May 1, 2025

Via Electronic Mail: secretary@cftc.gov

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

Re: National Futures Association: Proposed Interpretive Notice 9083 entitled: *Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons* and Amendments to Other Impacted Interpretive Notices

Dear Mr. Kirkpatrick:

Managed Funds Association ("**MFA**")[1] submits these comments to the Commodity Futures Trading Commission ("**CFTC**" or "**Commission**") in response to the National Futures Association's ("**NFA's**") Proposed Interpretive Notice 9083 entitled *Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons* ("**Proposed Interpretive Notice**") (italics in original).[2] Pursuant to Section 17(j) of the CEA, the Commission should immediately institute a review of the Proposed Interpretive Notice. The NFA Staff failed to address material concerns relating to alternative asset managers. As described below, the Proposed Interpretive Notice gives rise to unreasonable new burdens, is ambiguous, and is not properly tailored to alternative asset managers. For these reasons, the Proposed Interpretive Notice is not in the public interest and the Commission ultimately should reject it absent considerable revision.

More broadly, MFA is concerned that NFA's rules are not appropriately tailored to reflect the business operations of alternative asset managers and urge the NFA to review its regulatory framework to ensure that it meets the current needs of commodity market participants, while considering the impact of any rulemaking on investors, and commodity pool operators ("**CPOs**") and commodity trading advisors ("**CTAs**"). MFA members in the US are also registered with, and subject to comprehensive regulation by, the Securities and Exchange Commission ("**SEC**") as

---

[1] Managed Funds Association ("**MFA**"), based in Washington, D.C., New York City, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest it, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 fund manager members, including traditional hedge funds, private credit funds, and hybrid funds, that employ a diverse set of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

[2] NFA, National Futures Association: Proposed Interpretive Notice 9083 entitled: Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons and Amendments to Other Impacted Interpretive Notices (Apr. 21, 2025), avail. at https://www.nfa.futures.org/news/PDF/CFTC/2020-2029/20250421-Proposed-Interp-Notc-CR2-9-2-36-2-51-Amend-Impacted-Interp-Notices.pdf.

investment advisers under the Investment Advisers Act of 1940 ("**Advisers Act**"). Rather than add complexity to the aggregated regulatory framework, the NFA, the Commission, and the SEC should consider opportunities to streamline the regulatory framework and address costly and unnecessary duplicative regulatory requirements.

MFA wishes to continue to engage constructively with the NFA to address these concerns and ensure that the AP supervision requirements, as well as other NFA rules, are appropriately tailored to the needs and businesses operations of our members.

Executive Summary

The concerns described below were shared with NFA but remain unaddressed in the Proposed Interpretive Notice. Private fund managers that are registered with the NFA and CFTC invariably are registered as investment advisers with the SEC. Any NFA interpretation, guidance or rule therefore should not conflict or be inconsistent with applicable SEC rules.

While we welcome the opportunity to reengage with the NFA Staff to improve the Proposed Interpretive Notice, the Commission should reject the Proposed Interpretive Notice in its current form for the following reasons:

(i) The notice appears to require new recordkeeping rules around pre-trade oral communications for firms that are not otherwise subject to the NFA's rules requiring recording of oral communications;

(ii) It would impose new requirements, particularly around electronic communications review, that are inconsistent with applicable rules and at odds with the growing SEC recognition that electronic communications recordkeeping requirements must be modernized;

(iii) It would impose new requirements that will increase compliance risk and confusion amongst registrants and are unnecessary; and

(iv) Finally, the notice suggests supervisory obligations based on traditional sell-side member firms versus alternative asset management firms with entirely different AP functions and roles.

We discuss each of these items in greater detail below.

1. The Proposed Interpretive Notice appears to require new recordkeeping rules for pre-trade oral communications

Chief among our concerns with the Proposed Interpretive Notice is the discussion of pre-trade communications (and related communications) with customers and counterparties. MFA objects strongly to footnote 9 of the Proposed Interpretive Notice, which states that NFA members that *are not* required to record oral communications "should consider whether it may be appropriate to create, review, and maintain records of oral communications when designing a supervisory program that ensures it is properly supervising its APs' activities."

MFA opposes any suggestion that NFA member firms (not otherwise required to record oral communications) are somehow, otherwise obligated to do so to fulfill supervisory obligations. There is no such requirement under NFA or CFTC rules, and we are unaware of any such requirement under the federal securities laws. Further, the "may be

appropriate" standard is subjective and vague and extremely challenging for any firm's compliance and risk management departments to implement.

There also are additional collateral consequences of the Proposed Interpretive Notice suggesting this entirely new requirement, including the NFA's examination program. MFA is concerned that the Proposed Interpretive Notice would create an expectation with the NFA examination staff to expect memorialization of oral communications where the examinee firm is not specifically required by CFTC Rule 1.35 to do so. It appears Proposed Interpretive Notice, perhaps inadvertently, has increased those required to record communications by merely referring to NFA Rule 2-10. The NFA states that compliance with Compliance Rules 2-10(a) and 2-49 with respect to Required Communications, futures commission merchant ("**FCM**"), introducing broker ("**IB**"), CPO, CTA, and swap dealer members must have appropriate written policies and procedures in place to ensure that they are properly capturing and maintaining these records.

NFA Rule 2-10(a) includes recordings required by CFTC Regulation 1.35, but Rule 2-10(a) is not limited to CFTC requirements. The definition of "Required Communications" as defined in the text accompanying footnotes 8 and 9 is overly broad. The language would appear to state that if an internal conversation is within the definition of a "Required Communication" then according to the Interpretive Notice that Required Communication must be preserved as a requirement of Rule 2-10(a) even when a firm is not subject to CFTC Regulation 1.35. Such a reading also would conflict with footnote 9, which assumes there can be "Required Communications" not subject to recordkeeping, although the Proposed Interpretive Notice suggests that all communications as defined in footnote 8 subject to retention under Rule 2-10(a).

MFA recommends that footnote 9 be deleted from the Proposed Interpretive Notice if it is to move forward, or at a minimum revised to eliminate the "should consider" language from footnote 9. MFA further recommends that the Proposed Interpretive Notice be revised to reflect that CPOs and CTAs are not subject to CFTC Rule 1.35.

2. The Proposed Interpretive Notice seeks to impose off-channel communications requirements that are at odds with evolving regulatory approaches

The Proposed Interpretive Notice would codify an overly broad and unworkable framework for regulating off-channel communications. MFA recommends that the NFA await guidance from the incoming CFTC and SEC Chairmen regarding off-channel communications so that any NFA view can be aligned with evolving regulatory requirements.

The Proposed Interpretive Notice appears strongly at odds with existing rules relating to the manner electronic records must be maintained and preserved. The Proposed Interpretive Notice states that a firm in general does not meet its recordkeeping obligations if an AP screenshots a required communication that happened to take place on a personal device.[3] Such an interpretation, made in this Proposed Interpretive Notice for the first time, is not found in CFTC and SEC recordkeeping rules. While the Proposed Interpretive Notice attempts to address this sweeping interpretation by noting

[3] Proposed Interpretive Notice, at n. 12 and accompanying text.

that unforeseen circumstances may permit the use of screenshots,[4] the Proposed Interpretive Notice sets the standard for the NFA's examination and enforcement staffs: the use of screenshots is a recordkeeping (and thus likely supervisory) violation for the firm and the relevant AP(s). Such an approach is inconsistent with applicable requirements and with a risk-based approach to compliance. If an AP receives a communication from, for example, another AP by means of an off-channel communications platform, should the AP receiving the communication rely on a screenshot? We are unaware of any other approach to preserve the required communication.[5]

MFA acknowledges the importance of recordkeeping, including the various forms of electronic communications subject to applicable recordkeeping rules. The current recordkeeping rules, however, are woefully archaic, with the previous SEC Commission attempting to mold rules adopted in 1961 to the universe of electronic communications used today in all facets of the asset management industry. As SEC Commissioners Peirce and Uyeda noted in a recent enforcement action, under the current standards and antiquated recordkeeping rules "even well-intentioned firms could find themselves in the Commission's enforcement queue time and again."[6] Among other things, they highlighted the "lack of clarity" regarding the types of communications covered by the rules.[7] A widely-held sentiment of the financial services industry broadly, noted by the Commissioners Pierce and Uyeda, is that "Effective deterrence requires persons to understand what conduct is prohibited."[8] MFA agrees.

3. The Proposed Interpretive Notice covers topics already covered extensively in NFA rules, and imposing slightly different requirements on top of existing NFA rules would create confusion and is unnecessary

The Proposed Interpretive Notice is particularly broad in its discussion of all aspects of the AP's career at a member firm: It covers requirements extending from pre-hire qualifications and related due diligence relating to disciplinary or other matters, to (as discussed above) the manner in which the AP communicates with the firm's customers, counterparties, or other firm employees or personnel. These topics are already covered in great detail in existing NFA rules and as such are unnecessary to cover again in the Proposed Interpretive Notice.

---

4 *Id*.

5 MFA also notes that circumstances where the firm and its APs are operating under the firm's business continuity and disaster plan." Using personal devices under such a situation would be appropriate if the firm's systems are inoperable and we request confirmation from the NFA that a disaster would be "exigent."

6 The SEC's more recent settled orders suggest that firms are required to ensure that their "recordkeeping and communications policies and procedures [are] *always* being followed" (emphasis *added). See* In re Qatalyst Partners LP, Sec.Exch.Act Rel. No. 10114 at 5 (Sept. 24, 2024), avail. at https://www.sec.gov/files/litigation/admin/2024/34-101143.pdf (statement of Commissioners Pierce and Uyeda, dissenting).

7 *Id.*

8 *Id.*

MFA notes the following:

- The Proposed Interpretive Notice states that members may fulfill their supervisory obligations by engaging a third-party service provider to assist them in performing certain functions that otherwise would be undertaken by the member firm itself.[9]

  This paragraph is duplicative to NFA Interpretive Notice 9079. To avoid confusion, MFA recommends deleting this discussion in favor of a simple cross-reference to Interpretive Notice 9079.

- The Proposed Interpretive Notice states that part of the due diligence required before hiring an AP is to inquire about disciplinary issues.[10]

  While MFA concurs that disciplinary matters are a critical component of pre-hire due diligence, this discussion in the Proposed Interpretive Notice is duplicative of NFA Interpretive Notice 9010. MFA recommends that this discussion be replaced with a cross-reference to Interpretive Notice 9010.

- The Proposed Interpretive Notice contains an entire section on training for APs.[11]

  The "Training" section, on its face, does not appear to distinguish between this new discussion and the current NFA ethics training rule required in NFA Interpretive Notice 9051. At a minimum, the "Training" section must be revised to at least acknowledge the existing ethics training rules. If the "Training" section is intended to be a new requirement, MFA does not support as the new requirement would be wholly duplicative of existing requirements.

MFA recommends that the Proposed Interpretive Notice be revised to cross-reference the applicable NFA rule to avoid paraphrasing existing rules and creating ambiguity or room for differing interpretations by NFA staff, member firm staff, private litigants, or otherwise.

4. The Proposed Interpretive Notice is drafted towards the business models of traditional sell-side member firms rather than alternative asset management firms having entirely different AP functions and roles

Asset management firms have been subject to NFA membership, examination, and regulation since the CFTC eliminated the exemption for SEC-registered advisers.[12] Many NFA rules, however, including the Proposed Interpretive Notice, are not appropriately tailored to the unique businesses of alternative asset managers. As with other rules, the Proposed Interpretive Notice is drafted from the perspective of a traditional, sell-side FCM or IB that engages APs to

---

9 Proposed Interpretive Notice, *supra* note 2 at p. 4.

10 *Id.* at pp. 4-5.

11 *Id.* at p. 12.

12 Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators, 78 FR 52308 (Aug. 22, 2013), avail. at https://www.govinfo.gov/content/pkg/FR-2013-08-22/pdf/2013-19894.pdf.

perform traditional and static, oftentimes sales- or trading-oriented functions. Such is not the case for an AP of an alternative asset manager that is subject to NFA membership, where the functions of an AP can change rapidly to meet quickly evolving business requirements, often times far removed from the traditional AP functions giving rise to the NFA's supervisory rules.

The Proposed Interpretive Notice attempts to address this by acknowledging different business models, counterparties, resources, and the like.[13] While we agree that NFA members' varying business models require different supervisory systems, the Proposed Interpretive Notice reflects this reality imprecisely, at least for alternative asset managers. Despite the NFA language regarding differing business models, there are many instances in the Proposed Interpretive Notice where the NFA is proposing to codify prescriptive requirements that impose new substantive requirements. The NFA's Interpretative Notice goes far beyond offering guidance on "minimum standards" and instead appears to impose new, highly specific demands on firms through a highly abbreviated rulemaking process absent a meaningful opportunity for public comment or consideration of the potential costs imposed on market participants.

The Proposed Interpretive Notice requires that firm's procedures lay out the "specific tasks"[14] for each AP activity and supervise against those specific tasks. It is unnecessarily cumbersome and often times not feasible for buyside managers to compile and maintain, presumably on a real-time basis, an exhaustive list of every function performed by each AP of an alternative asset management firm. The requirement that, for each AP activity, a firm's policies and procedures must identify the firm's "specific supervisory procedures" to identify potential areas of non-compliance and then obligating a firm to adopt a highly specific and rigid set of review, escalation, and resolution criteria. MFA suggests that such an approach would be overly prescriptive and burdensome for CPOs/CTAs of any size and likely would prove exceedingly difficult.

MFA recommends a preferable and more realistic approach for the NFA. The NFA should comprehensively consider the need for an AP registration and supervisory framework applicable to SEC registered investment advisers. To the extent the NFA believes such a framework is necessary, it should explain why and then, after a reasonable notice and comment period, consider a tailored regulatory framework that can accommodate alternative asset managers. We again note that the prescriptive nature of the Proposed Interpretive Notice appears influential to the NFA's expectations of supervisory procedures, which firms would be obligated to follow to the letter of the Proposed Interpretive Notice. We again anticipate that the NFA Staff would examine against this checklist, much of which would be ill-fitting for many alternative asset management firms.

Conclusion

While MFA appreciates the obligations for NFA members to diligently supervise their APs, the Proposed Interpretive Notice goes too far and is redundant to existing supervisory rules. MFA recommends that the CFTC reject the Proposed Interpretive Notice. The NFA's existing rules have been developed extensively over decades to meet this

---

13 Proposed Interpretive Notice, *supra* note 2, at 2.

14 *Id.*, at pp. 3-4.

important obligation, rendering the Proposed Interpretive Notice unnecessary. If the Commission elects to move forward with the Proposed Interpretive Notice, MFA recommends that its effectiveness be delayed considerably so the NFA may be afforded additional time to consider recommendations from its members, including alternative asset management firms and the investment management industry more broadly.

MFA looks forward to working with the NFA on the Proposed Interpretive Notice upon the Commission delaying of its effectiveness so we can do so constructively. We also welcome the opportunity to discuss our views with you in greater detail. Please do not hesitate to contact Jeffrey O. Himstreet, Vice President & Senior Counsel (jhimstreet@mfaalts.org), or the undersigned (jhan@mfaalts.org), with any questions.

Very truly yours,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Legal Officer and Head of Global Regulatory Affairs

cc: The Hon. Caroline D. Pham, CFTC Acting Chairman
The Hon. Kristin N. Johnson, CFTC Commissioner
The Hon. Christy Goldsmith Romero, CFTC Commissioner
The Hon. Summer K. Mersinger, CFTC Commissioner