

December 10, 2018

Via Federal Express

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 Incorporate Swaps into Certain Compliance Rules and Interpretive Notices – *NFA Compliance Rule 2-4: Guidelines for the Disclosure by FCMs and IBs of Costs Associated with Futures Transactions; NFA Compliance Rule 2-6: Conducting Commodity Futures Business with an Expelled or Suspended Member or Associate; NFA Compliance Rule 2-4: Disclosure Guidelines for FCMs Offering Sweep Accounts; and NFA Compliance Rules 2-4 and 2-36: Prohibition on the Use of Certain Electronic Funding Mechanisms*

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 amendments to the following NFA Compliance Rules: 1-1; 2-2; 2-3; 2-6; 2-10; 2-38; 3-1; and 3-15 as well as the proposed amendments to the following four NFA Interpretive Notices: *NFA Compliance Rule 2-4: Guidelines for the Disclosure by FCMs and IBs of Costs Associated with Futures Transactions; NFA Compliance Rule 2-6: Conducting Commodity Futures Business with an Expelled or Suspended Member or Associate; NFA Compliance Rule 2-4: Disclosure Guidelines for FCMs Offering Sweep Accounts; and NFA Compliance Rules 2-4 and 2-36: Prohibition on the Use of Certain Electronic Funding Mechanisms*. NFA's Board of Directors ("Board") unanimously approved these amendments on November 15, 2018, and NFA respectfully requests Commission review and approval of the proposed amendments.

PROPOSED AMENDMENTS

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

NATIONAL FUTURES ASSOCIATION

COMPLIANCE RULES

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Part 1 – DEFINITIONS

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RULE 1-1. DEFINITIONS

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(g) "Commodity Interest" — means futures, forex and/or swaps.

(g)(h) "Commodity Pool Operator" or "CPO" — means a person who is required to register or is registered as a commodity pool operator under the Act and Commission Rules.

(h)(i) "Commodity Trading Advisor" or "CTA" — means a person who is required to register or is registered as a commodity trading advisor under the Act and Commission Rules.

(i)(j) "Contract Market" — means an exchange designated by the Commission as a contract market to trade in one or more commodities or licensed by the Commission for the trading of options commodity interests.

(j)(k) "Exchange Act" — means the Securities Exchange Act of 1934.

(k)(l) "Foreign Board of Trade" — means a board of trade, exchange, or market located outside the United States, its territories or possessions.

(l)(m) "Foreign Futures" and "Foreign Options" — means futures and options transactions made or to be made on or subject to the rules of a foreign board of trade.

(m)(n) "Foreign Futures or Foreign Options Customer" — means any person located in the United States, its territories or possessions who trades in foreign futures or foreign options.

(n)(o) "Forex" — has the same meaning as in Bylaw 1507(b).

(o)(p) "Forex Dealer Member" — has the same meaning as in Bylaw 306.

(p)(q) "Futures" includes -

- (1) futures and option contracts traded on a contract market;
- (2) option contracts granted by a person that has registered with the Commission under Section 4c(d) of the Act as a grantor of such option contracts or has notified the Commission under the Commission's rules that it is qualified to grant such option contracts;
- (3) foreign futures and foreign options made or to be made on or subject to the rules of a foreign board of trade for or on behalf of foreign futures or foreign options customers as those terms are defined in the Commission's rules;
- (4) leverage transactions as that term is defined in the Commission's rules; and
- (5) security futures products, as that term is defined in Section 1a(45) of the Act.

~~(q)~~(r) "Futures Commission Merchant" or "FCM" — means a person who is required to register or is registered as a futures commission merchant under the Act and Commission Rules.

~~(r)~~(s) "Hearing Committee" — means the Hearing Committee established under NFA Bylaw 707.

~~(s)~~(t) "Introducing Broker" or "IB" — means a person who is required to register or is registered as an introducing broker under the Act and Commission Rules.

~~(t)~~(u) "Leverage Transaction Merchant" or "LTM" — means a person who is required to register or is registered as a leverage transaction merchant under the Act and Commission Rules.

~~(u)~~(v) "Major Swap Participant" or "MSP" — means a person who is required to register or is registered as a major swap participant under the Act and Commission Rules.

~~(u)~~(w) "Member" — means a Member of NFA other than a contract market.

~~(v)~~(x) "Nominal Account Size" — means the account size agreed to by the client that establishes the level of trading in the particular trading program.

~~(w)~~(y) "Partially-Funded Account" — has the same meaning as in CFTC Regulation 4.10(m).

~~(x)~~(z) "Person" — includes individuals, corporations, limited liability companies, partnerships, trusts, associations and other entities.

(y)(aa) "Qualified Eligible Person" or "QEP" — has the same meaning as in CFTC Regulation 4.7(a).

(z)(bb) "Requirements" — includes any duty, restriction, procedure or standard imposed by a charter, bylaw, rule, regulation, resolution or similar provision.

(aa)(cc) "Retail Foreign Exchange Dealer" or "RFED" — means a retail foreign exchange dealer as that term is used in the Commodity Exchange Act, and that is required to be registered as such under the Act and Commission Rules.

(bb)(dd) "Security Futures Products" — has the same meaning as in Section 1a(45) of the Act.

(ee) "Swap Dealer" or "SD" — means a person who is required to register or is registered as a swap dealer under the Act and Commission Rules.

(ff) "Swap" — has the same meaning as in the Act and Commission Rules.

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Part 2 – RULES GOVERNING THE BUSINESS CONDUCT OF MEMBERS REGISTERED WITH THE COMMISSION

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RULE 2-2. FRAUD AND RELATED MATTERS.

No Member or Associate shall:

- (a) Cheat, defraud or deceive, or attempt to cheat, defraud or deceive, any commodity futures or swap customer or counterparty;
- (b) Bucket a customer's commodity futures order or engage in a business that is of the nature of a bucket shop;
- (c) Willfully make or cause to be made to a customer or counterparty a false report, or willfully to enter or cause to be entered for a customer or counterparty a false record, in or in connection with any commodity futures contract or swap;
- (d) Disseminate, or cause to be disseminated, false or misleading information, or a knowingly inaccurate report, that affects or tends to affect the price of any commodity that is the subject of a commodity futures contract or swap;

- (e) Engage in manipulative acts or practices regarding the price of a commodity futures contract or swap;
- (f) Willfully submit materially false or misleading information to NFA or its agents;
- (g) Effect a commodity futures or swap transaction ~~commodity trade~~ on or pursuant to the rules of a contract market or swap execution facility for a ~~person~~ customer who is subject to a Commission prohibition from trading on or pursuant to the rules of any contract market or swap execution facility, as applicable, unless the Member or Associate did not know or have reason to know of the prohibition; ~~or~~
- (h) Embezzle, steal, purloin or knowingly convert any money, securities or other property received from or accruing to a customer, client, ~~or~~ pool participant or counterparty in or in connection with a commodity futures contracts or swap; ~~or~~
- (i) Act in any capacity requiring registration under the Act unless the Member or Associate is either registered in that capacity or exempt from registration.

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RULE 2-3. SHARING IN PROFITS.

No Member or Associate shall share, directly or indirectly, in the profits or losses accruing from commodity ~~futures~~ interest trading in any account of a customer carried by the Member, or another Member, unless the customer's prior written authorization is therefor obtained.

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RULE 2-6. EXPELLED OR SUSPENDED MEMBER OR ASSOCIATE.

No person who has been expelled or suspended or is subject to a similar sanction by NFA in a proceeding brought pursuant to Part 3 of NFA's Compliance Rules that temporarily or permanently prohibits the person from NFA membership or affiliation in any capacity with an NFA Member shall hold himself out as a Member in good standing of NFA, or as affiliated with a Member, as the case may be, during the period ~~during which~~ the sanction is in effect. No FCM, IB, CPO or CTA Member, FDM or Associate shall permit such a person to maintain any affiliation with it or perform any activities for, on behalf of or in connection with its conduct commodity futures or forex interest business regardless of whether such affiliation or activities require registration or NFA Membership with such a person during the period the sanction is in effect unless

authorized by the Business Conduct Committee, Hearing Committee or the Appeals Committee.

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RULE 2-10. RECORDKEEPING.

(a) Each Member shall maintain adequate books and records necessary and appropriate to conduct its business including, without limitation, the records required to be kept under CFTC Regulations 1.18, 1.32 through 1.37, ~~4.68~~, and 1.71 for the period required under CFTC Regulation 1.31.

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(d) Each CPO, CTA, FCM, FDM, IB, MSP and SD Member must:

(1) file reports, requests for extensions, and other documents required to be filed with the CFTC and/or NFA in English;

(2) maintain English translations of all foreign-language promotional material, including disclosure documents and Web sites, distributed to or intended for viewing by customers located in the United States, its territories, or possessions;

(3) maintain written procedures required by CFTC or NFA rules in English (as well as in any other language if necessary for them to be understood by the Member's employees and agents);

(4) provide English translations of other foreign-language documents and records and file financial information in U.S. dollars when requested by NFA; and

(5) make available to NFA (during an examination or to respond to other inquiries) an individual who is authorized to act on the Member's behalf, is fluent in English, and is knowledgeable about the Member's business and about financial matters.

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RULE 2-38. BUSINESS CONTINUITY AND DISASTER RECOVERY PLAN.

(a) Each FCM, IB, CPO and CTA Member and each FDM must establish and maintain a written business continuity and disaster recovery plan that outlines procedures to be followed in the event of an emergency or significant business disruption. The plan shall be reasonably designed to enable the Member to continue operating, to reestablish

operations, or to transfer its business to another Member with minimal disruption to its customers, other Members, and the commodity futures markets.

(b) Each FCM, SD and MSP Member and each FDM must provide NFA with, and keep current, the name and contact information for all key management employees, as identified by NFA, in the form and manner prescribed by NFA. In addition, each FCM, SD and MSP Member and each FDM must provide NFA with the location/address and telephone number of its primary and alternative disaster recovery sites.

(c) Each IB, CPO and CTA Member must provide NFA with the name of and contact information for an individual who NFA can contact in the event of an emergency, and the Member must update that information upon request. Each IB, CPO, and CTA Member that has more than one principal must also provide NFA with the name of and contact information for a second individual who can be contacted if NFA cannot reach the primary contact, and the Member must update that information upon request. These individuals must be authorized to make key decisions in the event of an emergency.

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RULE 3-1. DEPARTMENT OF COMPLIANCE.

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(b) Prohibitions.

Neither the Compliance Director nor any employee or agent of the Compliance Department (including persons hired on a contract basis to perform compliance duties) may be a Member or Associate or have any connection, direct or indirect, with a Member or Associate, except as approved by the President. Except with the President's approval, the Compliance Director and any employee of the Compliance Department shall not trade, directly or indirectly, any commodity interest. ~~A commodity interest shall be defined as any commodity futures or commodity option contract traded on or subject to the rules of a contract market or linked exchange, or cash commodities traded on or subject to the rules of a board of trade which has been designated as a contract market.~~

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RULE 3-15. MEMBER OR ASSOCIATE RESPONSIBILITY ACTIONS.

(a) Nature of Action.

A Member or Associate may be summarily suspended from membership, or association with a Member, may be required to restrict its operations (e.g., restrictions on accepting new accounts), or may otherwise be directed to take remedial action, (e.g., may be ordered to immediately infuse additional capital or to maintain its adjusted net capital at a level in excess of its current capital requirement), where the President, with the concurrence of the NFA Board of Directors or Executive Committee, has reason to believe that the summary action is necessary to protect the commodity futures interest markets, customers, counterparties, or other Members or Associates. No member of either the Board of Directors or the Executive Committee shall participate in a summary action if the member, or any person with whom the member is connected, has a financial, personal or other direct interest in the matter under consideration or is disqualified under Bylaw 516 or Bylaw 708(c). Notice of such summary action shall be given promptly to the Commission.

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INTERPRETIVE NOTICES

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9005 - NFA COMPLIANCE RULE 2-4: GUIDELINES FOR THE DISCLOSURE BY FCMS AND IBS OF COSTS ASSOCIATED WITH FUTURES AND CLEARED SWAP TRANSACTIONS

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National Futures Association ("NFA") Compliance Rule 2-4 provides that "Members and Associates shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their commodity futures business and swaps business." NFA Compliance Rule 2-4 requires that each FCM Member, or in the case of introduced accounts, the Member introducing the account make available to its customers, prior to the commencement of trading, information concerning the costs associated with futures¹ and cleared swap transactions.⁴

If fees and charges associated with futures and cleared swap transactions are not determined on a per trade or round-turn trade basis, the FCM or IB Member must provide the customer with a complete written explanation of such fees and charges.

¹ NFA Bylaws and Rules define "futures" to include exchange-traded options. See NFA Bylaw 1507 and NFA Compliance Rule 1-1(g)(4).

NFA recognizes that FCM and IB Members may employ various arrangements in assessing customers fees and charges associated with futures or cleared swap transactions to customers. Any such arrangement which is intended to or is likely to deceive customers is a violation of NFA Requirements and will subject the Member to disciplinary action.

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9056 - NFA COMPLIANCE RULE 2-6: CONDUCTING COMMODITY FUTURES INTEREST BUSINESS WITH AN EXPELLED OR SUSPENDED MEMBER OR ASSOCIATE

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In the last several years, NFA has encountered several instances where brokers, who have been barred from NFA membership or affiliation as a result of an NFA disciplinary action, have continued to work at a Member firm. NFA Compliance Rule 2-6 addresses this situation (as well as situations where the broker has been suspended or subjected to a similar sanction that temporarily prohibits the person from being an NFA Member or Associate) by specifically prohibiting an provides that no FCM, IB, CPO or CTA Member, FDM or Associate from maintaining an affiliation with or permitting any such person to perform any activities for, on behalf of or in connection with its shall conduct commodity futures interest business. This prohibition applies regardless of whether the person's affiliation or activities require registration or NFA membership with a person who has been expelled or suspended or is subject to a similar sanction by NFA in a proceeding brought pursuant to Part 3 of NFA's Compliance Rules that temporarily or permanently prohibits the person from NFA membership or affiliation in any capacity with an NFA Member and continues throughout during the period the sanction is in effect unless an exception is authorized by the Business Conduct Committee, Hearing Committee or the Appeals Committee.

~~The purpose of this Rule is to address the problem described above. The phrase "commodity futures business", as used in Compliance Rule 2-6, means any and all activities performed by such persons on behalf of, and in connection with, an NFA Member's futures business. Therefore, a Member firm is prohibited from allowing a person who has been expelled or suspended or is subject to a similar sanction by NFA that temporarily or permanently prohibits the person from NFA membership or affiliation in any capacity with an NFA Member to perform any activities for or on its behalf regardless of whether such activities require registration or NFA membership. Under Compliance Rule 2-6, FCM, IB, CPO or CTA Members and FDMs firms are also prohibited from having such persons acting for or on behalf of the firm in connection with its futures commodity interest business, including as employees, consultants, independent contractors, agents or unpaid volunteers. Moreover, absent extraordinary~~

circumstances, FCM, IB, CPO or CTA Members and FDMs firms should not have such persons physically present in their offices.

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9059 - NFA COMPLIANCE RULE 2-4: DISCLOSURE GUIDELINES FOR FCMS OFFERING SWEEP ACCOUNTS

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Due to the increasingly competitive industry environment, Futures Commission Merchants ("FCMs") may seek to develop and offer to customers sweep account programs to manage cash balances. These sweep account programs transfer a customer's excess funds from a regulated commodity account (whether a customer segregated, or secured account or cleared swaps customer account) to a non-regulated account for the customer at the FCM, an affiliate of the FCM or another entity so that the customer can obtain a higher investment return than maintaining the funds in the FCM's customer regulated commodity accounts.

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Failure to follow the disclosure guidelines contained in this Notice may be deemed conduct inconsistent with a Member's obligation under NFA Compliance Rule 2-4 to observe high standards of commercial honor and just and equitable principles of trade in the conduct of its commodity futures business and cleared swaps business. NFA recognizes, however, that FCMs offering these sweep account programs may have to modify these guidelines to address their particular programs.

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9068 - NFA COMPLIANCE RULES 2-4 AND 2-36: PROHIBITION ON THE USE OF CERTAIN ELECTRONIC FUNDING MECHANISMS

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NFA Compliance Rule 2-4 requires Members and Associates to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their commodity futures business and swaps business. Similarly, NFA Compliance Rule 2-36(c) requires Forex Dealer Members (FDM) and their Associates to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their forex business.

NFA's Board of Directors (Board) recently reviewed information regarding the use of credit cards¹ by FDM retail customers to fund their forex trading accounts, which indicates that retail forex customers overwhelmingly fund their trading accounts using a credit card. For the reasons described below, the Board believes that permitting customers to invest in ~~the forex, or futures~~ commodity interest markets using a credit card is inconsistent with a Member's obligation to observe high standards of commercial honor and just and equitable principles of trade.

Credit cards, by their very nature, permit easy access to borrowed funds. Given the highly volatile nature of the commodity interest ~~forex and futures~~ markets, the substantial risk of loss, and the possibility that a total loss may occur in a very short period of time, the Board has concluded that Members should be prohibited from permitting customers to use credit cards to fund ~~forex, or futures~~ commodity interest accounts.

The Board also recognizes that the retail ~~forex, and futures~~ commodity interest businesses are largely Internet based, electronic payments are the acceptable payment method for most Internet based businesses, and that certain electronic funding methods may provide some convenience to customers. Therefore, the Board is not prohibiting all forms of electronic payment mechanisms.

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¹ For purposes of this Interpretive Notice, the term credit card also includes other electronic payment facilitators (e.g., Paypal) that commonly draw funds from a customer's credit card.

EXPLANATION OF PROPOSED AMENDMENTS

Following the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, NFA assumed oversight responsibilities for swap dealers, major swap participants and the swap activities of all NFA Members. Since that time, NFA has taken a measured approach to implementing rules changes covering NFA Member swap-related activities. Given NFA's experience over the last few years, NFA's Board recently approved several amendments to NFA Rules and related Interpretive Notices to ensure those requirements appropriately address Members' futures, swaps and retail forex activities.

NFA's Board has approved several amendments to NFA Rules designed to expressly incorporate references to swaps, counterparties¹ and related concepts. The Board has also approved amendments to clarify that certain rules apply to all commodity interests (*i.e.*, futures, forex and swaps) and to clarify that other rules only apply to specific membership categories. In particular, these amendments will expressly provide that NFA Compliance Rule 2-2 Fraud and Related Matters and NFA Compliance Rule 3-15 Member and Associate Responsibility Actions apply to Member's swap-related activities.

Specifically, the Board approved the following NFA Rule amendments:

- NFA Compliance Rule 1-1 (Definitions) to add definitions for the terms commodity interest, major swap participant, swap dealer and swap.
- NFA Compliance Rules 2-2 (Fraud and Related Matters) to include references to swaps, counterparties, and related concepts;
- NFA Compliance Rule 2-3 (Sharing in Profits), which currently applies to trading in customer accounts (and not counterparty transactions), to expand it to cover all commodity interests;
- NFA Compliance Rule 2-6 (Expelled or Suspended Member or Associate) to expand the rule to apply to all commodity interests and incorporate language from an existing Interpretive Notice to clarify the scope of the rule. The proposal also specifies that Compliance Rule 2-6 only applies to FCM, IB, CPO, and CTA Members, FDMs, and Associates;
- NFA Compliance Rule 2-10 to list all Member categories to clarify that the requirements relating to English records and fluency apply to SD Members;
- NFA Compliance Rules 2-38 (Business Continuity and Disaster Recovery) to clarify the Member categories subject to their coverage;
- NFA Compliance Rule 3-1 (Department of Compliance) to remove the limited purpose definition of commodity interest; and

¹ The term "customer" as used in NFA Rules generally does not include a counterparty (unless, for example, a Member acts as both an agent and counterparty with respect to a particular transaction). References to "counterparty" have been added to make clear that certain requirements apply to transactions between a Member and its counterparty.

- NFA Compliance Rule 3-15 (Member or Associate Responsibility Actions) to incorporate references to commodity interest and counterparties.

The Board also approved amendments to the following Interpretive Notices to integrate the applicable rule amendments:

- 9005 – *NFA Compliance Rule 2-4: Guidelines for the Disclosure by FCMs and IBs of Costs Associated with Futures Transactions;*
- 9056 – *NFA Compliance Rule 2-6: Conducting Commodity Futures Business with an Expelled or Suspended Member or Associate;*
- 9059 – *NFA Compliance Rule 2-4: Disclosure Guidelines for FCMs Offering Sweep Accounts;* and
- 9068 – *NFA Compliance Rules 2-4 and 2-36: Prohibition on the Use of Certain Electronic Funding Mechanisms.*

NFA staff presented these proposed amendments to all four advisory committees. The IB, FCM, CPO/CTA and Swap Participant Advisory Committees supported the proposed amendments. As stated earlier, NFA's Board unanimously approved the proposed amendments on November 15, 2018.

NFA respectfully requests that the Commission review and approve the proposed amendments to NFA Compliance Rules: 1-1; 2-2; 2-3; 2-6; 2-10; 2-38; 3-1; and 3-15 along with the proposed amendments to the following four NFA Interpretive Notices: *NFA Compliance Rule 2-4: Guidelines for the Disclosure by FCMs and IBs of Costs Associated with Futures Transactions;* *NFA Compliance Rule 2-6: Conducting Commodity Futures Business with an Expelled or Suspended Member or Associate;* *NFA Compliance Rule 2-4: Disclosure Guidelines for FCMs Offering Sweep Accounts;* and *NFA Compliance Rules 2-4 and 2-36: Prohibition on the Use of Certain Electronic Funding Mechanisms.*

Respectfully submitted,



Carol A. Wooding
Vice President and General Counsel

Mr. Christopher J. Kirkpatrick

December 10, 2018