

Therefore, the Commission hereby delegates authority to NFA: (1) To maintain the list of eligible ethics training providers for purposes of Commission Rule 3.34, including the authority to refuse to include persons on such list pursuant to the criteria set forth in Rule 3.34(b)(3)(iii) or criteria established by NFA and approved by the Commission; (2) to establish guidelines as to the required proficiency and experience of ethics training providers; (3) to receive and evaluate complaints concerning such providers and conduct other appropriate reviews of providers' operations, subject to Commission oversight; (4) to develop appropriate procedures to verify certifications filed by potential ethics training providers; and (5) to require that such certifications be updated periodically. NFA's procedures must be submitted to the Commission for review pursuant to Section 17(j) of the Act,¹⁵ which governs Commission review and approval of registered futures association rules.

In its comment letter on the proposed amendments to Rule 3.34, NFA supported the Commission's proposal to delegate responsibility to NFA for the processing and review of applications of prospective ethics training providers and confirmed its willingness to assume this responsibility. However, NFA suggested that the Commission establish objective standards for NFA to follow in discharging these responsibilities. NFA expressed the view that ethics training providers should satisfy a proficiency standard that is objective, readily measurable and would assure that providers possess a working knowledge of the industry and its regulations.

As noted above, the Commission is proposing, by separate Federal Register release, certain minimum requirements with respect to proficiency testing and experience to be applicable to ethics training providers other than SROs. These proposals include a requirement that ethics training providers be subject to the same proficiency testing requirements as the registrants they propose to instruct. This proficiency test will generally be the National Commodity Futures Examination (Series 3 Exam).

The Commission is also proposing to require that ethics training providers other than SROs demonstrate that they have at least three years of pedagogical or relevant industry experience. The Commission's delegation of authority to NFA includes authority to establish guidelines concerning the specific types of proficiency tests and experience

necessary to satisfy these requirements.¹⁶ Of course, NFA may submit to the Commission for decision any specific matters which have been delegated to it and Commission staff will be available to discuss with NFA staff issues relating to the implementation of these rules, including the review of operations of ethics training providers.

C. Permissible Representations

To date, in granting the applications of persons seeking to provide ethics training, the Commission has made clear that it is not approving the specific content of the proposed ethics training program or expressing any opinion as to the program's quality or accuracy. The Commission believes that it is appropriate to clarify by rule the effect of authorization to provide ethics training under Rule 3.34 for all providers. Accordingly, the Commission proposed in Rule 3.34(b)(5) to prohibit any representation or implication that an ethics training provider has been sponsored, recommended or approved, or the provider's abilities or qualifications or the content, quality or accuracy of the training program provided, has in any respect been passed upon or endorsed by the Commission, a registered futures association, or any representative thereof.

The commenters voiced no objections to this proposed provision. However, one commenter requested that the effective date of these rule amendments be delayed for ninety days for existing ethics training providers to enable them to modify their presentations and materials to comply with the adopted changes. The Commission believes that all providers should be given ninety days in which to comply with the requirement to include the specified statement in promotional and instructional material. Therefore, the effective date of Rule 3.34(b)(5) will be ninety days following publication, rather than thirty days following publication, which is the effective date for all other provisions.

Accordingly, the Commission has adopted Rule 3.34(b)(5) to provide that no SRO, state-accredited continuing education entity or other person included on a list of ethics training

providers "may represent or imply in any manner whatsoever that such person has been sponsored, recommended or approved, or that such person's abilities or qualifications, the content, quality or accuracy of his training program, or the positions taken in the course of resolving any actual or hypothetical situations presenting ethical or legal issues,"¹⁷ have in any respect been passed upon or endorsed, by the Commission or a registered futures association." Rule 3.34(b)(5) further provides that any promotional or instructional material used in connection with ethics training "must prominently state that the Commission and any registered futures association have not reviewed or approved the specific content of the training program and do not recommend the provider of such training."¹⁸

In the July 1994 release, the Commission also proposed to limit the use an ethics training provider may make of that status in certain adjudicatory proceedings. As stated in the proposing release, the Commission did not believe that a person should be able to use his or her status as an ethics training provider to qualify as an expert witness or to present expert testimony in an adjudicatory proceeding before the Commission or to which the Commission is a party. While the commenters voiced no objections to this provision, the Commission, upon reconsideration of this issue, has determined that the prohibitions of the representations specified in paragraph (b)(5) should suffice to bar inappropriate use of status as an ethics training provider. Therefore, the Commission has not adopted proposed paragraphs (b)(5)(ii) and (b)(5)(iii) of Rule 3.34, which would have limited certain uses of status as an ethics training provider. However, the Commission emphasizes that inclusion on the list of authorized ethics training providers should not be viewed as a warranty of expertise and that in its view such status should not be accorded weight in determinations of the provider's qualifications as an expert witness.

D. Videotape and Electronic Presentations

Commission Rule 3.34(b)(3) provides that a program of ethics training may be

¹⁶In comparable areas, such as registration and review of promotional material, the Commission has delegated authority to NFA to develop and implement specific standards and, in those instances, NFA has established standards above the minimum levels previously established by the Commission or set forth in the Act. See, e.g., NFA Rule 2-8(d) (minimum experience requirements for an associated person to exercise discretion over an account).

¹⁷This additional language has been added to clarify the proposal and is consistent with the intent of Rule 3.34.

¹⁸Rule 3.34(b)(5) also contains a proviso that it "shall not be construed to prohibit a statement that a person is included on a list of ethics training providers maintained by a registered futures association if such statement is true in fact and if the effect of such a listing is not misrepresented."

¹⁵ 7 U.S.C. 21(j)(1994).