

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83490; File No. SR-NFA-2018-02)

June 21, 2018

Self-Regulatory Organizations; National Futures Association; Notice of Filing and Immediate Effectiveness of Proposed Change to the Interpretive Notice to NFA Compliance Rule 2-9: Enhanced Supervisory Requirements: Requiring NFA Members to Maintain a Record of All Electronic Written Communications

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (“Exchange Act”),¹ and Rule 19b-7 under the Exchange Act,² notice is hereby given that on June 12, 2018, National Futures Association (“NFA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change described in Items I, II, and III below, which Items have been prepared by NFA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

On November 27, 2017, NFA filed this proposed rule change with the Commodity Futures Trading Commission (“CFTC”) and requested that the CFTC make a determination that review of the proposed rule change of NFA is not necessary. By letter dated December 11, 2017, the CFTC notified NFA of its determination not to review the proposed rule change.³

The text of the proposed rule change is available at the self-regulatory organization’s office, on the NFA’s website at www.nfa.futures.org, and at the SEC’s Public Reference Room.

I. Self-Regulatory Organization’s Description and Text of the Proposed Rule Change

NFA’s Interpretive Notice to NFA Compliance Rule 2-9 entitled “NFA Compliance Rule 2-9: Enhanced Supervisory Requirements” (“Interpretive Notice”) requires NFA Member

¹ 15 U.S.C. 78s(b)(7).

² 17 CFR 240.19b-7.

³ See letter from Matthew Kulkin, Director CFTC, to Carol A. Wooding, General Counsel, NFA (“Letter”).

(“Member”) firms that meet certain criteria identified by NFA’s Board of Directors (“Board”) to comply with specific enhanced supervisory requirements (“Requirements”) that are designed to prevent abusive sales practices. NFA’s Board is amending the Interpretive Notice to require all Members subject to the Requirements to maintain a record of all electronic written communications between associated persons (“APs”) and customers or potential customers, including but not limited to, email, text messages, instant messages, and any other communication that occurs in a chat room or on any social media platform. The proposed rule change also requires all Member firms subject to the Requirements of the Interpretive Notice to prepare a catalog of electronic written communications and for APs to maintain a log of those written electronic communications. The text of the proposed rule change to the Interpretive Notice is found in Exhibit 4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, NFA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NFA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

1. Purpose

Section 15A(k) of the Exchange Act⁴ makes NFA a national securities association for the limited purpose of regulating the activities of NFA Members who are registered as brokers or

⁴ 15 U.S.C. 78o-3(k).

dealers in security futures products under Section 15(b)(11) of the Exchange Act.⁵ NFA's Interpretive Notice applies to all NFA Members who meet the criteria in the Interpretive Notice, including those that are registered as security futures brokers or dealers under Section 15(b)(11) of the Exchange Act.

NFA's Interpretive Notice to Compliance Rule 2-9(b) authorizes NFA's Board to require Members to adopt certain enhanced supervisory requirements based upon the regulatory background of either its APs or principals. The Interpretive Notice is designed to, among other things, minimize the likelihood of a Member engaging in deceptive sales practices. One of the more important Requirements with respect to minimizing sales practice problems is the requirement that firms make audio recordings of all telephone conversations between APs and customers. At the time this Interpretive Notice was adopted, telephone communications were the most common method that APs used to solicit customers. However, since that time, other electronic written communications, such as text or instant messages, have become one of the primary methods of communication between APs and customers. NFA's Interpretive Notice, however, does not specifically require a Member firm subject to the Requirements to maintain a record of electronic written communications, prepare a catalog of electronic written communications, or require its APs to maintain a log of those communications. NFA relies on the catalog of communications and the AP sales solicitation logs when examining a Member for compliance with the Requirements.

Given the popularity of electronic written communications, NFA's Board is amending the Interpretive Notice to explicitly state that all Members subject to the Requirements are required to maintain a record of all electronic written communications, including but not limited to, emails, text messages, instant messages, and any other communication that occurs in a chat room

⁵ 15 U.S.C. 78o(b)(11).

or on any social media platform. NFA's Board is also amending the Interpretive Notice to require Member firms subject to the Requirements to prepare a catalog of electronic written communications and require APs to maintain a log of those written electronic communications. This modification to the Interpretive Notice merely parallels the current cataloging and AP log requirement for telephone sales solicitations and ensures that, for firms subject to the Requirements, all sales solicitations—regardless of the method by which they occur—are maintained, cataloged, and logged by the firm's APs.

Amendments to the Interpretive Notice were previously filed with the SEC in SR-NFA-2002-07, Exchange Act Release No. 34-47147 (Jan. 9, 2003), 68 FR 2383 (Jan. 16, 2003); SR-NFA-2003-01, Exchange Act Release No. 34-47533 (Mar. 19, 2003), 68 FR 14733 (March 26, 2003); SR-NFA-2005-01, Exchange Act Release No. 34-52808 (Nov. 18, 2005), 70 FR 71347 (Nov. 28, 2005); SR-NFA-2006-01 Exchange Act Release No. 34-53568 (Mar. 29, 2006), 71 FR 16850 (Apr. 4, 2006); SR-NFA-2007-03, Exchange Act Release No. 34-55710 (May 4, 2007), 72 FR 26858 (May 11, 2007); SR-NFA-2007-07, Exchange Act Release No. 34-57142 (Jan. 14, 2008), 73 FR 3502 (Jan. 18, 2008); SR-NFA-2008-02, Exchange Act Release No. 34-58709 (Oct. 1, 2008), 73 FR 59011 (Oct. 8, 2008); SR-NFA-2010-04, Exchange Act Release No. 34-63602 (Dec. 22, 2010), 76 FR 202 (Jan. 3, 2011); and SR-NFA-2014-05, Exchange Act Release No. 34-72514 (July 2, 2014), 79 FR 39046 (July 9, 2014).

2. Statutory Basis

The proposed rule change is authorized by, and consistent with, Section 15A(k)(2)(B) of the Exchange Act.⁶ That Section requires NFA to have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, including rules governing sales

⁶ 15 U.S.C. 78o-3(k).

practices and advertising of security futures products. The proposed rule change accomplishes this by imposing enhanced supervisory requirements on Member firms that meet certain criteria that NFA's Board has determined indicates a greater potential for sales practice fraud to occur.

B. Self-Regulatory Organization's Statement on Burden on Competition

At first glance, the proposed rule change appears to impose additional burdens on NFA Members subject to the Requirements. In practice, however, CFTC Regulation 1.35⁷ requires Futures Commission Merchants ("FCMs"), Retail Foreign Exchange Dealers ("RFEDs"), and Introducing Brokers ("IBs"), as well as Commodity Pool Operators ("CPOs") and Commodity Trading Advisors ("CTAs") that are members of a designated contract market ("DCM") or swaps execution facility ("SEF") to maintain a record of electronic written communications. Therefore, the proposed rule imposes no new or additional requirements on FCMs, RFEDs and IBs as well as CTAs and CPOs that are Members of a SEF or DCM.

However, CFTC Regulation 1.35 does not apply to CPOs and CTAs that are not a member of a DCM or SEF. NFA and NFA's Member Committees realize that this proposed rule would impose an additional recordkeeping requirement and additional costs to CPOs and CTAs that are not a member of a DCM or a SEF. However, NFA and NFA's Member Committees believe that this consideration is outweighed by the fact that, in NFA's experience, firms that qualify to adopt the Requirements are more likely to engage in deceptive sales solicitations and requiring these firms to maintain records of electronic written communications may reduce the likelihood of deceptive sales practices. Therefore, this burden is necessary and appropriate to help minimize deceptive sales solicitations.

⁷ 17 CFR 1.35.

Additionally, the other portion of the proposed rule change – the cataloging and AP log requirement for electronic written communication – poses minimal burden on impacted firms because it merely parallels the current cataloging and AP log requirement for telephone sales solicitations. This minimal burden is necessary and appropriate to minimize the likelihood of abusive sales practices.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

NFA worked with Member Committees in developing the proposed rule change. NFA did not, however, publish the proposed rule change to the membership for comment. NFA did not receive comment letters concerning the rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

On December 11, 2017, the CFTC notified NFA of its determination not to review the proposed rule change.⁸ The proposed rule change became effective on January 31, 2018.

At any time within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Exchange Act.⁹

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

⁸ See Letter, *Supra* note 3.

⁹ 15 U.S.C. 78s(b)(1).

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NFA-2018-02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NFA-2018-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NFA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make

publicly available. All submissions should refer to File Number SR-NFA-2018-02 and should be submitted on or before *[insert date 21 days from publication in the Federal Register.]*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

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Assistant Secretary

¹⁰ 17 CFR 200.30-3(a)(73).