

Act.⁴ Some of the firms that are affected by this rule change could be broker-dealers registered under Section 15(b)(11).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

NFA has prepared statements concerning the purpose of, and basis for, the proposed rule change, burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. These statements are set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 1993, NFA's Board adopted an Interpretive Notice to NFA Compliance Rule 2-9 that requires firms that employ a significant number of Associated Persons ("APs") who have previously worked at a Disciplined Firm to adopt enhanced supervisory procedures, including tape recording all conversations between APs and customers. Since 1993, the Interpretive Notice has defined a Disciplined Firm as one that meets the following three criteria:

1. The firm has been formally charged by either the CFTC or NFA with deceptive telemarketing practices or promotional material;
2. Those charges have been resolved; and
3. The firm has been closed down and permanently barred from the industry as a result of those charges.

Last month, the question was raised as to the proper interpretation of the phrase "closed down and permanently barred," as used in the third criterion. This issue arose in the context of a settlement of an NFA Business Conduct Committee ("BCC") sales practice complaint alleging telemarketing fraud against a south Florida firm.

The firm went out of business in February 2001 and withdrew its NFA membership and CFTC registration in April 2001. Although NFA had informed the firm that it was under investigation in the spring of 2001, the BCC issued the sales practice Complaint against the firm in October 2001 and the Complaint was settled in October 2002. Under the terms of the settlement, the firm agreed to be permanently barred from NFA membership.

The firm maintains that it should not be considered a "Disciplined Firm," under the Interpretive Notice, because it does not meet the third criterion listed above. Specifically, the firm argues that it was not "closed down" as a result of the charges in the recent BCC Complaint since it had already gone out of business and withdrawn its CFTC registration and NFA membership when the Complaint was issued.

NFA staff does not agree with the firm's position. NFA has always taken the view that "closed down" and "permanently barred" describe the same thing, namely, a *final* resolution in a sales practice case which results in a permanent bar and closure of a firm. Although it is true that, in this case, the firm ceased operations and withdrew its NFA membership prior to the issuance of the Complaint, there was nothing to prevent the firm from reapplying for NFA membership and resuming business. It was not until the firm agreed to be permanently barred from NFA membership in settlement of the BCC Complaint that the firm was finally and irreversibly "closed down and permanently barred" as contemplated by the Interpretive Notice.

If the firm's interpretation were to prevail, any firm that is the subject of a sales practice investigation could merely cease operations, prior to the issuance of a Complaint, reopen under a different name and, thereby, avoid being designated as a "Disciplined Firm." Such a result would neutralize the Interpretive Notice and render it useless. Therefore, NFA's Board determined to clarify the interpretive notice by deleting the phrase "closed down" from the third criterion.

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.⁶

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,⁷ the proposed rule change became effective on December 9, 2002.

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.⁸

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 Room. Copies of these filings also will be available for inspection and copying at the principal office of NFA. Electronically submitted comments will be posted on the Commission's Web site (<http://www.sec.gov>). All submissions should refer to File No. SR-NFA-2002-07 and should be submitted by February 6, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

J. Lynn Taylor,

Assistant Secretary.

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⁴ 15 U.S.C. 78o(b)(11).

⁵ 15 U.S.C. 78o-3(k).

⁶ 15 U.S.C. 1.

⁷ 15 U.S.C. 78s(b)(7)(B).

⁸ 15 U.S.C. 78s(b)(1).

⁹ 17 CFR 200.30-3(a)(75).