

CLIENT ALERT

NFA Compliance Roundup: Swap Firms, Promotional Material, Performance Reporting, Branch Offices and Annual Affirmations

December 19, 2019

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The National Futures Association has amended rules and updated interpretive guidance impacting commodity pool operators, commodity trading advisors and other NFA members that will become effective in early 2020. In addition, NFA is now accepting annual affirmation filings from CPOs and CTAs that are required to make such filings.

Swaps Proficiency Requirements

NFA's Swaps Proficiency Requirements modules will be available on January 31, 2020.¹ Individuals who are approved (or seeking approval) by NFA as swap associated persons ("APs") of commodity pool operators, commodity trading advisors, futures commission merchants and introducing brokers² must complete the Swaps Proficiency Requirements by January 31, 2021. NFA members with APs required to satisfy these requirements must designate a Swaps Proficiency Requirements Administrator who will be responsible for coordinating enrollment and tracking progress. This Administrator must be someone who is designated as a Security Manager on NFA's Online Registration System.

¹ For more information on NFA's Swaps Proficiency Requirements, please see our client memorandum entitled "NFA Implements Swaps Proficiency Requirements" (April 8, 2019), available [here](#).

² Swap dealers will also have an obligation to ensure that their APs satisfy these requirements, subject to certain exclusions for swap dealers located outside of the United States.

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Dues Surcharge for Swap Firms

NFA Bylaw 1303 was recently amended to impose an annual dues surcharge of \$1,750 on, among others, CPOs and CTAs that may engage in swap transactions. This surcharge will be invoiced to swap-approved or swap-pending NFA member firms for membership dues payable on or after January 1, 2020.

New Requirements for Public Communications and Promotional Materials

NFA recently amended Rule 2-29 and Rule 2-36 and related guidance that establish and interpret certain requirements for NFA member communications with the public and use of promotional material. The amendments are effective January 1, 2020, and, among other things, modernize Rule 2-29 to:

- clarify that the rule applies to all commodity interest activities, not just futures-related activities;
- clarify that “promotional material” includes communications disseminated via text message, instant message or other electronic means; and
- provide greater flexibility with respect to promotional material distributed exclusively to qualified eligible persons (“QEPs”) in terms of required disclaimers and disclosures.

Rule 2-36 was amended to require that NFA Forex Dealer Member promotional material generally comply with Rule 2-29 and its related interpretations.

Amendments to CPO and CTA Disclosure and Performance Reporting Rules

NFA recently amended Rule 2-34 and two interpretive notices related to CPO and CTA disclosure and performance reporting. These amendments will be effective February 1, 2020.

The amendments to *Interpretive Notice: Compliance Rule 2-13: Break-Even Analysis* clarify a variety of matters related to the preparation of a pool’s break-even table. Among other items addressed is the use of interest income to offset expenses in the break-even analysis. The CPO may include interest expected to be earned *only* from high credit quality, short-duration instruments or deposits. In addition, the amendments clarify that the break-even analysis must (i) include all pool expenses, (ii) account for redemption fees, and (iii) be based on both the minimum initial investment amount for a participant and the minimum total subscription amount required for a pool to commence trading.

NFA Rule 2-34 requires a CTA that advises partially funded accounts to have a written agreement with each relevant client detailing the trading program and the nominal size of the account (i.e., the account size that will be used to establish the level of trading in a particular trading program). The amendments will require, among other things, that a CTA that advises a client account that is overfunded (i.e., where actual funds exceed the nominal account size) also enter into a

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written agreement with such client. Such written agreements must include an explanation of how additions, withdrawals and net performance will affect the nominal account size.

New Requirements for Supervision of Branch Offices

Updates to NFA's interpretive notice, *Compliance Rule 2-9: Supervision of Branch Offices and Guaranteed IBs*, become effective January 1, 2020. This notice establishes, among other things, minimum requirements for supervision of branch offices. NFA stated that the updated guidance takes into account advances in electronic trading, communications and other technologies. It also incorporates references to existing anti-money laundering and information systems security program requirements.

Significant aspects of the updated interpretive notice include:

- **Due Diligence Review:** NFA members must now complete a due diligence review prior to establishing a branch office. The review must evaluate whether to establish the branch office and determine the appropriate supervisory oversight structure for such office. In addition, NFA members must ensure that one or more individuals at the branch office are knowledgeable about, and will track developments related to, the Commodity Exchange Act, CFTC regulations and NFA rules.
- **Procedures for Escalating Issues to Regulators:** NFA members must establish written supervisory policies and procedures for branch offices. Notably, under the updated guidance, NFA members must have policies and procedures that address when they will escalate significant findings that are identified during routine supervision and surveillance or annual inspections (e.g., findings related to fraud or customer harm) to NFA and/or other appropriate regulators.
- **Additional Requirements for Supervisory Policies and Procedures:** NFA members must now have policies and procedures related to, among other things, anti-money laundering and information systems security programs that are applicable to the branch office. In addition, members must require APs at a branch office to notify appropriate member personnel if any new circumstances arise that require additional disclosure to such AP's Form 8-R.
- **Annual On-Site Inspection Requirements:** NFA previously required members to conduct on-site inspections of any branch office (and recommended that such inspections occur annually). Pursuant to the updated guidance, NFA members *must* conduct inspections on an annual basis, subject to two exceptions. The first requires NFA members to promptly perform an on-site inspection if they become aware of any irregularities. The second allows NFA members to identify, based on certain factors, branch offices that may be inspected remotely every other year.

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Annual CPO and CTA Affirmation Window is Open

Each entity excluded from the definition of “commodity pool operator” by CFTC Rule 4.5, or exempt from CPO registration by Rule 4.13, must comply with an annual affirmation requirement if the entity wishes to maintain its excluded or exempt status. Each CTA exempt from CFTC registration pursuant to Rule 4.14(a)(8) also must affirm its claim of exemption on an annual basis. Affirmation filings are due within 60 days after the calendar year end. Filings for 2020 may be made at this time by accessing NFA’s Exemption System. Such filings must be made no later than February 29, 2020.

Failure to file a required affirmation by February 29, 2020 will result in the automatic withdrawal of the applicable notice of claim of exemption or exclusion.

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