

Under the current Interpretive Notice, an NFA member firm is required to adopt enhanced supervisory procedures over its telemarketing activities if the member: (1) Has at least five but less than ten associated persons ("APs") and 50% or more of those APs have been employed by one or more member firms which have been disciplined by the NFA or the Commission for sales practice fraud; (2) has at least ten but less than 20 APs and five or more of those APs have been employed by one or more member firms which have been disciplined by the NFA or the Commission for sales practice fraud; or (3) has 20 or more APs and 25% or more of those APs have been employed by one or more members which have been disciplined by the NFA or the Commission for sales practice fraud.³

Currently, an NFA member firm which meets the above-described criteria is required to tape-record all of its APs' sales solicitations which occur prior to the receipt of a customer's initial deposit and until the first order is received and entered for the customer's account. Firms meeting the criteria must tape-record such solicitations for a one-year period and retain the tapes up until six months after the one-year recording period ends.⁴

Based upon its experience overseeing the current telemarketing supervision requirements, NFA believes that the requirements have reduced the occurrence of widespread telemarketing fraud and have facilitated the gathering of evidence in enforcement actions related to deceptive telemarketing sales practices.

NFA's subject proposal would revise three different aspects of its current telemarketing supervision requirements. NFA contends that its proposed adjustments should increase the effectiveness of these requirements.

First, NFA's proposal would lower the thresholds at which NFA member firms would be required to adopt enhanced telemarketing supervision measures. Under the proposal, a firm would have to implement the enhanced procedures if it: (1) had at least five but less than ten APs and 40% or more of the APs had been previously employed by a

disciplined firm (the current threshold is 50%); (2) had at least ten but less than 20 APs and four or more of the APs had been previously employed by a disciplined firm (the current threshold is five or more APs); and, (3) had 20 or more APs and 20% or more of the APs had previously been employed by a disciplined firm (the current threshold is 25% or more).⁵ The NFA contends that lowering the threshold at which member firms must implement telemarketing supervision measures should offer increased protection from fraudulent telemarketing practices.

Second, NFA's proposal would revise the telemarketing supervision measures for those member firms which met the amended thresholds. Specifically, the proposal would require that such firms tape record all telephone conversations which occurred between their APs and any potential or existing customers. Currently, NFA does not have any taping requirement after a customer's first order is received and entered into the customer's account. NFA has found, however, that in many cases sales practice violations occur after the customer already has begun trading. In order to address this problem, NFA's proposal would expand the taping requirement to all AP-customer conversations.

Third, NFA's proposal would require that firms which were subject to the telemarketing supervision measures must submit their promotional material⁶ to the NFA for approval at least ten days before the marketing material was used.⁷ In support of this measure NFA contends that it has found that member firms which have lax supervisory requirements relating to

⁵ Under NFA's proposal, member firms with fewer than five APs would continue to be exempt from any enhanced telemarketing supervision requirements.

⁶ NFA Compliance Rule 2-29(g) defines "promotional material" to include:

(1) Any text of a standardized oral presentation, or any communication for publication in any newspaper, magazine or similar medium, or for broadcast over television, radio, or other electronic medium, which is disseminated or directed to the public concerning a futures account, agreement or transaction; (2) any standardized form of report, letter, circular, memorandum, or publication which is disseminated or directed to the public for the purpose of soliciting a futures account, agreement or transaction * * *

⁷ It should be noted that NFA already has a "pre-review" program whereby members may voluntarily submit promotional material to NFA staff for review prior to its first use. NFA staff reviews material for consistency with the requirements of Compliance Rule 2-29 and provides its comments to submitting members. Given that NFA staff is not able to review material for factual accuracy, a member who submits promotional material to NFA under the pre-review program does not receive any safe harbor protection with respect to those materials.

telemarketing often have similar lax requirements with respect to the review and use of promotional material.

The Commission also notes that on August 16, 1994, the President signed into law the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), Public Law No. 103-297, which requires that the Federal Trade Commission ("FTC") adopt rules prohibiting various deceptive and abusive telemarketing practices within one year of the enactment of the Telemarketing Act. The Telemarketing Act also added a new Section 6(f) to the Commodity Exchange Act⁸ requiring, subject to certain exceptions, that the Commission "promulgate, or require each registered futures association to promulgate, rules substantially similar" to the FTC rules implementing the Telemarketing Act within six months of the effective date of those rules, unless the Commission determines otherwise.⁹

On February 14, 1995, the FTC published its proposed telemarketing rules.¹⁰ The proposed rules generally prohibit certain deceptive and abusive telemarketing activities as well as establishing various requirements with respect to the time and frequency of telephone solicitations. The FTC published a revised notice of its proposed rules on June 8, 1995.¹¹

Currently, the Commission is reviewing the FTC's proposed rules. The Commission will continue to monitor the FTC's efforts to promulgate telemarketing rules in order to determine whether the Commission's and the NFA's rules provide substantially similar protections.

III. Request for Comments

The Commission requests general comment on NFA's proposed amendment to its Interpretive Notice to Compliance Rule 2-9. The Commission

⁸ § 6(f) of the Act and § 3(e) of the Telemarketing Act.

⁹ Section 6(f)(2) of the Act provides that the Commission is not required to promulgate rules if it determines that:

(1) its rules provide protection from deceptive and abusive telemarketing by persons subject to its jurisdiction substantially similar to that provided by the FTC's rules under the Telemarketing Act; or,

(2) such a rule promulgated by the Commission is not necessary or appropriate in the public interest, or for the protection of customers in the futures and options markets, or would be inconsistent with the maintenance of fair and orderly markets.

If the Commission determines that either of these exceptions applies, it must publish the reasons for its determination in the **Federal Register**.

¹⁰ 60 FR 8313.

¹¹ 60 FR 30406. The FTC's proposed rules generally were revised to address various concerns raised by commenters regarding the original proposed rules.

³ For these purposes, the Interpretive Notice to Compliance Rule 2-9 defines "disciplined member firm" as a firm which: (1) has been formally charged by either the Commission or the NFA with deceptive telemarketing practices; (2) has had those charges resolved; and (3) has been closed down and permanently barred from the futures industry as a result of those charges.

⁴ NFA can grant waivers from these requirements upon a satisfactory showing that a member firm's supervisory procedures provide effective supervision over its employees.