

October 6, 2010

**Via Federal Express**

Mr. David A. Stawick  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

Re: National Futures Association: Proposed Amendments to the Interpretive  
Notice Entitled: NFA Compliance Rule 2-9: Enhanced Supervisory  
Requirements\*

Dear Mr. Stawick:

Pursuant to Section 17(j) of the Commodity Exchange Act, as amended, National Futures Association (“NFA”) hereby submits to the Commodity Futures Trading Commission (“CFTC” or “Commission”) proposed amendments to the Interpretive Notice entitled: NFA Compliance Rule 2-9: Enhanced Supervisory Requirements. This proposal was approved by NFA’s Board of Directors (“Board”) on August 19, 2010.

NFA is invoking the “ten-day” provision of Section 17(j) of the Commodity Exchange Act (“CEA”) and will make these proposals effective ten days after receipt of this submission by the Commission unless the Commission notifies NFA that the Commission has determined to review the proposals for approval.

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**PROPOSED AMENDMENTS**  
**(additions are underscored and deletions are ~~stricken through~~)**

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**COMPLIANCE RULE 2-9: ENHANCED  
SUPERVISORY REQUIREMENTS**

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**INTERPRETIVE NOTICE**

**I. INTRODUCTION**

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Over the years, NFA's Board of Directors has adopted strict and effective rules to prohibit deceptive sales practices, and those rules have been vigorously enforced by NFA's Business Conduct Committee. The Board notes, however, that by their very nature, enforcement actions occur after the customer abuse has taken place. The Board recognizes that NFA's goal must be not only to punish such deception of customers through enforcement actions but to prevent it, or minimize its likelihood, through fair and effective regulation.

One NFA rule designed to prevent abusive sales practices is NFA Compliance Rule 2-9. Subsection (a) of this rule places a continuing responsibility on every Member to diligently supervise its employees and agents in all aspects of their futures activities, including sales practices. Although NFA has not attempted to prescribe a set of supervisory requirements to be followed by all NFA Members, NFA's Board of Directors believes that Member firms which are identified as having a sales force and/or principals that have been affected by questionable sales practice training and firms which charge commissions and fees well above the industry norm should be required to adopt enhanced supervisory requirements designed to prevent sales practice abuse. Subsection (b) authorizes the Board of Directors to require Members, which meet certain criteria established by the Board, to adopt specific supervisory procedures designed to prevent abusive sales practices. Subsection (b) covers all activities regulated by NFA, including the off-exchange retail forex activities of Members subject to NFA Compliance Rule 2-36.

The Board believes that in order for the criteria used to identify firms subject to the enhanced supervisory requirements to be useful, those criteria must be specific, objective and readily measurable. The Board also believes that any supervisory requirements imposed on a Member must be designed to quickly identify potential problem areas so that the Member will be able to take corrective action before any customer abuse occurs. The purpose of this Interpretive Notice is to set forth the criteria established by the Board which obligate a Member to adopt the enhanced supervisory requirements and to specify the enhanced supervisory requirements which are required of firms meeting these criteria.

In developing the criteria, the Board concluded that it would be helpful to review Member firms which had been disciplined through enforcement actions taken by

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the CFTC or NFA for deceptive sales practices. The Board's purpose was to identify factors common to these Member firms and probative of their sales practice problems, which could be used to identify other Member firms with potential sales practice problems.

One factor identified by the Board as common to these firms and directly related to their sales practice problems is the employment history and training of their sales forces and firm principals. For many of these Members, a significant portion of these individuals were previously employed and trained by one or more Member firms which had been disciplined for fraud. The Board believes that the employment history of a Member's APs and principals is a relevant factor to consider in identifying firms with potential sales practice problems. If a Member firm is disciplined by NFA or the CFTC for fraud related to widespread telemarketing or promotional material problems or by the Financial Industry Regulatory Authority or the SEC for fraud related to its sales practices regarding security futures products as defined in Section 1a (32) of the Commodity Exchange Act ("Act"), it is reasonable to conclude that the training and supervision of its sales force was wholly inadequate or inappropriate. It is also reasonable to conclude that an AP or principal who received inadequate or inappropriate training and supervision may have learned improper sales tactics, which he will carry with him to his next job. Therefore, the Board believes that a Member firm employing such a sales force must have stringent supervisory procedures in place in order to ensure that the improper training its APs and principals have previously received does not taint their sales efforts on behalf of the Member.

The Board notes further that there have been instances in which Members and Associates have subverted the Board's purpose in imposing the enhanced supervisory requirements by closing a firm once it qualifies for those requirements and opening another firm or firms that have a mix of employees that does not meet the criteria for adopting the requirements. The new firms typically have individuals who have worked for firms that have been disciplined for fraud related to telemarketing or promotional material and who worked at the original qualifying firm, but they are redistributed so as to keep the employee mix below the threshold for becoming subject to the enhanced supervisory requirements. The Board has determined to apply the enhanced supervisory requirements to firms that use this strategy.

The Board also notes that Members that assess commissions, fees and other charges that total well above the industry norm comprise a disproportionately high share of firms that have been subject to disciplinary action for sales practice abuses. Some of the abuses that have been cited relate to the creation of a misleading impression of the likelihood of achieving profits by investing with a Member through misstatements or material omissions concerning the impact of commissions and fees.

The Board believes that when a Member charges its customers commissions, fees and other charges that total well above the industry norm it is incumbent on that Member to exercise a very high degree of supervision of solicitations made by its APs so as to ensure that customers are given accurate information regarding the impact of those expenses on the likelihood of achieving profit. Consistent with its approach in other situations involving an increased likelihood of misleading solicitations, the Board believes that the enhanced supervisory requirements provide a practical opportunity for a Member that charges commissions, mark-ups, fees and other charges that are well above the industry norm to monitor solicitations and correct problems with those solicitations in an expeditious manner.

**I. OBLIGATIONS OF MEMBERS SUBJECT TO THE ENHANCED SUPERVISORY REQUIREMENTS**

**A. Recording of all conversations with existing and potential customers**

Those Member firms meeting the criteria requiring them to adopt the enhanced supervisory requirements will be required to make complete audio recordings of all telephone conversations that occur between their APs and both existing and potential customers, including existing and potential retail forex customers of Members subject to NFA Compliance Rule 2-36. The Board believes that recording these conversations provides these Members with the best opportunity to monitor closely the activities of their APs and also provides these Members with complete and immediate feedback on each AP's method of soliciting customers. Members that are required to record their conversations must retain such recordings for a period of five years from the date each recording is created and the recordings shall be readily accessible during the first two years of the

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five-year period. In retaining the recorded conversations, Member firms must catalog the recordings by AP and date. Additionally, any Member firm meeting the criteria must require all its APs to maintain a daily log for sales solicitations which reflects at a minimum the identity of each customer or prospective customer the AP spoke with on each day. A Member firm must be able to promptly produce, upon request from NFA or the CFTC, all conversations relating to a specific AP, and only that AP, for a given date. Members that are required to record under this Interpretive Notice are further required to promptly provide NFA or the CFTC with appropriate resources for listening to their recordings upon request.

#### **B. Enhanced capital requirement**

Any Member introducing broker ("IB"), ~~commodity trading advisor or commodity pool operator~~ meeting the criteria is required to either operate pursuant to a guarantee agreement, ~~as applicable~~, or maintain adjusted net capital of at least \$250,000 during the entire period for which the Member is required to adopt the enhanced supervisory requirements. Eligible guarantor futures commission merchants ("FCM"s) are those that meet the eligibility requirements for executing a Supplemental Guarantor Certification Statement pursuant to NFA Registration Rule 509(b)(5). Any IB Member opting to maintain the higher level of adjusted net capital shall also be subject to the financial record-keeping and reporting requirements applicable to FCMs.

Any Member commodity trading advisor ("CTA") or commodity pool operator ("CPO") meeting the criteria is required to maintain adjusted net capital of at least \$100,000 during the entire period for which the Member is required to adopt the enhanced supervisory requirements. Member CTAs and CPOs meeting the criteria are required to demonstrate compliance with this adjusted net capital requirement to NFA upon request.

Any Forex Dealer Member ("FDM") ~~or FCM~~ meeting the criteria is required to maintain adjusted net capital of at least the early warning requirement under CFTC rules. Any ~~FCM~~ Member that is not an FDM is required to maintain adjusted net capital of at least \$1,000,000.

#### **C. Filing promotional material with NFA**

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Those Member firms meeting the criteria will be required to file all promotional material, as defined in NFA Compliance Rule 2-29(i), with NFA at least 10 days prior to its first use.

#### **D. Written supervisory procedures**

Those Members meeting the criteria shall have written supervisory procedures that include the titles, registration status and locations of the firm's supervisory personnel as these relate to the firm's commodity futures business, retail forex business, and applicable securities laws and regulations for the trading of security futures products. The written procedures must include at a minimum:

- a description of the steps taken to supervise and monitor calls which identify how often monitoring of recordings will take place; who will conduct the monitoring; and how the results of monitoring will be documented;
- specific information identifying the recording equipment being used;
- a description of the method for cataloging and maintaining recordings; and
- a description and sample format of the daily logs prepared by APs that includes, at a minimum, the identity of each customer or prospective customer the AP spoke with on each day.

Member firms shall also maintain on an internal record the names of all persons who are designated as supervisory personnel and the dates for which the designation is or was effective. Additionally, a Member meeting the criteria shall file with NFA's Compliance Department a report relating to the Member firm's compliance with the supervisory requirements contained herein within 15 days after the end of each calendar month quarter. Member firms shall retain the internal record and report(s) for a period of five years, the first two years in an easily accessible place.

### **III. QUALIFICATION FOR THE ENHANCED SUPERVISORY REQUIREMENTS**

#### **A. Definitions, treatment of individuals and firms and exemptions**

##### **1. Definition of Disciplined Firm**

A current list of the firms which meet the definition of a Disciplined Firm is maintained on NFA's Web site at <https://www.nfa.futures.org/ereg>. For purposes

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of this Interpretive Notice, a Disciplined Firm is defined very narrowly to include those firms that fall into one of the following two groups:

- a. Firms that have been disciplined by NFA or the CFTC

Members that qualify as Disciplined Firms based on their disciplinary histories with the CFTC or NFA include those firms for which:

- 1. the firm has been formally charged by either the CFTC or NFA with deceptive telemarketing practices or promotional material;
  - 2. those charges have been resolved; and
  - 3. the firm has either been permanently barred from the industry at any time as a result of those charges or has been sanctioned in any way within the preceding five years as a result of those charges.
- b. Firms that have been disciplined in connection with sales practices involving security futures products

Members that qualify as Disciplined Firms based on their disciplinary histories related to sales practices involving security futures products include any broker-dealer that, in connection with sales practices involving the offer, purchase, or sale of any security futures product as defined in Section 1a (32) of the Act has at any time been expelled from membership or participation in any securities industry self-regulatory organization ("Securities SRO") or is subject to an order of the SEC revoking its registration as a broker-dealer or has been sanctioned in any way within the preceding five years in connection with sales practices involving the offer, purchase, or sale of any security futures product as defined in Section 1a (32) of the Act.

## 2. Treatment of principals who previously worked at a Disciplined Firm

For purposes of determining whether a Member will be required to adopt the enhanced supervisory requirements based on the employment histories of its APs and principals, principals of a firm, who are not also APs of that firm and

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who have been previously employed as an AP by one or more Disciplined Firms, shall be counted as if they were APs of the firm.

### 3. Treatment of FCMs that guarantee introducing brokers

For purposes of determining whether an FCM Member will be required to adopt the enhanced supervisory requirements, an FCM and its guaranteed introducing brokers ("GIBs") will be considered a single firm. Therefore, for FCMs with GIBs, the APs of its GIBs will be treated as APs of the FCM for determining whether the FCM meets the requirements. If the FCM Member firm meets the requirements, then the FCM and all its GIBs shall be required to adopt the supervisory procedures specified herein. Of course, individual FCMs or GIBs will be required to adopt the enhanced supervisory requirements provided the FCM or GIB meets the requirements on its own.

### 4. Exemptions from being counted as an AP who worked at a Disciplined Firm

The Board recognizes that there are identifiable populations of APs who are included in the general population of APs who have worked at Disciplined Firms in the past who, further analysis suggests, do not raise the same concerns regarding their previous supervision and training that are raised by the majority of APs who have worked at Disciplined Firms. Generally, these APs worked at Disciplined Firms fairly long ago and are free of additional factors of concern in their employment histories.

A number of the APs in this group worked at Disciplined Firms for only a short period of time many years ago and have not worked at a Disciplined Firm since or been personally subject to disciplinary action. Others worked at a single Disciplined Firm for a somewhat lengthier period and have subsequently been employed for a substantial length of time by Members that have not shown a propensity for customer abuse and the AP has not been personally subject to disciplinary action.

The Board has determined that APs who have not been personally subject to a disciplinary action by NFA or the CFTC and who meet the following criteria shall not be counted by a Member that hires them as having been employed by a

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Disciplined Firm for purposes of calculating whether the composition of the Member's sales force triggers the enhanced supervisory requirements:

- a. they have been previously employed by Disciplined Firms for a cumulative total of less than 60 days and have not been employed by any Disciplined Firm during the 5 years preceding the determination of whether a Member firm is required to employ the enhanced supervisory requirements established in this Interpretive Notice. In addition, the AP may not have been employed by a Member that has been subject to any sales practice action by NFA or the CFTC, or by any Securities SRO or the SEC in connection with sales practices involving the offer, purchase or sale of any security futures product as defined in Section 1a (32) of the Act since leaving the last Disciplined Firm by which they were employed; or
- b. they worked at only one Disciplined Firm more than 10 years preceding the determination of whether a Member firm is required to employ the enhanced supervisory requirements and they have not been employed by a Member that has been subject to any sales practice action by NFA or the CFTC, or by any Securities SRO or the SEC in connection with sales practices involving the offer, purchase or sale of any security futures product as defined in Section 1a (32) of the Act within the 10 years preceding the determination, and they have been an NFA Member or Associate Member for at least eight of the ten years preceding the determination.

**B. Criteria that obligate a Member to adopt the enhanced supervisory requirements**

Member firms will be required to adopt the enhanced supervisory requirements if they fall into any of the categories described below.

**1. Obligation based on employment histories of APs and principals:**

Firms that meet any of the following numerical criteria are required to adopt the enhanced supervisory requirements:

- For firms with less than five APs, 2 or more of its APs have been employed by one or more current Disciplined Firms;
- For firms with at least 5 but less than 10 APs, 40 percent or more of its APs have been employed by one or more current Disciplined Firms;
- For firms with at least 10 but less than 20 APs, four or more of its APs have been employed by one or more current Disciplined Firms; or
- For firms with at least 20 APs, 20 percent or more of its APs have been employed by one or more current Disciplined Firms.<sup>1</sup>

2. Obligation based on affiliations of principals:

Once a Member firm meets the criteria to adopt the enhanced supervisory requirements, any other Members of which the principals of that Member firm are, or become, principals must also adopt the enhanced supervisory requirements or seek a waiver therefrom subject to the following exception.

As is the case with some APs, the Board recognizes that there is a limited group of individuals who have been principals of firms that have qualified for the enhanced supervisory requirements who are otherwise free of additional factors that raise concern about their ability to effectively supervise their firms.

Therefore, a Member will not qualify for the enhanced supervisory requirements under this section if the principal whose history would cause the qualification meets the following criteria:

- the principal has not been personally subject to a disciplinary action by NFA or the CFTC;

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<sup>1</sup> The Board notes that NFA Registration Rule 206(d) requires sponsors to file a Form 8-T with NFA reporting the termination of an AP within 20 days of their termination. Members should be aware that, notwithstanding that Rule, a Member's obligation to adopt the enhanced supervisory requirements is conclusively established on any day on which its sales force meets one of the listed numerical criteria and that the obligation shall not be extinguished by the effect of the subsequent filing of a Form 8-T for a terminated AP even if the form is filed within 20 days of an AP's termination.

- the principal has been a principal of only one firm that has qualified for the enhanced supervisory requirements;
  - the principal has never been a principal or an AP of a current Disciplined Firm;
  - the one firm in the principal's history that qualified for the enhanced supervisory requirements either received a full waiver from abiding by those requirements or abided by those requirements for at least two years and is no longer subject to the enhanced supervisory requirements; and
  - the one firm in the principal's history that qualified for the enhanced supervisory requirements has not become subject to a sales practice or promotional material based disciplinary action by NFA or the CFTC since qualifying for the enhanced supervisory requirements.
3. Obligation based on assessing commissions, fees and other charges well above the industry norm

Any Member firm that charges 50% or more of its active customers round-turn commissions, fees and other charges that total \$100 or more per futures, forex or option contract is required to adopt the enhanced supervisory requirements. Any Member that charges 50% or more of its active customers round-turn commissions, fees and other charges in the amount specified above must promptly inform NFA of that fact. In addition, upon request by NFA, Members shall have the burden of demonstrating to NFA that they charge more than 50% of their active customers round-turn commissions, fees and other charges that are less than the specified amounts. The term "active customers" as used in this section means any customers who are entitled to a monthly statement under the provisions of CFTC Regulations Section 1.33(a). For purposes of this section, any Member whose customer initiates an options contract that would result in total commissions, fees and other charges of \$100 or more if the trade was liquidated will be deemed to have charged total commissions, fees and other charges of \$100 even if the contract is not ultimately liquidated.

4. Obligation based on the initiation of disciplinary action

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- a. Members that have fulfilled the enhanced supervisory requirements that become subject to subsequent disciplinary action

Any Member that has previously been required to adopt the enhanced supervisory requirements; has, in fact, fulfilled that requirement either by adopting the enhanced supervisory requirements for a prescribed period or by receiving a full or partial waiver from the enhanced supervisory requirements from the Telemarketing Procedures Waiver Committee; and subsequently becomes subject to a CFTC or NFA enforcement or disciplinary proceeding alleging deceptive sales practices, shall, within 30 days of being served with notice of the action, adopt all of the enhanced supervisory requirements and may not seek a waiver therefrom. This obligation shall continue until after the disciplinary or enforcement proceeding is closed and all appeals are completed or the time for appeal has passed without an appeal being filed or perfected.

- b. Members already subject to the enhanced supervisory requirements

If an NFA Business Conduct Committee disciplinary proceeding or CFTC enforcement proceeding has been filed against a Member firm required to adopt the enhanced supervisory requirements, then the enhanced supervisory requirements will remain in effect for the applicable time period specified or until after the disciplinary or enforcement proceeding is closed and all appeals are completed or the time for appeal has passed without an appeal being filed or perfected, whichever occurs latest.

#### **IV. WAIVER PROCEDURE**

Any Member required to adopt the enhanced supervisory requirements may seek a waiver by filing a petition with the Telemarketing Procedures Waiver Committee within 30 days of the date of being notified by NFA that it is required to adopt the enhanced supervisory requirements. NFA may grant such a waiver upon a satisfactory showing that the Member's current supervisory procedures provide effective supervision over its employees, including enabling the Member to identify potential problem areas before customer abuse occurs. Additionally, if a Member meets the criteria and trades security futures products, then the Member firm must also make a satisfactory showing that the Member's supervisory

procedures ensure compliance with all applicable securities laws and regulations. Should a Member fail to file a petition seeking a waiver within 30 days or should it file a petition that is denied by the Telemarketing Procedures Waiver Committee, either in whole or in part, the Member may not petition for a full or partial waiver again until at least two years have elapsed since the Member adopted the required enhanced procedures. Members that meet the criteria to adopt the enhanced supervisory requirements and receive either a full or partial waiver of their obligation to adopt those requirements are, nevertheless, deemed to be a Member that qualified for the requirements for the purposes of this Interpretive Notice.

Some of the factors that the three-member Waiver Committee may consider in evaluating a waiver request include:

- the total number and the backgrounds of APs sponsored by the Member;
- number of branch offices and GIBs operated by the Member;
- the experience and background of the Member's supervisory personnel;
- the number of the Member's APs who had received training from firms which have been closed for fraud, the length of time those APs worked for those firms and the amount of time which has elapsed since those APs worked for the disciplined firms;
- the results of any previous NFA examinations;
- the cost effectiveness of the taping requirement in light of the firm's net worth, operating income and related telemarketing expenses;
- whether the Member assesses commissions, fees and other charges that are based on all of the relevant circumstances, including the expense of executing orders and the value of services the Member renders based on its experience and knowledge; and
- whether the Member adequately discloses the amount of commissions, fees and other charges before transactions occur in light of a retail customer's trading experience and the impact that the commissions, fees and other charges may have on the likelihood of profit.

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Conditions that the Telemarketing Procedures Waiver Committee shall impose on any Member to which it grants a full or partial waiver include requirements that the firm: notify NFA of any action charging the firm with a violation of CFTC, SEC or Self Regulatory Organization ("SRO") regulations or rules; notify NFA of any customer complaint involving sales practices or promotional material; not change ownership; not have any material deficiencies noted during any SRO examination; not hire additional APs from Disciplined Firms; execute a written acknowledgement that the firm understands the conditions of the waiver; and may include any other conditions deemed by the Committee to be appropriate in consideration of a total or partial waiver from the enhanced supervisory requirements. Violation of any of those conditions may serve as cause for the Telemarketing Procedures Waiver Committee to review and amend or revoke the waiver.

A Member firm that does not comply with this Interpretive Notice will violate NFA Compliance Rule 2-9(b) and will be subject to disciplinary action.

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#### **EXPLANATION OF PROPOSED AMENDMENTS**

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Member firms trigger the enhanced supervisory requirements ("Requirements") based upon the regulatory background of either their APs or principals. The few Member firms triggering the Requirements must record all telephone conversations with customers and prospects, pre-submit promotional material, adopt written supervisory procedures and either operate under a guarantee agreement or maintain an enhanced capital level. The proposed amendments to NFA Compliance Rule 2-9's Interpretive Notice entitled "Enhanced Supervisory Requirements" ("Notice") include:

- limited relief for some Members that would currently qualify for the Requirements based on a principal's previous affiliation with another Member that was subject to the Requirements;

- changes to the enhanced capital requirements in light of a recent increase in the FCM minimum capital requirement;
- changes to deal with the enhanced capital requirements for CPOs and CTAs in a manner more consistent with the nature of their business;
- requiring specific items to be included in a firm's written supervisory procedures;
- requiring quarterly rather than monthly reports on a firm's compliance with the Requirements; and
- clarifying language regarding—charging abnormally high commissions and fees; the effect that receiving a waiver has on future situations involving the Requirements; and the 2007 list of firms qualifying as Disciplined Firms, which have resolved sales practice actions within the past five years.

Limited Relief Based On Principal's Prior Affiliation

Historically, the only way that a Member could trigger the Requirements was to have a defined percentage of APs who had previously worked for a firm that had been disciplined for misleading sales practices or promotional material (“Disciplined Firm”).

In 2005, NFA's Board made revisions to the Notice after recognizing that the principals of several firms that had triggered the Requirements had avoided them by simply closing their firms and opening other firms that had a mix of APs that did not trigger the Requirements. NFA noted that the new firms typically had APs from the closed firm who had worked at Disciplined Firms, but their percentage ratios to the overall AP population of the new firms were below the triggering point for imposing the Requirements. This issue was dealt with by providing that once a firm had triggered the Requirements, then any other firms of which the principals of the qualifying firm are also principals would become subject to the Requirements.

The 2005 revision has been generally effective in discouraging the practice of sham reorganizations to avoid the Requirements. However, NFA has found that there were some principals whose firms triggered the Requirements with

backgrounds that suggested they were not part of the population that the amendment was designed to impact. NFA undertook the task of identifying objective criteria that were met by individuals who did not appear to be part of the target group but were, nevertheless, impacted by the 2005 amendment. In doing so, NFA focused on criteria similar to those that have been adopted to provide exemptions to some APs who previously worked at Disciplined Firms. These criteria generally include a clean personal regulatory record and limited affiliation with potentially problematic Members.

NFA ultimately identified a set of five criteria that apply to approximately 60 individuals and approximately five entities that do not appear to raise undue concerns regarding their ability to effectively supervise their firms. Those criteria include the following:

- the principal has not been personally subject to a disciplinary action by NFA or the CFTC;
- the principal has been a principal of only one firm that has qualified for the Requirements;
- the principal has never been a principal or an AP of a current Disciplined Firm;
- the firm in the principal's history that triggered the Requirements either received a full waiver from the Requirements or abided by the Requirements for at least two years and is no longer subject to the Requirements; and
- the firm in the principal's history that triggered the Requirements has not become subject to a sales practice action since triggering the Requirements.

Exempting Members from adopting the Requirements when those Requirements are triggered by a principal who meets the aforementioned five criteria would eliminate the need for some waiver petitions (which are typically granted), saving time and undue complications for the affected Members, the Telemarketing Procedures Waiver Committee ("Waiver Committee") and NFA staff. NFA believes that this

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exemption could provide relief to certain principals whose profiles indicate that they are unlikely to pose any supervisory issues.

### Capital Requirement Issues

The Notice currently provides that FCMs affected by the Notice are required to maintain adjusted net capital (“ANC”) of at least \$1,000,000. This was indeed an enhanced level of ANC since when this provision was adopted the minimum ANC level was \$500,000. However, the minimum ANC for all FCMs was raised to \$1,000,000 in March of this year rendering the current provision moot.

The language in the Notice regarding the enhanced level of ANC required to be maintained by affected FCMs is revised so as to impose a flexible enhanced ANC. The proposed amendments would track the approach taken by the Board in 2008 to deal with changes to the enhanced ANC provision for FDMs. Specifically, rather than set a defined number, it ties the enhanced ANC level for FCMs to the early warning requirement under CFTC rules, which is currently 150% of required ANC. This revision would not only bring the current enhanced ANC obligation into harmony with last March’s revisions to NFA Financial Requirements Section 11, it would also provide flexibility in light of any future changes to the level of ANC required of FCMs.

The Notice currently requires CPOs and CTAs that trigger the Requirements to maintain ANC of at least \$250,000. In addition, affected CPOs and CTAs are currently subject to the financial recordkeeping and reporting requirements applicable to FCMs.

It is relatively uncommon for CPOs and CTAs to qualify for the Requirements. If CPOs and CTAs do qualify, they often request relief from the \$250,000 capital requirement even if they are required to tape. The Waiver Committee has dealt with ten waiver petitions from Members in those categories and completely denied five of those petitions. Four of those firms are no longer NFA Members. The other five received partial waivers from the full enhanced ANC requirement which reduced that requirement. Two waivers set the required ANC level at \$100,000, two at \$75,000 and one eliminated the obligation altogether. Three of those firms remain NFA Members.

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In light of the Waiver Committee's past decisions regarding this issue, the amendments to the Notice reduce the ANC required of CPOs and CTAs that trigger the Requirements from the current \$250,000 to \$100,000. In addition, the amendments to the Notice provide that the financial recordkeeping and reporting obligations of affected CPOs and CTAs be simplified by merely requiring them to demonstrate compliance with their enhanced ANC obligation to NFA upon request.

#### Other Issues

The amendments to the Notice identify specific areas that need to be addressed by an affected Member in the written supervisory procedures they are required to prepare. This addition is contemplated to give clear guidance as to the minimum standards to be met in preparing written supervisory procedures. Generally, the proposed language would establish the inclusion of specific procedures for monitoring, cataloging and logging taped conversations in an affected Member's written supervisory procedures.

The Notice currently requires affected Members to file monthly reports regarding their compliance with the Requirements. It has been NFA's experience in reviewing these reports that most of them tend to be repetitious in nature. Nevertheless, NFA feels that the reports are useful in that they periodically bring the Member's focus to bear on the Requirements, create a written historical record and, on occasion, may provide the impetus for corrective action by NFA and/or the Member. The obligation to file such reports will be changed from a monthly to a quarterly basis.

Members that charge 50% or more of their active customers round-turn commissions, fees and other charges that total \$100 or more per futures, forex or option contract are required to adopt the Requirements. NFA has recently encountered situations in which Members purchase out-of-the-money options and charge a commission just short of \$100. There are additional charges if the option is liquidated that would bring total charges above \$100; however, it is often the case that the out-of-the-money options expire worthless and no additional costs are assessed. The result is that some Members are able to avoid the Requirements by encouraging their customers to take on riskier out-of-the-money positions that are less likely to incur liquidation charges that would raise costs to \$100 or more.

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Members that engage in the practice described above are clearly within the group of Members that are likely to engage in sales practice abuses that should be subject to the Requirements when the Board chose to use high commissions and fees as a trigger for imposing the Requirements. Therefore, the proposed amendments to the Notice provide that trading an options contract that would result in total commissions, fees and other charges of \$100 or more if the trade was liquidated will be deemed to have been charged \$100 even if the contract is not ultimately liquidated.

The proposed amendments to the Notice add language that makes it clear that even though a Member receives either a full or partial waiver, it is still deemed to be a Member that has met the criteria for purposes of the Notice.

From 1993 until 2007, the term "Disciplined Firm" only included Members that had been permanently barred from the industry as the result of a sales practice or promotional material action. In 2007, the proposed amendments to the Notice added Members that had been sanctioned in any way in a sales practice or promotional material action within the preceding five years to the definition of a Disciplined Firm. This resulted in the creation of a list of "five year" Disciplined Firms that is separate from the list of permanent Disciplined Firms. The electronic reporting system that monitors Disciplined Firms automatically removes these firms from the Disciplined Firm list once five years have passed.

There has been some confusion expressed as to whether a "five year" Disciplined Firm is still considered to be a Disciplined Firm for purposes of triggering the Requirements once the firm is dropped from the "five year" list. The proposed amendments to the Notice eliminates this confusion by simply adding the word "current" before the term Disciplined Firm in four relevant places in Section III (B)(1) of the Notice.

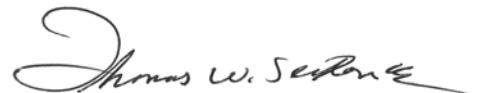
NFA discussed all the aforementioned changes to the Requirements with NFA's FCM, IB, and CPO/CTA Advisory Committees, which all supported the amendments. As mentioned earlier, NFA is invoking the "ten-day" provision of Section 17(j) of the Commodity Exchange Act. NFA intends to make the amendments to the Interpretive Notice entitled NFA Compliance Rule 2-9: Enhanced Supervisory Requirements effective ten days after receipt of this submission by the Commission,

Mr. David A. Stawick

October 6, 2010

unless the Commission notifies NFA that the Commission has determined to review the proposal for approval.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas W. Sexton".

Thomas W. Sexton  
Senior Vice President and  
General Counsel

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\* The proposed amendments to the Interpretive Notice entitled "NFA Compliance Rule 2-9: Enhanced Supervisory Requirements" will become effective January 3, 2011.