



NATIONAL FUTURES ASSOCIATION

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September 22, 2006

Received CFTC
Records Section

9/22/06

Via E-Mail (secretary@cftc.gov)

Ms. Eileen Donovan
Acting Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

COMMENT

**Re: Advertising by Commodity Pool Operators, Commodity Trading
Advisors, and the Principals Thereof**

Dear Ms. Donovan:

National Futures Association (NFA) is committed, first and foremost, to protecting investors. As discussed below, the requirements in the Commission's proposed amendments to CFTC Regulation 4.41 already apply to NFA Members through our rules. The Commission's proposal would ensure that they also apply to CPOs and CTAs who are either exempt from registration or who provide trading advice without directly managing customer accounts. Therefore, we support each of the proposed changes.

Regulation 4.41(b)(2) currently provides that a CPO or CTA must prominently display the prescribed disclosure for hypothetical results. The Commission proposes amending this rule to clarify that the disclosure must be in immediate proximity to those results. NFA Compliance Rule 2-29's requirements and the interpretive notice to that rule entitled "Use of Promotional Material Containing Hypothetical Performance Results," *NFA Manual*, ¶ 9025, govern the use by NFA Members of hypothetical performance results. Similar to the Commission's proposed amendments, NFA's interpretive notice requires that the disclaimer immediately precede or follow the performance results.¹ These requirements have been an effective deterrent to the use of misleading hypothetical performance results by NFA Members.

The Commission also proposes to amend Regulation 4.41 to require advertisements that use testimonials to provide additional disclosures. Again, this is a current NFA requirement imposed upon NFA Members. Specifically, NFA Compliance

¹ NFA interpreted Compliance Rule 2-29 to require that the CFTC's hypothetical results disclaimer be in near proximity to the hypothetical results even before adopting the interpretive notice. See, e.g., *In re Minogue Investment Company, Inc.*, Case No. 98-APP-006 on appeal from Case No. 96-BCC-012 (NFA APP May 26, 1999).

Rule 2-29(b)(6) prohibits the use of testimonials unless they are representative of reasonably comparable accounts, the promotional material prominently states that the testimonials are not indicative of future performance or success, and paid testimonials prominently state that fact.²

NFA's current rules are also consistent with the Commission's clarification that Regulation 4.41 applies to performance results presented in electronic media. NFA Compliance Rule 2-29(i) defines promotional material to include "communication for broadcast over television, radio, or other electronic medium."³

These NFA rules have proven effective in protecting customers from misleading information without placing undue burdens on NFA Members. Making similar amendments to the Commission's rules will do the same for customers of CPOs and CTAs that are not subject to NFA requirements. Therefore, we fully support the Commission's proposals.

If you have any questions concerning this letter, please contact me at 312-781-1413 or tsexton@nfa.futures.org.

Respectfully submitted,

Thomas W. Sexton
Vice President and General Counsel

cc: Lawrence B. Patent (lpatent@cftc.gov)

m:/ham/commentletters/ cpoctaadvertising

² Misleading testimonials were prohibited by the general provisions of Compliance Rule 2-29 even before NFA adopted these specific requirements. See, e.g., *In re MBH Commodity Advisors, Inc.*, 96-BCC-015 (NFA HP May 4, 1998) *aff'd*, 98-APP-004 (NFA App. Comm. February 19, 1999).

³ NFA has applied this rule to materials posted on websites. See, e.g., *In re MBH Commodity Advisors, Inc.*, 98-APP-004 on appeal from 96-BCC-015 (NFA APP February 19, 1999).