

CLIENT ALERT

NFA Proposes Rule for Digital Asset Commodity Activity

March 21, 2023

AUTHORS

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On February 28, 2023, National Futures Association submitted the proposed adoption of NFA Compliance Rule 2-51: Requirements for Members and Associates Engaged in Activities Involving Digital Asset Commodities,¹ to the Commodity Futures Trading Commission for approval. In submitting the rule to the CFTC, NFA invoked the “ten day” provision of Section 17(j) of the Commodity Exchange Act, as amended, which allows NFA to make a rule effective as soon as ten days after the CFTC receives the submission. Notably, and for purposes of NFA Compliance Rule 2-51, the term “digital asset commodity” is defined as Bitcoin and Ether.

NFA highlighted that over 100 Members have reported engaging in business activities related to digital assets. NFA indicated further that, with the exception of NFA’s Interpretive Notice 9073,² which sets forth certain disclosure requirements for Members engaging in activities related to virtual currencies or virtual currency derivatives, NFA may otherwise lack authority to discipline Members regarding their digital asset activities in the spot market. NFA Compliance Rule 2-51 would provide NFA with authority to discipline Members engaging in digital asset commodity activities, and address potential fraud and misconduct related to spot digital assets.

¹ National Futures Association, *Proposed NFA Compliance Rule 2-51: Requirements for Members and Associates Engaged in Activities Involving Digital Asset Commodities*, February 28, 2023, available at <https://www.nfa.futures.org/news/PDF/CFTC/030223-Proposed-CR-2-51.pdf> (“NFA Compliance Rule 2-51”).

² For more information regarding NFA’s disclosure requirements for Members engaging in virtual currency transactions, please see our prior client alert [here](#).

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Under NFA Compliance Rule 2-51, NFA Members and associates engaged in digital asset commodities activities, including spot or cash market activities, would be required to comply with the following anti-fraud, just and equitable principles of trade, disclosure and supervision requirements:³

Fraud and Related Matters. No Member or associate engaging in activities involving any digital asset commodity shall:

- i. cheat, defraud, or deceive, or attempt to cheat, defraud or deceive any other person involved in those activities;
- ii. make a communication related to a digital asset commodity that operates as a fraud or deceit; employs or is part of a high-pressure approach; or makes any statement that trading in digital asset commodities is appropriate for all persons;
- iii. willfully make or cause to be made a false report, or willfully enter or cause to be entered a false record in, or in connection with, any transaction involving a digital asset commodity;
- iv. 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 digital asset commodity;
- v. engage in manipulative acts or practices regarding the price of any digital asset commodity; or
- vi. embezzle, steal, or purloin or knowingly convert to its own use or the use of another, any money, securities, digital assets or other property received from or accruing to any person in connection with a transaction involving a digital asset commodity.⁴

Just and Equitable Principles of Trade. Members and their associates are required to observe high standards of commercial honor and just and equitable principles of trade related to the conduct of their business involving any digital asset commodity.⁵

³ NFA Compliance Rule 2-51 expands NFA's traditional supervision and anti-fraud rules to digital asset commodities (NFA Compliance Rules 2-2, 2-36, 2-4, 2-9).

⁴ NFA Compliance Rule 2-51 at 2–3.

⁵ *Id.*

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Disclosure and Related Matters. Members engaged in activities involving digital asset commodities are required to comply with the applicable requirements set forth in NFA's Interpretive Notice 9073.⁶

Supervision. Each Member engaged in digital asset commodity activities must diligently supervise its employees and agents in the conduct of their digital asset commodity activities for or on behalf of the Member. Moreover, each associate that has supervisory duties over a Member's digital asset commodity activities must diligently exercise such duties in the conduct of that associate's digital asset commodity activities for or on behalf of the Member.⁷

NFA, in limiting the applicability of NFA Compliance Rule 2-51 to Bitcoin and Ether, noted that these two digital assets align with prevailing CFTC jurisdiction. NFA further noted that should any additional digital assets be identified as commodities in the future, NFA Compliance Rule 2-51 would be amended accordingly. Looking forward, and absent a notification by the CFTC to NFA that it intends to review the proposal for approval, we expect NFA to issue a notice to Members specifying the effective date for NFA Compliance Rule 2-51.

If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, the [Willkie Digital Works team](#) or the Willkie attorney with whom you regularly work.

Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist on your matters.

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⁶ *Id.*

⁷ *Id.*

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