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Commodity Pool Operators

CPO Compliance Series: Marketing and Promotional Materials (Part Two of Three)

By Stephen A. McShea, Cary J. Meer and Lawrence B. Patent

Commodity pool operators (CPOs) that must soon register with the U.S. Commodity Futures Trading Commission (CFTC) and become members of the National Futures Association (NFA) because of the rescission of the CFTC Regulation 4.13(a)(4) registration exemption will shortly need to undertake numerous CFTC and NFA compliance obligations. One of the key compliance obligations arises from CFTC Regulation 4.41 and NFA Compliance Rule 2-29, each of which sets forth various prohibitions and guidelines for marketing activities and promotional materials for both CPOs and commodity trading advisors (CTAs). In certain instances, these guidelines require very specific disclosures and statements to be included in the promotional materials. While these prohibitions and guidelines are similar to those contained in Section 206 of the Investment Advisers Act of 1940 (Advisers Act) and related Securities and Exchange Commission (SEC) no-action guidance concerning advertising materials, the CFTC and NFA guidelines have a few specific requirements, and applications of those requirements, that are different from those applicable to SEC-registered investment advisers. A newly registered CPO and/or CTA may find that its current promotional materials and review practices may not satisfy some of the CFTC's and NFA's guidelines or may not comply with the manner in which the NFA may apply those guidelines. This article discusses in detail the CFTC and NFA prohibitions and guidelines for marketing activities and promotional materials for CPOs and CTAs contained in CFTC Regulation 4.41 and NFA Compliance Rule 2-29 and its related interpretive notices and provides practical guidance on how to comply with these prohibitions and guidelines.

This article is the second of a three-part series of articles that focus in detail on various compliance obligations of CPOs under CFTC and NFA regulations and guidance. The first article addressed NFA Bylaw 1101, which addresses conducting business with non-NFA members. See "CPO Compliance Series: Conducting Business with Non-NFA Members (NFA Bylaw 1101) (Part One of Three)," The Hedge Fund Law Report, Vol. 5, No. 34 (Sep. 6, 2012). The third article will address reporting of principals and registration of associated persons. For additional coverage of each of these topics and the topics discussed in this article, see "Do You Need to Be a Registered Commodity Pool Operator Now and What Does It Mean If You Do? (Part One of Two)," The Hedge Fund Law Report, Vol. 5, No. 8 (Feb. 23, 2012).

Background: CFTC Regulation 4.41 and NFA Compliance Rule 2-29

General

CFTC Regulation 4.41 and NFA Compliance Rule 2-29 govern advertising by CPOs and CTAs and are applicable to all marketing activities and promotional materials produced by a CPO and/or CTA.[1] Both CFTC Regulation 4.41 and NFA Compliance Rule 2-29 provide general prohibitions against fraudulent or deceptive advertising

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and require specific statements to accompany certain types of marketing presentations that include simulated or hypothetical performance. NFA Compliance Rule 2-29 also requires specific statements to accompany marketing material that includes statements regarding the possibility of profit and actual past trading profits. While the language of CFTC Regulation 4.41 focuses expressly on the term advertising and sets forth a list of the items to which its prohibitions and requirements apply, NFA Compliance Rule 2-29 instead applies its general prohibitions to *any* communication with the public and then focuses on the content of promotional material.

CFTC Regulation 4.41

CFTC Regulation 4.41(a) prohibits a CPO[2] or any of its principals from advertising in a manner which:

1. Employs any device, scheme or artifice to defraud any participant or client or prospective participant or client;
2. Involves any transaction, practice or course of business which operates as a fraud or deceit upon any participant or client or any prospective participant or client; or
3. Refers to any testimonial,[3] unless the advertisement or sales literature providing the testimonial prominently discloses: (i) that the testimonial may not be representative of the experience of other clients; (ii) that the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, the fact that it is a paid testimonial.

Following this set of prohibitions and guidelines, CFTC Regulation 4.41 goes on to require the inclusion of a specific disclaimer in connection with the use of any "simulated or hypothetical" performance. CFTC Regulation 4.41(b). Although CFTC Regulation 4.41(b) includes express language for the disclaimer, in order to comply with NFA Compliance Rule 2-29, it is the NFA Compliance Rule 2-29 disclaimers, some of which are set out in detail below under "NFA Compliance Rule 2-29 and Related Interpretive Notices – Hypothetical Results," that should be used in connection with simulated or hypothetical performance.

The CFTC Regulation 4.41 prohibitions and guidelines apply to "any publication, distribution or broadcast of any report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice, whether by electronic media or otherwise, including information provided via internet or e-mail, the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations." CFTC Regulation 4.41(c)(1).

NFA Compliance Rule 2-29 and Related Interpretive Notices

NFA Compliance Rule 2-29, together with its various related interpretive notices,[4] governs communications with the public and promotional materials. NFA Compliance Rule 2-29 sets forth: (i) general prohibitions regarding communications with the public; (ii) general prohibitions and specific guidelines regarding the content of promotional material; (iii) specific restrictions and guidelines, including disclaimers regarding the use of hypothetical performance; (iv) supervisory and recordkeeping requirements; and (v) approval requirements for radio and television advertisements. The related interpretive notices provide additional guidance on the purpose and application of some of these prohibitions and guidelines.

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General Prohibitions

Under the general prohibitions of NFA Compliance Rule 2-29(a), an NFA member may not make any communication with the public which:

1. operates as a fraud or deceit;
2. employs or is part of a high-pressure approach; or
3. makes any statement that futures trading is appropriate for all persons.

The NFA views the general prohibitions of items (1) and (2) above as the central underpinnings of its guidelines on promotional materials for its members. In NFA Interpretive Notice 9025, in which the NFA discussed its consideration of whether to allow its members to use hypothetical performance (discussed below), the NFA noted that "the ultimate test of any promotional material is whether the overall impact of the material is misleading or is likely to deceive the public." Within that context, importantly, the NFA went on to note in Interpretive Notice 9025 that: "The fact that an [NFA member] has printed the disclaimer required pursuant to NFA Compliance Rule 2-29 and that the promotional material is in facial compliance with [Interpretive Notice 9025] does not ensure that material is not misleading."

Examples of sales activities that have led to enforcement cases by the NFA for high-pressure sales tactics are set out in NFA Interpretive Notice 9038 and include: (i) rushing the customer through the account opening forms and glossing over the risk disclosure; (ii) a pattern of telephone calls which are unusual in their timing or frequency – late at night, early in the morning, several times a day or several days a week for weeks on end; and (iii) bullying or abusive tone.

Promotional Material Content Guidelines and Prohibitions

NFA Compliance Rule 2-29 defines "promotional material" as including: "(i) [a]ny 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; (ii) any standardized form of report, letter, circular, memorandum or publication which is disseminated or directed to the public; and (iii) any other written material disseminated or directed to the public for the purpose of soliciting a futures account, agreement or transaction." NFA Compliance Rule 2-29(i). The NFA considers websites promotional material.

Under the promotional material content guidelines of NFA Compliance Rule 2-29(b), an NFA member may not "use any promotional material which:

1. is likely to deceive the public;
2. contains any material misstatement of fact or which the Member or Associate knows omits a fact if the omission makes the promotional material misleading;
3. mentions the possibility of profit unless accompanied by an equally prominent statement of the risk of loss;
4. includes any reference to actual past trading profits without mentioning that past results are not necessarily indicative of future results;
5. includes any specific numerical or statistical information about the past performance of any actual accounts (including rate of return) (i) unless such information is and can be demonstrated to NFA to be representative of

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the actual performance for the same time period of all reasonably comparable accounts, and (ii) in the case of rate of return figures, unless such figures are calculated in a manner consistent with CFTC Regulation 4.25(a)(7)[5] for commodity pools . . . ; or

6. includes a testimonial that is not representative of all reasonably comparable accounts, does not prominently state that the testimonial is not indicative of future performance or success and does not prominently state that it is a paid testimonial (if applicable).

In addition to the above guidelines, NFA Compliance Rule 2-29 also expressly requires that any statements of opinion in promotional material "must be clearly identifiable as such and must have a reasonable basis in fact." NFA Compliance Rule 2-29(d).

Hypothetical Results

Hypothetical results in CPO marketing materials must contain specific disclaimers as set forth in NFA Compliance Rule 2-29(c) and comply with other elements of NFA Compliance Rule 2-29(c). The rule addresses hypothetical results based on employing a particular trading system of the NFA member or associate or on a composite in the case of a record showing what a multi-advisor account portfolio or pool could have achieved. It is important to note, however, that the NFA Compliance Rule 2-29(c) restrictions and requirements on the use of hypothetical trading results do not apply to promotional material directed solely to persons who qualify as a "Qualified Eligible Person" (or QEP) as defined in CFTC Regulation 4.7(a), which includes a qualified purchaser as defined in Section 2(a)(51)(A) of the Investment Company Act of 1940 (Investment Company Act). Accordingly, the NFA Compliance Rule 2-29(c) restrictions and requirements on the use of hypothetical trading results will likely not apply to CPOs managing and marketing solely privately offered funds relying on the exclusion from the definition of investment company contained in Section 3(c)(7) of the Investment Company Act, as such funds would normally be operating in reliance on the CFTC Regulation 4.7(b) exemption.[6] For a detailed discussion of the CFTC Regulation 4.7(b) exemption, see "Do You Need to Be a Registered Commodity Pool Operator Now and What Does it Mean If You Do? (Part Two of Two)," The Hedge Fund Law Report, Vol. 5, No. 19 (May 10, 2012).

The form of disclaimer required under NFA Compliance Rule 2-29(c)(1) with respect to hypothetical performance results of a particular trading system is set forth below. It is important to note that this disclaimer is not an example, but rather, represents the actual disclaimer (both in content and in font, i.e., all caps) that is required and that the NFA expects to see:

> HYPOTHETICAL PERFORMANCE RESULTS HAVE MANY INHERENT LIMITATIONS, SOME OF WHICH ARE DESCRIBED BELOW. NO REPRESENTATION IS BEING MADE THAT ANY ACCOUNT WILL OR IS LIKELY TO ACHIEVE PROFITS OR LOSSES SIMILAR TO THOSE SHOWN. IN FACT, THERE ARE FREQUENTLY SHARP DIFFERENCES BETWEEN HYPOTHETICAL PERFORMANCE RESULTS AND THE ACTUAL RESULTS SUBSEQUENTLY ACHIEVED BY ANY PARTICULAR TRADING PROGRAM.
>
> ONE OF THE LIMITATIONS OF HYPOTHETICAL PERFORMANCE RESULTS IS THAT THEY ARE

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GENERALLY PREPARED WITH THE BENEFIT OF HINDSIGHT. IN ADDITION, HYPOTHETICAL TRADING DOES NOT INVOLVE FINANCIAL RISK, AND NO HYPOTHETICAL TRADING RECORD CAN COMPLETELY ACCOUNT FOR THE IMPACT OF FINANCIAL RISK IN ACTUAL TRADING. FOR EXAMPLE, THE ABILITY TO WITHSTAND LOSSES OR TO ADHERE TO A PARTICULAR TRADING PROGRAM IN SPITE OF TRADING LOSSES ARE MATERIAL POINTS WHICH CAN ALSO ADVERSELY AFFECT ACTUAL TRADING RESULTS. THERE ARE NUMEROUS OTHER FACTORS RELATED TO THE MARKETS IN GENERAL OR TO THE IMPLEMENTATION OF ANY SPECIFIC TRADING PROGRAM WHICH CANNOT BE FULLY ACCOUNTED FOR IN THE PREPARATION OF HYPOTHETICAL PERFORMANCE RESULTS AND ALL OF WHICH CAN ADVERSELY AFFECT ACTUAL TRADING RESULTS.[7]

If the CPO has less than one year of experience managing either outside investor funds or its own proprietary accounts, the disclaimer must also contain the following:

(THE MEMBER) HAS HAD LITTLE OR NO EXPERIENCE IN TRADING ACTUAL ACCOUNTS FOR ITSELF OR FOR CUSTOMERS. BECAUSE THERE ARE NO ACTUAL TRADING RESULTS TO COMPARE TO THE HYPOTHETICAL PERFORMANCE RESULTS, CUSTOMERS SHOULD BE PARTICULARLY WARY OF PLACING UNDUE RELIANCE ON THESE HYPOTHETICAL PERFORMANCE RESULTS.

In addition to including these disclaimers, as necessary, use of hypothetical performance based on employing a particular trading system must include comparable information in the promotional material regarding: "(i) past performance results of all customer accounts directed by the [NFA member] pursuant to a power of attorney over at least the last five years or over the entire performance history if less than five years; [and] (ii) if the [NFA member] has less than one year of experience in directing customer accounts, past performance results of his proprietary trading over at least the last five years or over the entire performance history if less than five years." NFA Compliance Rule 2-29(c)(3).

Hypothetical performance based on employing a particular trading system is prohibited if the NFA member has three months of actual trading results for that system. NFA Compliance Rule 2-29(c)(4).

Supervisory and Recordkeeping Requirements

NFA Compliance Rule 2-29(e) requires the adoption and enforcement of written procedures for the supervision of an NFA member's employees for compliance with the rule. In addition, prior to its first use, all promotional material must be "reviewed and approved, *in writing*, by an officer, general partner, sole proprietor, branch office manager or other supervisory employee other than the individual who prepared such material" unless prepared by the only individual qualified to do the review and approval. If the NFA member is an SEC-registered broker-dealer and the promotional material specifically refers to security futures products, then the individual reviewing and approving the promotional material must be a designated security futures principal. NFA Compliance Rule 2-29(e) (emphasis added).

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In addition to the supervisory requirement, NFA Compliance Rule 2-29(f) sets out recordkeeping requirements that require a CPO to keep copies of all promotional materials along with a record of the approval of such materials and the supporting data for any performance information presented. These records must be made available for NFA examination, kept for five years and must be readily accessible for the first two years as prescribed by CFTC Regulation 1.31.

Radio and Television Advertisements

Although these types of advertisements are not, as of the date of this article, currently relevant for managers of private funds given the current restrictions on general solicitation and general advertising contained in Rule 506 of Regulation D promulgated under the Securities Act of 1933, that may change upon adoption of final rules by the SEC pursuant to the Jumpstart Our Business Startups Act (JOBS Act). See "JOBS Act: Proposed SEC Rules Would Dramatically Change Marketing Landscape for Hedge Funds," The Hedge Fund Law Report, Vol. 5, No. 34 (Sep. 6, 2012). In the event that CPOs operating private funds were eventually to engage in radio and television advertising, if such advertising "makes any specific trading recommendation or refers to or describes the extent of any profit obtained in the past that can be achieved in the future," then such advertisements must be submitted to the NFA's Promotional Material Review Team for its review at least 10 days prior to its first use (or lesser time if allowed by the NFA). NFA Compliance Rule 2-29(h).

How to Comply

General

CPOs that are also SEC-registered advisers should review their Advisers Act compliance procedures concerning marketing materials and update them to comply with the CFTC's and NFA's guidelines. Where a CPO does not already have marketing materials compliance policies and procedures, or would prefer not to work CFTC and NFA compliance policies and procedures into any Advisers Act compliance manual, a simple set of policies and procedures on marketing materials can be created by outlining the requirements of the regulations and rules discussed in this article and then setting out the general approach that the firm will take to comply with them.

Beyond this general approach, the following are some specific steps a CPO should consider taking to comply with certain of the marketing and promotional material guidelines discussed in this article, in particular where NFA's guidelines and/or the application of those guidelines may differ from those of the SEC.

Statements on Possibility of Profit and Actual Past Trading Profits

Although item (3) of NFA Compliance Rule 2-29(b) (mention of possibility of profit without an equally prominent statement of the risk of loss) is effectively identical to one of the SEC advertising guidelines set forth in the Clover Capital no-action letter,[8] and thus CPOs that are SEC-registered advisers may already have some disclosure in their marketing materials to address this, it is important to keep in mind that the manner in which the NFA requires compliance with this item may differ from that of the SEC. In particular, the presentation of a performance chart showing a fund's performance over a period of time with positive returns has been viewed by NFA staff as the mention of the possibility of profit that then triggers the requirement for an equally prominent statement of potential

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for risk of loss, even where such a chart shows both ups and downs in performance. In addition, the NFA staff expects express language in immediate proximity to the performance disclosure or chart (i.e., immediately under or above a performance chart) and in the same size font. A simple statement to the effect that past performance is not indicative of future results in itself is not viewed by the NFA as satisfying the NFA Compliance Rule 2-29(b)(3) requirement. These are items that the NFA staff reviews closely in routine exams.

A form of disclosure that the NFA has found acceptable to comply with each of items (3) and (4) of NFA Compliance Rule 2-29(b) is as follows: "Past performance is no guarantee of future results and an investment in [FUND NAME] could lose value." Another example of express disclosure for item 3 is as follows: "An investment in any investment vehicle or security described in this report can lose value." An example of a detailed, broad general disclosure for addressing both items (3) and (4) of NFA Compliance Rule 2-29(b), which could be included at the end of a CPO's promotional material (in addition to but not in place of the above), is as follows:

> **Past performance is no guarantee of future results.** There can be no assurance nor should it be assumed that future investment performance of [the fund] will conform to any performance examples set forth in this report or that the [fund's] investments will be able to avoid losses. The investment results and portfolio compositions set forth in this report are provided for illustrative purposes only and may not be indicative of the future investment results or future portfolio composition of the [fund]. The composition, size of, and risks associated with an investment in the [fund] may differ substantially from the examples set forth in this report. An investment in the [fund] can lose value.

A lengthy disclosure such as the above could be included in a disclosures section at the end of the promotional material, and the shorter, prior examples should be included immediately under or at least on the same page as the presentation of performance. CPOs that are also SEC-registered investment advisers should review their marketing material disclosures on these issues with an eye to both the express disclosure language used and the location of those disclosures. Disclosures solely at the end of the marketing materials will not be sufficient.

Supervisory Requirements

If they do not already have them, CPOs should create a form to be used for the reviewer to sign off on their marketing material and/or a procedure for signoff via e-mail. A signoff form could include initial lines for relevant parties or departments involved in preparing and reviewing the applicable portions of the marketing material and a signature line to be signed by the appropriate reviewer to comply with NFA Compliance Rule 2-29(e) – that is, an officer, general partner, sole proprietor, branch office manager or other supervisory employee other than the individual who prepared the marketing material. The process of collecting any initials and a written signoff could be done by manually collecting initials of involved parties and a signoff signature or electronically via e-mail with all signoff e-mails attached to the signoff form. These signoff sheets should be prepared in connection with each piece of marketing material, and each update thereto, and the forms should be saved in an appropriate file (either hard copy or electronic) that is easily accessible in the event of an NFA exam.

Use of Testimonials

Although included in the discussion summary of NFA Compliance Rule 2-29(b)'s guidelines and prohibitions,

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CPOs that are SEC-registered investment advisers should note that Advisers Act Rule 206(4)-1 expressly prohibits any registered adviser from publishing, circulating or distributing any advertisement that "refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser." The SEC staff has, however, permitted the use of *bona fide*, unbiased third-party reports if they do not include a statement of a client's or an investor's experience with or endorsement of the adviser, and third-party ratings (as long as client responses to surveys are an insignificant factor in determining the rating).[9]

NFA Review

Although this article is not expressly advocating this approach, as a service to its members, the NFA will review a member's marketing material prior to its first use. Members that wish to use this service must submit their material to the NFA's Compliance Department at least 21 calendar days prior to its first intended use.[10] This material should be directed to:

National Futures Association
Advertising Regulatory Team
Suite 1800
300 S. Riverside Plaza
Chicago, IL 60606

Promotional material may also be filed in any electronic format at art@nfa.futures.org. In either case, the material must include a cover letter from a principal or firm contact, but may direct NFA staff to provide comments to another person at the firm. In addition, NFA members may ask general questions about promotional material or NFA Compliance Rule 2-29 by contacting NFA's Information Center at (312) 781-1410 or (800) 621-3570 or through the "contact" feature of NFA's web site at www.nfa.futures.org. Interpretive Notice 9009: NFA Compliance Rule 2-29: REVIEW OF PROMOTIONAL MATERIAL PRIOR TO ITS FIRST USE.

Stephen A. McShea is the General Counsel and Chief Compliance Officer of Larch Lane Advisors LLC, a CFTC-registered CPO and SEC-registered investment adviser that specializes in early-stage investing through its funds of hedge fund platform and its hedge fund seeding platform. In his role at Larch Lane, Mr. McShea manages and supervises all legal and regulatory operations of Larch Lane, including: structuring domestic and offshore private funds of funds offerings and managing the funds' ongoing compliance obligations; negotiating and structuring founder class and seed investments in start-up and early-stage hedge funds; structuring credit facilities for domestic and offshore funds; implementing compliance policies and procedures; and preparing SEC and NFA filings. Mr. McShea is also an Adjunct Professor of Law at Fordham University School of Law, where he teaches a class on investment adviser and hedge fund regulation.

Cary J. Meer is a partner in K&L Gates' Washington, D.C. office and a member of the Investment Management practice group. She provides compliance advice to registered investment advisers, CPOs and CTAs, and assists firms in registering as investment advisers, CPOs and CTAs. She also structures and organizes private investment companies, including hedge and private equity funds and funds of funds as well as assists institutional investors in investing in private funds.

Lawrence B. Patent is of counsel in K&L Gates' Washington, D.C. office. Prior to joining K&L Gates, Mr. Patent was Deputy Director of the CFTC's Division of Clearing and Intermediary Oversight. His principal areas of concentration are investment management,

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commodity futures, financial services and derivatives matters. Mr. Patent's experience includes substantial involvement with all of the CFTC regulations related to intermediaries, including registration and fitness, sales practices, disclosure, reporting, recordkeeping, minimum financial requirements, customer funds protection, international trading, foreign currency, anti-money laundering, bankruptcy, risk assessment and managed funds.

[1] Note that CFTC Regulation 4.41 by its terms applies to both registered CPOs and CTAs and exempt CPOs and CTAs. NFA Compliance Rule 2-29 applies only to NFA members. See CFTC Regulation 4.41(c)(2).

[2] Note that these prohibitions and guidelines also apply to CTAs. The focus of this article, however, is solely on CPOs.

[3] Note that a CPO that is an SEC-registered investment adviser is prohibited, except in limited circumstances, under the Advisers Act from using testimonials. See discussion under "How to Comply – Use of Testimonials."

[4] The NFA has released a series of interpretive notices covering various portions of NFA Compliance Rule 2-29. While some of these notices are referenced in this background discussion, a detailed discussion of all of these notices is beyond the scope of this article. These notices are as follows and all may be found on the NFA's website: 9003 – NFA COMPLIANCE RULE 2-29: COMMUNICATIONS WITH THE PUBLIC AND PROMOTIONAL MATERIAL (Board of Directors, Nov. 19, 1985); 9009 – NFA COMPLIANCE RULE 2-29: REVIEW OF PROMOTIONAL MATERIAL PRIOR TO ITS FIRST USE (Staff, May 1, 1989); 9025 – COMPLIANCE RULE 2-29: USE OF PROMOTIONAL MATERIAL CONTAINING HYPOTHETICAL PERFORMANCE RESULTS (Board of Directors, Feb. 1, 1996); 9033 – NFA COMPLIANCE RULE 2-29: DECEPTIVE ADVERTISING (Board of Directors, Jun. 4, 1996); 9034 – NFA COMPLIANCE RULE 2-29: DECEPTIVE ADVERTISING (Board of Directors Sep. 2, 1998); 9038 – NFA COMPLIANCE RULE 2-29: HIGH PRESSURE SALES TACTICS (Staff, Jun. 19, 1996); 9039 – NFA COMPLIANCE RULES 2-29 AND 2-9: NFA'S REVIEW AND APPROVAL OF CERTAIN RADIO AND TELEVISION ADVERTISEMENTS (Board of Directors, Mar. 28, 2000); and 9055 – NFA BYLAW 1101, COMPLIANCE RULES 2-9 AND 2-29: GUIDELINES RELATING TO THE REGISTRATION OF THIRD-PARTY TRADING SYSTEM DEVELOPERS AND THE RESPONSIBILITY OF NFA MEMBERS FOR PROMOTIONAL MATERIAL THAT PROMOTES THIRD-PARTY TRADING SYSTEM DEVELOPERS AND THEIR TRADING SYSTEMS (Board of Directors, Aug. 19, 2004, effective Jan. 10, 2005).

[5] CFTC Regulation 4.25(a)(7) requires that return figures be supported by the following amounts, calculated on an accrual basis in accordance with generally accepted accounting principles: (A) The beginning net asset value for the period, which shall be the same as the previous period's ending net asset value; (B) All additions, whether voluntary or involuntary, during the period; (C) All withdrawals and redemptions, whether voluntary or involuntary, during the period; (D) The net performance for the period, which shall represent the change in the net asset value net of additions, withdrawals and redemptions; (E) The ending net asset value for the period, which shall represent the beginning net asset value plus or minus additions, withdrawals, redemptions and net performance; (F) The rate of return for the period, which shall be calculated by dividing the net performance by the beginning net asset value. . .; and (G) The number of units outstanding at the end of the period, if applicable."

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Under the SEC staff's guidance, gross performance may be shown in certain limited circumstances, such as in one-on-one presentations to wealthy clients. See Investment Company Institute, SEC No-Action Letter (pub. avail. Sept. 23, 1988). Although the NFA rule would appear not to permit the showing of gross performance in the manner permitted by SEC staff guidance, the NFA staff appears to be willing to permit gross performance to be shown to wealthy clients if it is either accompanied by disclosure of net performance or an example showing the effect of compounding of fees is provided.

[6] Note that the definition of "U.S. person" contained in Rule 902(k) of Regulation S under the Securities Act of 1933 and the definition of "Non-United States person" contained in CFTC Regulation 4.7(a)(1)(iv) are not exactly the same. Therefore, all Section 3(c)(7) funds may not be composed solely of QEPs.

[7] There is a similar prescribed legend when including hypothetical composite performance of a multi-advisor account portfolio or pool in promotional material. See NFA Compliance Rule 2-29(c)(2).

[8] Clover Capital Mgmt., Inc., SEC No-Action Letter 1986 WL 67379 (Oct. 28, 1986).

[9] See Silverman, New York Investors Group, Inc., SEC No-Action Letter, 1982 WL 29455 (pub. avail. Sept. 7, 1982); Stalker Advisory Services, SEC No-Action Letter, 1994 WL 49843 (pub. avail. Jan. 18, 1994); DALBAR, Inc., SEC No-Action Letter, 1998 WL 136415 (pub. avail. Mar. 24, 1998); Investment Adviser Association, SEC No-Action Letter (pub. avail. Dec. 2, 2005).

[10] If the member intends to use any radio or television advertisement or any other audio or video advertisement distributed through media accessible by the public that contains any specific trading recommendation or refers to or describes the extent of any profit obtained in the past that can be achieved in the future, or promotes security futures products distributed through media accessible by the public, the member must submit the advertisement to NFA's Advertising Regulatory Team for its *review and approval* at least 10 days prior to first use or such shorter period as NFA may allow in particular circumstances.