTC in accordance with CFTC

Regulation 1.17(c)(6)(v), incorporating the requirements of CFTC Regulation 23.102. A Member FCM seeking NFA's approval to use an internal model(s) must submit an application to NFA in the form and manner required by NFA.

(c) A Member FCM that is also a registered swap dealer and has received approval to use internal models to compute market risk and credit risk charges for uncleared swaps, must maintain net capital equal to or in excess of \$100 million.

(d) Each Member FCM for which NFA is the designated self-regulatory organization ("DSRO") must file financial reports with NFA for each month-end, including its fiscal year end, within 17 business days of the date for which the report is prepared. All financial reports must be filed on Form 1-FR-FCM; or, if the Member is a broker-dealer, on Form 1-FR-FCM or the FOCUS Report and all financial reports must be filed electronically using an electronic medium approved by NFA.

(e) A Member FCM for which NFA is the DSRO that is required to file any document with or give any notice to its DSRO under CFTC Regulations 1.10 [Financial reports of futures commission merchants and introducing brokers], 1.12 [Maintenance of minimum financial requirements by futures commission merchants and introducing brokers], 1.16 [Qualifications and reports of accountants], or 1.17 [Minimum financial requirements for futures commission merchants and introducing brokers] or is required to file any financial report or statement (e.g., FOCUS Reports) with any other securities or futures self-regulatory organization of which it is a member shall also file one copy of such document with or give such notice to NFA, in a form and manner required by NFA, no later than the date such document or notice is due to be filed with or given to the CFTC or the self-regulatory organization.

(f) No Member FCM may use forex customer equity as capital or may record forex customer equity as an asset without recording a corresponding liability. For purposes of this requirement:

(i) Forex customer means any person who is not an eligible contract participant, as defined in Section 1a(18) of the Act, who enters into forex transactions (as defined in Bylaw 1507(b)) with the FCM or any of its affiliates described in Section 2(c)(2)(B)(i)(II)(cc)(BB) of the Act; and

(ii) Forex customer equity means money, securities, and property received by the FCM or any of its affiliates described in Section 2(c)(2)(B)(i)(II)(cc)(BB) of the Act to margin, guarantee, or secure forex transactions between a forex customer and the FCM or any of its affiliates described in Section 2(c)(2)(B)(i)(II)(cc)(BB) of the Act, or accruing to a forex customer as a result of such transactions.

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**SECTION 10. LATE FINANCIAL REPORTS.**

Each financial report required by Section 1, 5, 6, ~~or 11~~, or 18 that is filed after it is due shall be accompanied by a fee of \$1,000 for each business day it is late. Payment and acceptance of the fee does not preclude NFA from filing a disciplinary action under the Compliance Rules for failure to comply with the deadlines imposed by NFA Financial Requirements or CFTC rules.

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**SECTION 18. SWAP DEALER AND MAJOR SWAP PARTICIPANT FINANCIAL REQUIREMENTS****(a) Application of this Rule**

- (i) Except for subsection (f), the provisions of this rule do not apply to an NFA Member swap dealer (Member SD) or major swap participant (Member MSP) that is subject to minimum capital requirements of a prudential regulator under section 4s(e) of the Commodity Exchange Act or to an NFA Member FCM that is subject to the capital requirements under NFA Financial Requirements Section 1 and CFTC Regulation 1.17.
- (ii) The provisions of this rule do not apply to a Member SD or MSP that is organized and domiciled outside the United States and that meets the requirements of CFTC Regulation 23.101(a)(5) or CFTC Regulation 23.101(b)(4), respectively.

**(b) Minimum Financial Requirements for Swap Dealers and Major Swap Participants**

- (i) Each Member SD must maintain "Regulatory Capital" (as defined in CFTC Regulation 23.100) as set forth in CFTC Regulation 23.101(a), as applicable.
- (ii) Each Member Major Swap Participant must meet the minimum financial requirements set forth in CFTC Regulation 23.101(b).

**(c) Requirements for Calculating Market Risk and Credit Risk Exposure Requirements using Internal Models**

- (i) Except as provided in (iii) below, a Member SD may not use an internal model(s) to calculate market and/or credit risk exposure under 23.101(a) without obtaining prior written approval from NFA or CFTC in

accordance with CFTC Regulation 23.102, as applicable and subject to the restrictions set forth in CFTC Regulation 23.102(e).

- (ii) A Member SD seeking NFA's approval to use an internal model(s) under (i), must submit an application to NFA in a form and manner required by NFA.
- (iii) A Member SD that meets the requirements of CFTC Regulation 23.102(f) may use an internal model(s) to calculate market and/or credit risk exposure prior to obtaining NFA's approval upon filing with the CFTC the application and certification and by filing with NFA the certification required by CFTC Regulation 23.102(f)(1) and subject to the requirements of CFTC Regulation 23.102(f)(2) and (3).

**(d) NFA Pre-Approval of Subordinated Debt Loan Agreements**

- (i) A Member SD that is not otherwise registered with the Securities and Exchange Commission as a broker-dealer (including an OTC derivatives dealer) or security-based swap dealer (non-SEC registered SD Member) that elects to be subject to the minimum capital requirements under CFTC Regulation 23.101(a)(1)(i) and seeks to use subordinated debt to meet regulatory capital requirements, or elects to be subject to the minimum capital requirements under CFTC Regulation 23.101(a)(1)(ii) and seeks to use subordinated debt to meet regulatory capital requirements, must obtain pre-approval of the subordinated debt loan agreement from NFA in order for the subordinated debt to be satisfactory for regulatory capital.
- (ii) A non-SEC registered Member SD may not make any prepayments of the subordinated debt without prior approval of NFA.
- (iii) A non-SEC registered Member SD must file any proposed subordinated debt loan agreement and request for prepayment with NFA, in a form and manner required by NFA.
- (iv) A Member SD that has received approval from the SEC or designated examining authority (DEA), as applicable, of a proposed subordinated debt agreement or prepayment shall immediately file with NFA a copy of the SEC's or DEA's approval.

**(e) Financial Reporting**

- (i) Each Member SD and MSP must file unaudited financial reports with NFA for each month-end or quarter-end, as required under CFTC Regulation 23.105(d), including its fiscal year end, within 17 business

days of the date for which the report is prepared using an electronic medium approved by NFA.

- (ii) Within 60 days of the Member's fiscal year end, or within 90 days of the Member's fiscal year end for those SDs or MSPs electing to be subject to minimum capital requirements under CFTC Regulation 23.101(a)(2) or CFTC Regulation 23.101(b), each Member SD and MSP must file with NFA its annual audited financial report as required per CFTC Regulation 23.105(e) in a form and manner required by NFA.
- (iii) SD Members must file their financial reports on the following forms:
  - (1) A Member SD that is a broker-dealer, security-based swap dealer or major security-based swap participant must file its financial reports on the FOCUS Report.
  - (2) All other SD Members must file their financial reports on Form FR-CSE-NLA or FR-CSE-BHC.

**(f) Notice Requirements**

A Member SD or MSP that is required to file any document with or give any notice to a registered futures association under CFTC Regulations 23.105 [Financial recordkeeping, reporting and notification requirements for swap dealers and major swap participants] or receives an approval or a confirmation from the CFTC under CFTC Regulations 23.101 [Minimum financial requirements for swap dealers and major swap participants] or 23.106 [Substituted compliance for swap dealer's and major swap participant's capital and financial reporting], shall also file one copy of such document with and give such notice to NFA, or provide such approval or confirmation to NFA, in a form and manner required by NFA, no later than the date required to be filed with or given to the CFTC or the registered futures association, as applicable. A Member SD that receives any notification, order, or regulatory restrictions limiting or prohibiting the Member SD's use of internal models under CFTC Regulation 23.102 shall also immediately file one copy of such notification, order, or regulatory restriction with NFA, in a form and manner required by NFA.

## **REGISTRATION RULES**

### **Rule 201. REGISTRATION REQUIREMENTS AND PROCEDURES**

Except as otherwise provided in the Rules, NFA shall perform registration functions in accordance with the provisions set forth in these Rules for all persons, except Swap Dealers (SD) and Major Swap Participants (MSP) and principals of SDs and MSPs for

whom it has been granted registration responsibilities pursuant to Section 8a(10) or Section 17(o) of the Act. Except as provided below, NFA shall perform registration functions with respect to SDs and MSPs and principals of SDs and MSPs in accordance with all of the Regulations governing the registration contained in Part 3 of the Commission's Regulations and CFTC Regulation 23.101(c).

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## INTERPRETIVE NOTICES

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### **XXXX - NFA FINANCIAL REQUIREMENTS SECTION 18: NFA PRE-APPROVAL OF THE USE OF SUBORDINATED DEBT**

NFA Financial Requirements Section 18 sets forth minimum capital requirements for swap dealers (SDs) and major swap participants (MSPs). Subsection (d) requires certain SD Members that elect to comply with the Bank Based (BB) capital requirements under CFTC Regulation 23.101(a)(1)(i) or the Net Liquid Asset (NLA) capital requirements under CFTC Regulation 23.101(a)(1)(ii) to obtain NFA's pre-approval of a subordinated debt loan agreement before using subordinated debt for capital purposes. As described more fully below, NFA adopted this requirement to provide non-SEC registered Member SDs with the ability to use subordinated debt as regulatory capital to meet their capital requirements.

Both the BB and NLA alternatives permit SD Members to use subordinated debt as capital if the subordinated debt qualifies under SEC Regulation 240.18a-1d. This SEC regulation requires that the SEC approve the subordinated debt loan agreement prior to the agreement's effective date (i.e., before the subordinated debt may be used as capital) and to approve any pre-payments of the subordinated debt. SD Members that are also registered with the SEC as broker-dealers or security-based swap dealers are expected to obtain the requisite approvals under applicable SEC Regulations. Certain SD Members that are not registered with the SEC may also elect one of these alternative methods to calculate their capital requirements and may wish to use subordinate debt for capital purposes. However, since these SD Members are not SEC registered, the firms will not be able to obtain approval by the SEC of the subordinated loan agreement and thus will not be able to use subordinated debt as capital. In order to permit these non-SEC registered SD Members to use subordinated debt in appropriate circumstances, NFA Financial Requirements Section 18 permits a Member SD that is not otherwise registered with the SEC to use subordinated debt for capital provided the SD Member obtains NFA's pre-approval of the subordinated debt loan agreement. Financial Requirements Section 18 also prohibits a Member SD from making any pre-payment of the subordinated debt without prior approval of NFA.

Proposed subordinated loan agreements must be filed with NFA at least 30 days prior to the proposed execution date of the agreement. NFA will review the agreement for conformity, consistency and applicability with SEC Regulation 240.18a-1d and CFTC

Regulations 23.101(a)(i) and 23.101(a)(ii). An SD Member may not use subordinated debt to meet its capital requirement, or make a pre-payment of previously approved subordinated debt, until it receives NFA's approval.

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**EXPLANATION OF PROPOSED RULE AND  
INTERPRETIVE NOTICE AND PROPOSED AMENDMENTS**

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As described more fully below, NFA's Board has adopted rules establishing NFA's minimum capital and other financial requirements for NFA Member swap dealers ("SDs") and major swap participants ("MSPs") that are not subject to the rules of a prudential regulator (collectively "Covered SDs" or "SD Members").

NFA's Board has adopted NFA Financial Requirements Section 18, which largely mirrors the Commission's capital requirements for Covered SDs, except for certain requirements NFA is imposing with respect to subordinated debt agreements and other requirements regarding financial reporting and notification requirements. NFA Financial Requirements Section 18 contains subsections (a)-(f) that provide for the following.

Subsection (a) sets forth Section 18's applicability and specifies that it does not apply to SD Members that are prudentially regulated SD Members or SD Members that are also registered as FCMs and subject to NFA Financial Requirements Section 1. Subsection (a) also specifies that SD Members relying on substituted compliance with respect to the Commission's requirements are not subject to NFA Financial Requirements Section 18.

Subsection (b) sets forth the minimum capital requirements and requires SD Members subject to the Commission's Final Rule to meet the applicable capital requirement in CFTC Regulation 23.101(a). Although there are currently no registered MSPs, subsection (b) requires MSPs to meet the Commission's requirement set forth in CFTC Regulation 23.101(b).

For those SD Members seeking to use internal models to calculate market risk and credit risk exposures, subsection (c) requires an SD Member to submit an application to NFA and obtain NFA's written approval prior to using the model(s). For those SD Members using a model that has been approved by certain regulators specified in CFTC Regulation 23.102, subsection (c) permits those SD Members to use the model prior to NFA's approval provided the SD Member complies with 23.102(f).

Subsection (d) is not drawn directly from a CFTC requirement. This subsection requires SD Members that are not registered with the SEC as a broker-dealer or security-based swap dealer to obtain NFA's approval to use subordinated debt to meet regulatory capital requirements. The Board also adopted an Interpretive Notice that outlines the reason for this provision (i.e., provides an avenue for SD Members that are not SEC registered to use subordinated debt for these purposes) and provides information on seeking NFA's approval.



Subsection (e) requires regular monthly or quarterly reporting to NFA in accordance with the Commission's regulation. Subsection (e) also specifies the forms SD Members must use, including new standardized forms for SD Members not filing the FOCUS Report. Finally, subsection (f) requires SD Members to file certain notices with NFA.

In adopting these additional provisions regarding subordinated debt approval, standardized filings, and notification requirements, the Board determined that these provisions are not burdensome, and in certain circumstances will benefit SD Members.

Additionally, the Board approved proposed amendments to NFA Financial Requirements Section 1 to address capital and internal model requirements for Covered SDs that are also registered as an FCM. The Board also approved an amendment to NFA Financial Requirements Section 10 to impose a \$1,000 per business day late fee for financial reports that are required to be filed pursuant to the newly adopted Financial Requirements Section 18, which is consistent with the late fee imposed on FCM, IB, and RFED Members. Further, the Board approved an amendment to NFA Registration Rule 201 to specify that NFA will be reviewing an SD Members' compliance with minimum capital requirements during the registration process.

The Swap Participant Advisory Committee supported the proposed new Financial Requirements Section 18 and the related Interpretive Notice, as well as the other amendments which were unanimously approved by NFA's Board. As mentioned earlier, NFA is invoking the "ten-day" provision of Section 17(j) of the CEA. NFA intends to issue a Notice to Members establishing an effective date for the proposed Financial Requirements Section 18, and the related Interpretive Notice entitled *NFA Financial Requirements Section 18 – NFA Pre-Approval of the Use of Subordinated Debt* and amendments to NFA Financial Requirements Sections 1 and 10 and NFA Registration Rule 201 as early as ten days after receipt of this submission by the Commission, unless the Commission notifies NFA that the Commission has determined to review the proposal for approval.

Respectfully submitted,



Carol A. Wooding  
Senior Vice President and  
General Counsel