

December 2, 2020

**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 Interpretive Notice entitled *NFA Compliance Rule 2-9(d): Swap Dealer and Major Swap Participant Supervision of the Use of Marketing Materials*

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 the Interpretive Notice entitled *NFA Compliance Rule 2-9(d): Swap Dealer and Major Swap Participant Supervision of the Use of Marketing Materials* ("Interpretive Notice"). NFA's Board of Directors ("Board") unanimously approved the adoption of this Interpretive Notice on November 19, 2020.

NFA is invoking the "ten-day" provision of Section 17(j) of the CEA and plans to make this Interpretive Notice 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 proposed Interpretive Notice for approval.

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**PROPOSED INTERPRETIVE NOTICE  
(additions are underscored)**

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**NATIONAL FUTURES ASSOCIATION**

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**INTERPRETIVE NOTICES**

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## **NFA COMPLIANCE RULE 2-9(d): SWAP DEALER AND MAJOR SWAP PARTICIPANT SUPERVISION OF THE USE OF MARKETING MATERIALS**

### **Introduction**

NFA Compliance Rule 2-9(d) places a continuing responsibility on each Swap Dealer and Major Swap Participant (collectively SD) Member to diligently supervise its employees and agents in the conduct of their swap activities for or on behalf of the Member. Compliance Rule 2-9(d) is broadly written to provide each firm with some degree of flexibility in determining what constitutes "diligent supervision" and to develop and implement written supervisory procedures tailored to meet the Member's particular needs. Although NFA leaves the exact form of supervision to the SD Member, all SD Members are required to have written policies and procedures designed to achieve ongoing compliance with applicable NFA and CFTC requirements. In discharging their supervisory obligations, SD Members should have written policies and procedures (supervisory program) governing the use of marketing materials if they provide marketing materials to counterparties and potential counterparties (collectively counterparties). NFA is adopting this Notice to provide guidance to SD Members on meeting their regulatory obligations under Compliance Rule 2-9(d) related to their use of marketing materials.

NFA has previously adopted guidance that applies to FCM, IB, CPO and CTA Members' (intermediary Members) use and supervision of promotional materials, and many of the principles of this guidance are appropriate for SD Members. NFA recognizes, however, that SD Members conduct business and engage with clients differently than intermediary Members—most notably SD Members generally conduct business with counterparties that qualify as Eligible Contract Participants and negotiate bilateral, bespoke swaps tailored to a counterparty's specific needs. The guidance set forth in this Notice takes into account these fundamental differences.

### **Definition of Marketing Material**

For purposes of this Notice's requirements, marketing materials include standardized documents in the form of pitch books, reports, letters, circulars, memoranda, presentations, publications, or brochures or other similar standardized documents (delivered via either hard copy or electronically, e.g., by email, text, or

instant message) used for the purpose of soliciting a counterparty to enter into swap transaction(s) with the SD.<sup>1</sup> Marketing materials do not include research reports as defined by CFTC Regulation 23.605(a)(9).<sup>2</sup>

## **Supervision of the Use of Marketing Materials**

To satisfy its supervisory responsibilities under NFA Compliance Rule 2-9(d), each SD Member must implement and enforce a written supervisory program that is designed to reasonably ensure that marketing materials comply with all applicable NFA and CFTC requirements including rules related to fraudulent and deceptive practices (Compliance Rules 2-2 and 2-49 incorporating CFTC Regulation 23.410), fair and balanced communications (Compliance Rule 2-49 incorporating CFTC Regulation 23.433), and just and equitable principles of trade (Compliance Rule 2-4). NFA recognizes that, given the differences in the size and complexity of their operations, SD Members must have flexibility to design procedures regarding the use and supervisory review of marketing materials that are tailored to the Member's own situation. However, any adequate supervisory system must include policies and procedures for reviewing and approving marketing materials, training employees on the appropriate content and use of marketing materials, and recordkeeping requirements.

### a. Review and Approval

All marketing materials used by a SD Member must be reviewed and approved by appropriate SD personnel. The primary purpose of this review is to ensure that the marketing materials comply with the SD Member's requirements, as well as to ensure that the material does not violate any applicable NFA or CFTC requirement.

NFA recognizes that SD Members may use marketing materials that are general in nature, as well as marketing materials that are tailored to or focused on a particular type or group of counterparties (e.g., counterparties interested in a specific swap product). Although all marketing materials must be reviewed and approved, the timing of the review and approval may vary based on the type of material and/or the SD Member's relationship with the counterparty. For example, an SD Member may use a pitch book that includes general information on the SD Member and its business (i.e., a template). Since this general material may be provided to multiple counterparties, the supervisory program must require that this type of material be

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<sup>1</sup> NFA recognizes that the list of items under "Marketing and Sales Materials" under CFTC Regulation 23.201(b)(4) may be broader than the definition of "Marketing Materials" used in this Notice. Certainly, not all communications between an SD Member and its counterparties are covered by the requirements of this Notice nonetheless, an SD Member is required to have policies and procedures reasonably designed to ensure that all communications with counterparties comply with NFA and CFTC requirements, including those highlighted above.

<sup>2</sup> CFTC Regulation 23.605(a)(9) provides that a research report is any written communication (including electronic) that includes an analysis of the price or market for any derivative, and that provides information reasonably sufficient upon which to base a decision to enter into a derivatives transaction, subject to certain exceptions.

reviewed and approved prior to its first use to ensure that the material is not deceptive and misleading on its face, is fair and balanced and that it includes all information necessary to ensure that the material is not misleading. However, once an SD Member reviews and approves this marketing material, then the SD Member is permitted to use the material with other counterparties in the future, unless the SD Member has reason to know that the material may not be appropriate for a particular counterparty or potential counterparty.

With respect to marketing material that is tailored to or focused on a particular type or group of counterparties, an SD Member's supervisory program may retain some flexibility on the timing of the review and approval of the material based on the nature and extent of the SD Member's relationship with the counterparty. For example, while the supervisory program should generally require review and approval of tailored material before it is provided to a new or potential new counterparty, an SD Member's supervisory program may allow for review and approval of tailored material to occur after the material is provided to an existing counterparty, particularly one that has previously engaged in swaps activity with the SD Member. Moreover, in determining whether a particular piece is fair and balanced and not deceptive or misleading, the SD Member may consider its relationship with a particular counterparty, including past discussions and materials shared about a particular swap transaction, provided it is reasonable for the SD Member to believe that the counterparty is aware of those past discussions or materials. Whatever review and approval process an SD Member adopts, its policies and procedures must adequately set forth the firm's requirements around the timing of its review and approval.

An SD Member's supervisory program must specify the type of personnel who are authorized to create marketing materials and those that are authorized to review and approve marketing materials. Additionally, the supervisory program must require that an individual other than the creator of the marketing material review and approve the material in accordance with the SD Member's requirements, and that those authorized to review and approve have general knowledge of NFA and CFTC rules and understand the requirements related to communications with counterparties and marketing materials. To that end, SD Members have the flexibility to identify appropriate personnel for the review and approval, including compliance staff, a desk supervisor, a marketing department, or other individuals with sufficient knowledge to ensure that the material is fair and balanced and not misleading and in compliance with applicable NFA and CFTC requirements. If compliance staff is not involved in the review and approval process, the SD Member's policies and procedures should indicate under what circumstances it will provide appropriate compliance staff with the marketing material within a reasonable time of it being used.

b. Training

An SD Member's written supervisory program must require individuals authorized to create or provide marketing materials to counterparties and the individuals authorized to review and approve marketing materials to be appropriately trained. The supervisory program must also include a description of the SD Member's training related to the use of marketing materials. In particular, the training must cover applicable NFA and CFTC rules and include examples of material that are considered fair and balanced communications and not deceptive and misleading, as well as examples that would violate these requirements. The training should also discuss the SD Member's procedures for the review and approval of marketing material. While NFA is not mandating the frequency of this training, the training should be provided to individuals before they are permitted to create, review, and approve materials, and on a periodic basis afterward, with additional training required whenever there is a material change in regulatory requirements, an SD Member materially changes its policies and procedures, or identifies a material area of concern. In any case, an SD Member's policies and procedures should specify the frequency.

c. Recordkeeping

An SD Member's supervisory program must also outline an SD's requirements with respect to recordkeeping of marketing material. At a minimum, an SD Member must maintain copies of all marketing materials along with a record of the material's review and approval. These records should be maintained for the periods specified in CFTC Regulations 23.203(b) and 1.31.<sup>3</sup>

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**EXPLANATION OF PROPOSED INTERPRETIVE NOTICE**

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NFA's Board has adopted an Interpretive Notice under NFA Compliance Rule 2-9 that requires swap dealer and major swap participant Members (SD Members) to establish a supervisory program for the use of marketing materials provided to counterparties and potential counterparties and provides guidance on the appropriate components of this supervisory program. The Interpretive Notice is based on supervisory principles that are tailored to reflect that SD Members conduct business exclusively with counterparties that qualify as Eligible Contract Participants and negotiate bilateral, bespoke swaps tailored to a counterparty's specific needs.

Specifically, the Interpretive Notice requires that an SD Member adopt a supervisory program that is designed to reasonably ensure that marketing materials comply with all applicable NFA and CFTC requirements including rules related to fraudulent and deceptive practices. While SD Members have flexibility in designing the supervisory program, the Interpretive Notice requires that an adequate supervisory program include policies and procedures related to the following three areas: (i) review and approval of marketing materials; (ii) training; and (iii) recordkeeping. The

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<sup>3</sup> NFA Compliance Rule 2-49 adopts by reference CFTC Regulations 23.201(b)(4) and 23.203(b), which govern records retention, including marketing and sales materials.

Interpretive Notice provides additional guidance on topics that should be covered in each of these areas.

The Swap Participant Advisory Committee supported the proposed Interpretive Notice, which was 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 make the proposed Interpretive Notice entitled *NFA Compliance Rule 2-9(d): Swap Dealer and Major Swap Participant Supervision of the Use of Marketing Materials* effective 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,

A handwritten signature in black ink that reads "Carol A. Wooding". The signature is written in a cursive style with a large, sweeping flourish at the end.

Carol A. Wooding  
Senior Vice President and  
General Counsel