



INVESTMENT ADVISER  
ASSOCIATION

May 10, 2024

*Via E-mail*

Mr. Christopher Kirkpatrick  
Secretary  
U.S. Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20581

Ms. Carol Wooding  
Senior Vice President and General Counsel  
National Futures Association  
320 South Canal, Suite 2400  
Chicago, IL 60606

**Re: NFA: Proposed Amendments to NFA Bylaw 301 and Proposed Adoption of NFA Compliance Rule 2-52: NFA Member Questionnaire Requirements and the related Interpretive Notice 9082 – NFA Compliance Rule 2-52: Requirements in Connection with NFA’s Member Questionnaire**

Dear Mr. Kirkpatrick and Ms. Wooding:

The Investment Adviser Association (**IAA**)<sup>1</sup> appreciates the opportunity to comment on the NFA Proposal.<sup>2</sup> Some IAA members, as commodity pool operators (**CPOs**) and/or commodity trading advisors (**CTAs**), are members of the NFA (**Members**)<sup>3</sup> and will be impacted

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<sup>1</sup> The IAA is the leading organization dedicated to advancing the interests of fiduciary investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA’s member firms manage more than \$35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit [www.investmentadviser.org](http://www.investmentadviser.org).

<sup>2</sup> See NFA: Proposed Amendments to NFA Bylaw 301 (**Proposed Bylaw 301 Amendments**), and Proposed Adoption of NFA Compliance Rule 2-52: NFA Member Questionnaire Requirements (**Proposed Rule 2-52**) and the related Interpretive Notice 9082 – *NFA Compliance Rule 2-52: Requirements in Connection with NFA’s Member Questionnaire* (Feb. 27, 2024) (**Proposed Interpretive Notice**, and together, the **NFA Proposal**), available at <https://www.nfa.futures.org/news/PDF/CFTC/Proposed-CR-2-52-Interp-Notc-Amend-Bylaw-301.pdf>.

<sup>3</sup> IAA members that are NFA Members are also SEC-registered investment advisers.

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by the NFA Proposal. The NFA filed the NFA Proposal on February 27, 2024 and invoked the “ten-day” provision of Section 17(j) of the Commodity Exchange Act, which allows the NFA to adopt a proposed rule as early as ten days following its submission to the CFTC, unless the CFTC notifies the NFA that it intends to review the proposal.<sup>4</sup> We recognize that the ten-day period has passed without notice to the NFA from the CFTC. However, because the IAA was unable to collect member feedback and prepare a comment letter on the NFA Proposal within this very short time, we request that the Commission and the NFA consider these comments, which urge the NFA to make two changes before the NFA Proposal is finalized and implemented.

Specifically, we recommend that (i) a duly authorized individual, regardless of whether that person is also a principal and a registered associated person (**AP**), should continue to be permitted to sign and submit the Member Questionnaire, and (ii) the Proposed Interpretive Notice should clarify that the list of “material changes” is presumptively material and that the presumption can be rebutted should a Member determine the change not to be material, under its particular facts and circumstances.

Our comments are discussed below.

### **Background of Proposal**

The NFA Proposal would make the following changes to the current Annual Questionnaire process for NFA Members:

First, the NFA would adopt new Compliance Rule 2-52 to (i) change the “Annual Questionnaire” to a “Member Questionnaire,” (ii) require Members to file the Member Questionnaire at least annually, whenever the NFA requests an update, and when there are “material changes” to the Member’s business operations, and (iii) require that the Member Questionnaire be submitted by an individual who is both an AP and a listed principal of the Member.

Second, the Proposed Interpretive Notice would explain the revised Member Questionnaire and provide very detailed and specific examples of what is considered a “material change,” requiring a Member to file an amended Questionnaire under new Rule 2-52.

Third, the Proposed Bylaw 301 Amendments would incorporate the changes made to the Questionnaire by Compliance Rule 2-52 (in Bylaw 301(h)(viii)).

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<sup>4</sup> The ten-day period ended on March 8, 2024. The CFTC did not provide notice to the NFA that it will review the NFA Proposal.

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## **IAA Comments and Recommendations**

While we support the NFA's efforts to increase transparency and improve its oversight, we are concerned with two aspects of the NFA Proposal: (i) the lack of flexibility in the specific category of employee identified in Proposed Rule 2-52 that must sign and submit the amended Questionnaire; and (ii) the prescriptive language in the Proposed Interpretive Notice related to the materiality threshold for filing an amended Questionnaire. We offer recommendations below that we believe would achieve the NFA's policy goals while providing the needed flexibility for Members to implement the amendments.

Given the significant impact to IAA members' business models and workflows from the proposed changes and the lack of sufficient time to comment, we urge the CFTC and the NFA to consider our comments before adopting any amendments.

### **A. A Duly Authorized Individual Should Continue to Be Able to Submit the Member Questionnaire.**

Currently, the Questionnaire may be submitted by a duly authorized individual able to bind the Member.<sup>5</sup> This is consistent with the requirements for submitting other reports, such as financial reports, Form PQR, and Form PR, each of which also requires that the filings "be submitted by a representative duly authorized to bind [the CPO or CTA]."<sup>6</sup> New Rule 2-52, however, will create a much narrower set of individuals authorized to submit the Questionnaire. Specifically, it will require Members to "ensure that the Member Questionnaire and any updates

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<sup>5</sup> Currently, the Annual Questionnaire requires that the individual submitting the form certify that "the Member agrees that such filing constitutes a Member's certification that the answers and the information provided in the Annual Questionnaire are true, complete and accurate and that in light of the circumstances under which the Member has given them, the answers and statements in the Annual Questionnaire are not misleading in any material respect; and certification that the person who electronically files the Annual Questionnaire on behalf of the Member is authorized by the Member to file the Annual Questionnaire and to make these certifications." See Annual Questionnaire User Guide, available at <https://www.nfa.futures.org/electronic-filing-systems/AQ-user-guide.pdf>. Current NFA Bylaw 301 provides that a Member must complete and submit an Annual Questionnaire but does not require that the submission be completed by a particular employee or agent of the Member.

<sup>6</sup> NFA CPO Form PQR Questions & Answers, available at <https://www.nfa.futures.org/faqs/members/CPOFormPQR.html>; NFA CTA Form PR Questions & Answers, available at <https://www.nfa.futures.org/faqs/members/CTAFormPR.html>; CFTC Rule 4.27 (Each oath or affirmation must be made by a representative duly authorized to bind the CPO or CTA). See also pool annual reports certification ("I hereby affirm that, to the best of my knowledge and belief, the information contained in this Annual Report filing is accurate and complete. This submission also constitutes an attestation that I am duly authorized to bind the commodity pool operator..."), available at <https://www.nfa.futures.org/electronic-filing-systems/PFSEasyFileSystemHelp.pdf>.

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required by subsection (b) are reviewed, signed and submitted by an *individual who is a registered associated person and a listed principal of the Member.*<sup>7</sup> (emphasis added.)

Depending on how a Member is structured, it could be extremely burdensome and highly impractical to have a person who is both a principal and an AP submit the filing. In some firms, for example, this narrow category of employees may consist of just a few very senior executives who have delegated day-to-day operations, including the responsibility for ensuring accurate regulatory and SRO filings, to appropriately experienced and knowledgeable employees. As noted above, these duly authorized employees, for example, senior legal personnel or the CCO of a Member, also currently file the annual financial reports, Form PQR, and Form PR, and we do not believe they treat the Annual Questionnaire any less seriously than these other regulatory filings. Nor do we believe that such duly authorized individuals take their obligations any less seriously than would a person who is both a principal of the firm and an AP. In our view, the NFA has not adequately explained why the current process is inadequate or why it is necessary to treat this aspect of the Member Questionnaire differently from financial reports, Form PQR, or Form PR. We are especially concerned because of the additional burdens that would be placed on senior executives who may not be in the best position operationally at their firms to take over this function.<sup>8</sup>

Accordingly, we recommend that the NFA change Proposed Rule 2-52(c) (and the Proposed Interpretive Notice) as follows so that filing requirements remain consistent with other financial filings for CPO or CTA members and provide the needed flexibility for Members not to have to change how they have structured their businesses:

(c) Except for SD and MSP Members (unless the firm is a Member in another NFA Membership category), each Member must ensure that the Member Questionnaire and any updates required by subsection (b) are reviewed, signed and submitted by an individual who is a **representative duly authorized to bind** ~~registered associated person and a listed principal of the Member.~~

This change would continue to ensure that Members appropriately oversee their filings by having a duly authorized employee certify as to their accuracy, thus meeting the NFA's goals of

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<sup>7</sup> Proposed NFA Rule 2-52(c). CFTC Regulation 3.1 defines principal to include a chief compliance officer. *See* NFA Principal Status, available at <https://www.nfa.futures.org/registration-membership/who-has-to-register/principal.html>. An AP is an individual who solicits orders, customers, or customer funds (or who supervises persons so engaged) on behalf of a CTA or CPO. An AP is anyone who is a salesperson or who supervises salespersons for any of these categories of individuals or firms. *See* CFTC Regulation 3.12 and <https://www.nfa.futures.org/registration-membership/who-has-to-register/ap.html>.

<sup>8</sup> We understand that frequently firms delegate the filing responsibility to senior legal personnel, who typically are neither principals nor APs.

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transparency and accountability. At the same time, it would prevent the new rule from needlessly imposing a burdensome, impractical, and unnecessary new obligation on Members.

At the very least, if the NFA feels that it is important to have a person at the level of a principal file the Questionnaire, we respectfully request that it consider not requiring that the person also be an AP. An AP may not be as well positioned as certain non-APs to make the filing, given that this may result in a person in a marketing/distribution role affirming compliance and operational information around the firm and its pools and accounts. Conversely, persons who are more likely to be familiar with the requirements of the Questionnaire and thus well suited to file it, may be principals, but they are unlikely to be APs.<sup>9</sup> Our concerns are exacerbated by the new requirement for more frequent updates than annually, which makes it all the more important that Members have the flexibility to delegate the function to the most suitable person. While we do not believe it is necessary for this person to be a principal, this alternative – i.e., designation of a principal who does not also have to be an AP – would be significantly less burdensome.

**B. The Proposed Interpretive Notice Should Make Clear that its List of “Material Changes” May Be Rebutted Where Appropriate.**

Proposed Rule 2-52(b) would require a Member to promptly file an amendment to the Questionnaire “to disclose *material changes to the Member’s business operations*, which make the information previously submitted in the Questionnaire inaccurate or incomplete.” (emphasis added.) We appreciate that the Proposed Interpretive Notice “recognizes that each Member is in the best position to determine what constitutes a material change in its operations based on the type, size and complexity of the Member’s business.”<sup>10</sup> We urge the NFA to retain some of this flexibility in the list of changes it appears to consider to be *per se* material. While we agree that the listed changes are likely to be material in most cases, there may be situations in which they are not material under the surrounding facts and circumstances. We thus recommend that, instead of setting out a *per se* list, the NFA create a rebuttable presumption of materiality for the listed changes. If a Member determines that one of these changes is not material, it would need to explain that determination.

We thus suggest the following modification to the Proposed Interpretive Notice:

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<sup>9</sup> For instance, a firm’s CCO is by definition a principal but is unlikely to also be an AP. We understand that in many cases, for example, the CCO may sign the Self-Examination Questionnaire, which requires that “an appropriate supervisory person” sign and date a written attestation stating that he/she has reviewed the Member’s operations in light of the matters covered by the questionnaire. See <https://www.nfa.futures.org/members/member-resources/files/self-exam-files/self-exam-questionnaire.pdf>.

<sup>10</sup> Proposed Interpretive Notice.

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However, NFA believes that, unless it can demonstrate that a change listed below is not material under the specific facts and circumstances, a Member should update its Questionnaire if certain changes occur. Specifically, engaging or disengaging in activities relating to: commodity interest products, micro-contracts, retail forex or digital assets, algorithmic trading activities, or cloud computing; a significant increase or decrease in customer accounts; an IB's revenue increases to exceed the designated threshold that would require it to comply with Commodity Futures Trading Commission Regulation 1.35(a)(1)(iii) [footnote omitted]; or, if a CPO has a pool that has just commenced operations.

We believe these modifications to the proposed language will more closely align the Proposed Interpretive Notice with Proposed Rule 2-52 and the well-established understanding of materiality, thereby making it easier for Members to move from an Annual Questionnaire to a potentially more frequent Member Questionnaire and achieve the NFA's objectives without unnecessarily burdening Members.

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We appreciate the Commission's and the NFA's consideration of our comments and recommendations and stand ready to provide any additional information that may be helpful. Please contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein

Gail C. Bernstein  
General Counsel

/s/ Monique S. Botkin

Monique S. Botkin  
Associate General Counsel

cc: The Honorable Rostin Behnam, Chair  
The Honorable Kristin N. Johnson, Commissioner  
The Honorable Christy Goldsmith Romero, Commissioner  
The Honorable Summer K. Mersinger, Commissioner  
The Honorable Caroline D. Pham, Commissioner  
Amanda Olear, Director, Market Participants Division