

firms that had previously been exempted because they had fewer than five APs. The revised Notice also treated FCMs and all of their guaranteed IBs as a single firm for purposes of determining whether the enhanced supervision requirements are triggered. In addition, the definition of a Disciplined Firm was expanded to include firms that have been closed down or permanently barred from the industry solely as a result of promotional material violations.

The Board's 2001 changes to the Notice have achieved their desired effect of adding a number of potentially problematic firms to the group of Members that are required to tape record all conversations with customers and prospects. However, NFA's Telemarketing Procedures Waiver Committee ("Waiver Committee") has granted waiver requests made by several of the newly included firms because the Committee felt that, under their particular circumstances, those firms did not pose a threat to the public and should not be subject to mandatory taping.

Some waivers have been granted in cases where the AP whose prior employment at a Disciplined Firm triggered enhanced supervisory requirements had worked at such a firm for only a short period of time or a long time ago. NFA staff reviewed the employment histories of APs who have worked at Disciplined Firms with regard to their tenure at and the passage of time since such employment to determine if the current triggering criteria can be further refined so as to affect the fewest number of Members while capturing the problem firms that concern the Board.

NFA staff studied a variety of data related to the employment histories of APs who worked for Disciplined Firms. The data was broken down to identify APs with a cumulative tenure of fewer than 60 days with a Disciplined Firm as well as those with fewer than 30 days. Other tables identified APs for whom at least 5, 7 or 10 years had passed since they had last worked at such a firm. Staff also considered the backgrounds of other firms that the APs had worked at and the APs' personal disciplinary histories.

After analyzing this data, it became apparent that when a cumulative tenure of less than 60 days at Disciplined Firms was combined with the passage of more than 10 years since employment with a Disciplined Firm, the resulting group of APs did not have an atypical number of disciplinary actions taken against them and they tended to currently work for firms that did not cause concerns about sales practice training and experience.

Currently, 27 active APs fit the profile of those that have been employed for a cumulative total of less than 60 days at a Disciplined Firm more than 10 years ago and of these 27, only 2 have worked at any other firms that have been charged with violations related to sales practices or promotional material. Both of those actions resulted in settlements in which the firm paid a fine. Not one of the active APs has ever personally been the subject of any disciplinary action by NFA, the CFTC or an Exchange.

Based upon this data, the Board felt that the triggering criteria in the Notice can be further refined while still achieving the Board's desire to impose supervisory enhancements on firms that cause concern. Not including these APs for purposes of calculating whether a Member was subject to enhanced supervision would serve the efficiency and fairness of the Waiver Committee's function by altogether removing some non-problematic firms from the waiver process. The Board, therefore, amended the Notice so that APs who have been employed for a cumulative total of less than 60 days at a Disciplined Firm more than 10 years ago would not be included in the triggering criteria.

The Board also amended the term "Disciplined Firm" in the Notice. Currently, the term Disciplined Firm as it is defined in the Notice includes Members that have been barred by NFA or the CFTC for deceptive sales practices or promotional material. With the advent of trading in security futures products and at the request of the Securities and Exchange Commission, the Board amended the definition of a Disciplined Firm set out in the Notice to include broker-dealers that have been barred from doing business by the SEC or NASD because of deceptive sales practices involving security futures. The Board felt that including these firms would promote NFA's mandate of customer protection and is consistent with the Board's reason for establishing enhanced supervisory requirements. Under the proposed expanded definition of a Disciplined Firm, a Member would be required to count individuals who have been trained at and worked for either Member or non-Member broker-dealers that have been barred by the NASD and SEC for using dishonest sales practices to market security futures products when determining whether the composition of the Member's sales force triggers an obligation to tape and to abide by the other enhanced supervisory requirements established in the Notice.

2. Statutory Basis

The rule change is authorized by, and consistent with, Section 15A(k) of the Act.⁵

B. Self-Regulatory Organization's Statement on Burden on Competition

The rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act and the Commodity Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NFA did not publish the rule changes to the membership for comment. NFA did not receive comment letters concerning the rule changes.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(7)(B) of the Act,⁶ the proposed rule change became effective on March 17, 2003.

Within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Act.⁷

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change conflicts with the Act. Persons making written submissions should file nine copies of the submission with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments also may be submitted electronically to the following e-mail address: rule-comments@sec.gov. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference

⁵ 15 U.S.C. 78o-3(k).

⁶ 15 U.S.C. 78s(b)(7)(B).

⁷ 15 U.S.C. 78s(b)(1).