

May 20, 2024

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 Amendments to NFA Interpretive Notice 9031 – Standard List of Documents to be Exchanged under Section 8 of NFA's Code of Arbitration and Proposed Amendments to NFA Interpretive Notice 9032 – Standard List of Documents to be Exchanged under Section 7 of NFA's Member Arbitration Rules

Dear Mr. Kirkpatrick:

Pursuant to Section 17(j) of the Commodity Exchange Act ("CEA" or "Act"), as amended, National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("CFTC" or "Commission") proposed amendments to NFA Interpretive Notice 9031 – Standard List of Documents to be Exchanged under Section 8 of NFA's Code of Arbitration ("Notice Under Code") and Proposed Amendments to NFA Interpretive Notice 9032 – Standard List of Documents to be Exchanged under Section 7 of NFA's Member Arbitration Rules ("Notice Under Member Rules") (both documents collectively referred to as "Notices"). NFA's Board of Directors ("Board") unanimously approved the proposed amendments at its meeting on May 16, 2024. NFA is invoking the "ten-day" provision of Section 17(j) of the CEA and plans to make the amendments to this proposal effective as early as ten days after receipt of this submission by the Commission unless NFA is notified that the Commission has determined to review the proposal for approval.

PROPOSED AMENDMENTS

(additions are underscoring and deletions are ~~stricken through~~)

NATIONAL FUTURES ASSOCIATION

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NFA INTERPRETIVE NOTICES

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9031 - STANDARD LIST OF DOCUMENTS TO BE EXCHANGED UNDER SECTION 8 OF NFA'S CODE OF ARBITRATION

INTERPRETIVE NOTICE

Section 8 of NFA's Code of Arbitration requires the parties to automatically exchange certain documents early in the discovery process. Under this procedure, NFA will identify the standard documents that are routinely relevant for the causes of action alleged in a particular case from this list of documents approved by NFA's Board of Directors as set forth below. NFA will then notify the parties that they must automatically exchange the standard documents with each other no later than 15 days after the last pleading is due, whether such documents are maintained electronically or otherwise. Except for the list showing the customer's investment experience, a party is not required to obtain or exchange any documents that do not exist or that are not in the party's possession or control.

The parties may ask for other documents and information within 30 days after the last pleading is due. The parties may ask for documents and information on the list which have not been identified for automatic exchange if they believe those documents and information are ~~also~~ relevant to the claim or defense.

A Customer May be Asked to Provide Any or All of the Following:

- All contracts or written agreements between the firm and any party named in the arbitration, including but not limited to aAccount opening documents and forms for the customer's account such as including, but not limited to, account applications, account agreements, acknowledgment forms, margin agreements, option agreements, option disclosure statements, and other risk disclosure statements.
- Records (including telephone bills) ~~billing records), tapes, notes, and transcriptions of tapes of telephone or in-person conversations of all~~ communications between the customer and any party named in the arbitration, ~~or~~ any employee of a party named in the arbitration or the trading advisor trading the account, including but not limited to video and audio recordings, transcripts of in-person meetings and video and oral communications, emails, texts, social media messages and chat messages.
- Any notes made by the customer concerning the customer's account or any transactions in the account.
- ~~All contracts or written agreements between the customer and any party named in the arbitration.~~
- Any correspondence or agreements concerning the strategy to be used in trading the account.
- All powers-of-attorney giving someone other than the customer the right to trade the account.
- Daily confirmation statements for the customer's account.
- Monthly activity statements for the customer's account.

- A list, to be prepared by the customer, showing the customer's investment experience. For each type of investment the customer has made, the list must contain the type of investment, the names of the firms the customer has done or is doing business with, the account numbers for accounts at each firm, the dates the accounts were opened and, if applicable, the dates the accounts were closed.
- Research or marketing materials concerning any trading recommendations made to the customer or concerning any transaction made in the customer's account, including but not limited to newsletters, emails, presentations (whether in-person or virtual) and commentary letters.
- Any ~~The~~ disclosure document, (s) private placement memorandum, offering memorandum or similar document that is relevant to the dispute for any trading advisor trading the account.
- All notifications the customer received from any party (or employee thereof) named in the arbitration proceeding regarding any price adjustments or system operational difficulties that allegedly occurred on the dates in question.

A Member and/or Associate May be Asked to Provide Any or All of the Following:

- All contracts or written agreements between the firm and any party named in the arbitration, including but not limited to aAccount opening documents and forms for the customer's account such as including, but not limited to, account applications, account agreements, acknowledgment forms, margin agreements, option agreements, option disclosure statements, and other risk disclosure statements.
- Records (including telephone bills) of all communications between the customer and the broker,¹ other firm personnel or the trading advisor trading the account, including but not limited to video and audio recordings, transcripts of in-person meetings and video and oral communications, emails, texts, social media messages and chat messages.
- Any notes made by the broker concerning the customer's account or any transactions in the account.
- Any correspondence or agreements concerning the strategy to be used in trading the customer's account.
- All powers-of-attorney giving someone other than the customer the right to trade the account.
- Daily confirmation statements for the customer's account.
- Monthly activity statements for the customer's account.
- Margin calls for the customer's account.
- ~~All powers-of-attorney giving someone other than the customer the right to trade the account.~~
- ~~Records (including billing records), tapes, notes, and transcriptions of tapes of telephone or in-person conversations between the customer and the broker,¹, other firm personnel, or the trading advisor.~~
- ~~Any notes made by the broker concerning the customer's account or any transactions in the account.~~

- Registration applications, biographies, resumes or similar documents showing employment history and educational background of the broker and any trading advisor.
- ~~Floor and office e~~Order tickets, electronic trade and order logs, and any ~~other similar information documents submitted at the time of~~ relevant to the transactions for transactions made in the customer's account.
- Research and marketing materials prepared or distributed by the firm, the broker, or the trading advisor concerning any trading recommendations made to the customer or any transaction made in the customer's account, including but not limited to newsletters, emails, presentations (whether in-person or virtual) and commentary letters.
- The index to the firm's compliance manual and an index or summary list of any written compliance policies.
- Agreements, contracts or other documents, including guarantee agreements, governing the relationship between the firm and any other individual or entity introducing, carrying or advising the account or operating the pool of which the customer is a participant in ~~introducing the account and the FCM or FDM carrying the account, or between the trading advisor and either the firm introducing the account or the FCM or FDM carrying the account.~~
- Commission runs for the broker who serviced the customer's account.
- ~~Any~~The disclosure document, (s) private placement memorandum, offering memorandum or similar document that is relevant to the dispute ~~for any trading advisor trading the account.~~
- All notifications provided to the customer regarding any price adjustments or system operational difficulties that allegedly occurred on the dates in question. ~~This includes~~ notifications the firm received from the applicable counterparty or liquidity provider ~~and as well as~~ the notes or internal correspondence regarding the disputed transactions.
- The firm's electronic Trading System Procedures required by NFA Interpretive Notice 9060 – *NFA Compliance Rule 2-36(e): Supervision of the Use of Electronic Trading Systems* for the period the customer's account was open.

¹ In this context, "broker" refers to the individual AP (or APs) who serviced the account.

9032 - STANDARD LIST OF DOCUMENTS TO BE EXCHANGED UNDER SECTION 7 OF NFA'S MEMBER ARBITRATION RULES

INTERPRETIVE NOTICE

Section 7 of NFA's Member Arbitration Rules requires the parties to automatically exchange certain documents early in the discovery process. Under this procedure, NFA will identify the standard documents that are routinely relevant for the causes of action alleged in a particular case from this list of documents approved by NFA's Board of Directors as set forth below. NFA will then notify the parties that they must automatically exchange the standard documents with each other no later than 15 days

after the last pleading is due, whether such documents are maintained electronically or otherwise. A party is not required to obtain or exchange any documents that do not exist or that are not within the party's possession or control.

The parties may ask for other documents and information within 30 days after the last pleading is due. The parties may ask for documents and information on the list which have not been identified for automatic exchange if they believe those documents and information are also relevant to the claim or defense.

A Member and/or Associate May be Asked to Provide Any or All of the Following:

- Records (including telephone bills ~~billing records~~), ~~tapes, notes and transcriptions of tapes of telephone or in-person conversations~~ of all communications between the parties relating to the matters involved in the dispute, including but not limited to video and audio recordings, transcripts of in-person meetings and video and oral communications, emails, texts, social media messages and chat messages.
- Any memoranda, notes or other correspondence between the parties relating to the matters involved in the dispute.
- Contracts or written agreements between the parties.
- Partnership or joint venture agreements.
- Corporate documents (i.e.g., formation documents ~~articles of incorporation~~, by-laws, resolutions, minutes of meetings of the Board of Directors or a similar governing body ~~meetings~~).
- Annual reports and financial statements.
- Any disclosure documents, private placement memorandum, offering memorandum or similar document that is relevant to the arbitration proceeding.
- Authorizations for transferring accounts or positions from one FCM to another.
- Records of security or guarantee deposits made by one party with or for the benefit of another party.
- Commission runs.
- Customer equity runs.
- Registration applications, biographies, resumes or similar documents showing employment history and educational background of the parties.
- Employee personnel files, including performance evaluations.
- Employee handbooks, including amendments.
- Forms 8-T or U-5 for the parties.
- Documents showing salary history (including bonuses, commissions and commission pay-outs).
- The index to a party's ~~procedures~~ compliance manual and an index or summary list of any written compliance policies.
- If the dispute involves a customer account, copies of the customer's account opening documents and forms, monthly activity statements, ~~and~~ daily confirmation statements, commission runs, margin calls and powers-of-attorney giving someone other than the customer the right to trade the account.

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EXPLANATION OF PROPOSED AMENDMENTS

NFA's arbitration program administers claims under two sets of rules—the Code of Arbitration for claims involving a customer and the Member Arbitration Rules for claims involving only Members and/or Associates. Under both the Code of Arbitration and the Member Arbitration Rules, all parties in a proceeding must automatically exchange certain documents that NFA has identified as routinely relevant for a cause of action in a particular case (e.g., commission runs for a broker who serviced a customer's account for a case that alleges churning), and the Notice Under the Code and the Notice Under the Member Rules identify the documents that NFA may identify. Both the Notices are out-of-date and do not reflect documents and information relevant to a dispute due primarily to implementation of new methods and channels of communication and the wide-spread adoption of electronic trading that has occurred since these Notices were last updated. Therefore, NFA's Board has approved amendments to update both Notices to reflect these changes. The Board also approved several other minor non-substantive changes to both Notices. In addition to the Board, NFA's FCM, IB and CPO/CTA Advisory Committees and NFA's FDM Members, all fully supported the amendments to the Notices.

As mentioned earlier, NFA is invoking the “ten-day” provision of Section 17(j) of the CEA. NFA intends to make the amendments to the Notices regarding the standard list of documents to be exchanged under Section 8 of NFA's Code of Arbitration and Section 7 of NFA's Member Arbitration Rules effective as early as ten days after receipt of this submission by the Commission, unless NFA is notified that the Commission has determined to review the proposal for approval.

Respectfully submitted,



Carol A. Wooding
Senior Vice President and
General Counsel