

## COVID-19 AND BUSINESS CONTINUITY: NOT U.S. FUTURES REGULATORS' FIRST DISASTER<sup>1</sup>

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Even though the severity of business and social disruption caused by the COVID-19 pandemic<sup>3</sup> is unprecedented, the occurrence of disruption itself is not entirely unexpected. These events (*i.e.*, disruptions) continue to happen with increasing frequency and severity, making it a near certainty that disruptive events will happen again in the future, and industry participants should expect the unexpected.<sup>4</sup> In response to the recurring disruptions over the past two decades, U.S. and global regulators have made several recommendations and promulgated regulatory and compliance obligations that require market participants to design and implement business continuity and di-

aster recovery (BCDR) plans, as well as corresponding policies and procedures.

The COVID-19 pandemic, of course, stands out from previous disruptions in both its severity and scope of global impact.<sup>5</sup> The purpose of this paper is to analyze specific actions taken by U.S. derivative regulators in response to the COVID-19 pandemic and how businesses and regulators responded to this unprecedented challenge within the framework of already established BCDR guidelines. The author concludes the paper with several suggestions as to how existing BCDR requirements should be updated, promulgated, or revised with a focus on the jurisdictional scope of the Commodity Futures Trading Commission (CFTC) and the National Futures Association (NFA).<sup>6</sup> As suggested in this paper, BCDR preparedness needs to apply equally to those regulated by the CFTC and the NFA (and by other self-regulatory organizations (SROs)), as well as the regulators themselves-*i.e.*, the CFTC, the NFA and the SROs.

<sup>1</sup>A prior version of this paper was presented at the Futures Industry Association (FIA) Virtual Law & Compliance (L&C) Division Conference on April 30, 2021.

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## 1. BUSINESS CONTINUITY AND DISASTER RECOVERY REQUIREMENTS

Currently, BCDR guidelines are mandatory for entities that are registered with the CFTC, but that is not to say that non-registrants (such as large commodity traders or de minimis swap dealers) should not implement BCDR policies and procedures even if undertaken voluntarily by the participant and implemented in response to guidance or advisement by the CFTC, NFA or the SROs. In theory, seeking widespread industry preparedness for a disruption event reduces systemic risk, may help prevent contagion, and may generally help to reduce economic loss on a net basis.

Section 1 of this paper summarizes and analyzes the requirements of the existing BCDR guidelines, as well as what the voluntary guidelines should be (please see [Appendix 1](#) below for further references to the rules and guidance discussed in this section).

### (a) GENERAL GUIDELINES FOR BCDR

In response to Hurricane Sandy's significant impact on financial markets,<sup>7</sup> the staff of the CFTC, the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) issued a detailed advisory<sup>8</sup> in August 2013 (BCDR Joint Staff Advisory), which was drafted after conducting a review of select market participants' BCDR planning. They suggested that regulated firms focus on the following areas to ultimately improve their BCDR plans:

- Preparation for widespread disruption;
- Planning for alternative locations;

- Telecommunications services and technology;
- Communications plans;
- Regulatory and compliance considerations; and
- Reviewing and testing.

The BCDR Joint Staff Advisory provided a holistic overview of what an effective BCDR plan should encompass and how enhancements can be discovered and implemented to test efficiency of BCDR policies and procedures. The BCDR Joint Staff Advisory is the first comprehensive regulatory analysis of how financial markets participants should respond to a major disruption event. Likewise, preparation for this advisory gave the regulators an opportunity to analyze (and share information cross-industry) about disruption-related events and their impact on market participants, and to provide advice on mitigating risks associated with these adversities. In sum, this was the first time these regulators identified and analyzed categories of disruption as well as their consequences and identified what both market participants and regulators should expect in the event of a wide-scale disruption.

One of the key recommendations in the BCDR Joint Staff Advisory was to consider either alternate locations for staff or a possibility of working from home. Another recommendation stressed that telecommunications networks should be able to handle the flow of data.<sup>9</sup>

With the onset of the 2020 COVID-19 pandemic, these principles and recommendations were put to the test by market participants and regulators alike. The outcomes of this "test" are

discussed below in the context of CFTC and NFA relief.

*(b) MANDATORY BCDR—THE CFTC*

The CFTC has promulgated or proposed to promulgate a number of BCDR requirements for designated contracts markets (DCMs), swap execution facilities (SEFs), derivatives clearing organizations (DCOs), futures commission merchants (FCMs), commodity pool operators (CPOs), commodity trading advisors (CTAs), introducing brokers (IBs), swap dealers (SDs) and major swap participants (MSPs).

In 2010, the CFTC issued a notice of proposed rulemaking (BCDR NPRM)<sup>10</sup> wherein the CFTC proposed to establish standards for recovery and resumption of trading and clearing operations by DCMs and DCOs that the CFTC determines to be critical financial markets or core clearing and settlement organizations in the event of a wide-scale disruption affecting such entities' trading or clearing operations. As the BCDR NPRM came less than two years after the financial crisis of 2008, the CFTC was concerned that a systemically significant financial utility, such as a DCM or a DCO, could cause irreparable damage to the U.S. financial system.

In its BCDR NPRM, the CFTC stated, in relevant part,

“These proposed standards would require such entities [*i.e.*, DCMs and DCOs] to maintain business continuity and disaster recovery resources sufficient to meet a same-day recovery time objective for trading and clearing, and maintain geographic dispersal of infrastructure and personnel sufficient to enable achievement of a same-day recovery time objective, in the event of a wide-scale disruption. The proposed amend-

ments also revise application guidance and acceptable practices under the Core Principles for DCMs relating to business continuity and disaster recovery matters that would harmonize acceptable practices for DCMs and DCOs.”

Shortly thereafter, the U.S. Congress enacted the Dodd-Frank Act of 2010<sup>11</sup> in response to the 2008 financial crisis, further amending core principles applicable to DCMs and DCOs and usurping the CFTC's effort to finalize its BCDR rulemaking. Nevertheless, the principles originally envisioned in the NOPR were mostly codified in subsequent CFTC rulemakings and brought to fruition via industry implementation.

For example, with respect to registered SDs and MSPs, it is a requirement under 17 C.F.R. § 23.603 to design and implement a BCDR plan “that outlines the procedures to be followed in the event of an emergency or other disruption of its normal business activities.” The provision goes on to state that “. . . the [BCDR] plan shall be designed to enable the swap dealer or major swap participant to continue or to resume any operations by the next business day with minimal disturbance to its counterparties and the market, and to recover all documentation and data required to be maintained by applicable law and regulation.”<sup>12</sup>

The essential components of the SD BCDR are similar to the principles set forth in the BCDR Joint Staff Advisory, and require:

- Identification of the documents, data and infrastructure essential to operation of the SD or MSP;
- Identification of the supervisory personnel and responsible employees for implementation of the BCDR plan;

- A plan to communicate in the event of emergency with employees, counterparties, and all critical components of the business infrastructure, such as DCOs, SDRs, banks, etc.;
- Procedures for and the maintenance of back-up facilities and alternate staffing;
- Maintenance of back-up facilities, systems and infrastructure;
- Back-up or copying with sufficient frequency of documents and essential data for continued operations; and
- Identification of potential business interruptions encountered by third-parties that are essential to continued operations and a plan to minimize these interruptions.

To become registered as a SD/MSP, an entity needs to demonstrate to the CFTC and the NFA that it meets these requirements. This BCDR requirement was subsequently enforced by the CFTC in a complaint filed against Deutsche Bank in 2016 where the CFTC alleged that Deutsche Bank did not have sufficiently effective BCDR policies. As a result, according to the CFTC's complaint, data loss sustained by the bank due to an outage was far in excess of the data loss that would have happened if the SD had more effective and adequate BCDR policies and procedures as required by § 23.603.<sup>13</sup>

In another example, the CFTC promulgated the rules and core principles for SEFs in 2013 and as required by the Dodd-Frank Act of 2010.<sup>14</sup> Applying BCDR related requirements to SEFs, Core Principle 14-System Safeguards, § 37.1401(a)(3) requires a SEF to address BCDR planning and resources, which includes: “. . .

regular, periodic testing and review of BCDR capabilities and controls and . . . any other elements of BCDR planning and resources included in generally accepted best practices.”

Further, even though CFTC's BCDR NPRM was not finalized with respect to DCMs,<sup>15</sup> all DCMs have implemented a form of BCDR plan.<sup>16</sup> For example, the CME adopted Rule 983<sup>17</sup> that requires its clearing members to implement and periodically test their BCDR procedures and has sanctioned various DCOs/DCMs/clearing members for failure to comply.<sup>18</sup>

### (c) MANDATORY BCDR—THE NFA

The NFA is responsible for managing the registration process of most market participants regulated by the CFTC, as well as serving as the day-to-day overseer of their operations. Most of these registered market participants are NFA members required to comply with NFA's rules and advisories.

Subsequent to the September 11, 2001 attacks, the NFA promulgated new Rule 2-38 and Interpretative Notice 9052 in April and June of 2003, respectively. NFA's Rule 2-38 requires all NFA members (*i.e.*, FCM, IB, CPO, CTA, FDM (RFEDs), and since 2012 SDs<sup>19</sup> as provided in NFA Rule 2-49) to establish and maintain a written BCDR plan that “outlines procedures to be followed in the event of an emergency or significant business disruption.” This rule also requires members to provide the NFA with the names of critical management employees and the location and address of alternate sites.

NFA Interpretative Notice 9052 explains that NFA members have the “flexibility to adopt a [BCDR] Plan tailored to their individual needs.

NFA recognizes that the exact form of the Plan adopted by the Member will vary based on a number of factors, including the size and complexity of Member's business . . .” The Notice further provides:

“A Plan should address the following, as applicable:

- Establishing back-up facilities, systems, and personnel that are located in one or more reasonably separate geographic areas from the Member's primary facilities, systems, and personnel (*e.g.*, primary and back-up facilities should be located in different power grids and different telecommunication vendors should be used), which may include arrangements for the temporary use of facilities, systems, and personnel provided by third parties;
- Backing up or copying essential documents and data (*e.g.*, general ledger) on a periodic basis and storing the information off-site in either hard-copy or electronic format;
- Considering the impact of business interruptions encountered by third parties and identifying ways to minimize that impact; and
- Developing a communication plan to contact essential parties such as employees, customers, carrying brokers, vendors and disaster recovery specialists.”

As noted above, many of these principles were carried over to CFTC Regulation § 23.603 as it applies to SDs and MSPs.

Further, to ensure compliance, the NFA requires that its members complete the annual questionnaire—a part of which specifically provides a set of questions to assess NFA members' compliance with the BCDR plans (Self Examination Questionnaire Appendix B).<sup>20</sup> In addition to self-assessment, the NFA conducts periodic examinations of its members and, since 2003, NFA examinations evaluate and test the effectiveness of BCDR plans.

Other U.S. financial regulators, such as SEC

and FINRA, have also either adopted or proposed rules to implement BCDR policies. Subsequent to the 2013 BCDR Joint Staff Advisory, the SEC had proposed several actions aimed at strengthening regulated entities BCDR responses.<sup>21</sup>

#### (d) *RECOMMENDED BCDR*

A large number of participants in commodity derivatives markets are not registered with either the CFTC or the NFA, and therefore are not subject to the requirements to design and implement BCDR plans. However, it had become market practice to design such plans and to periodically test them even before the outbreak of the COVID-19 pandemic. Many of these commodity traders are critical components in the supply chain of interstate and international commodity trade; failure of these entities could produce devastating effects equivalent to a business disruption of regulated entities.

It is clear that market and business practices that have emerged during 2020 and 2021 will fundamentally change the way businesses operate for the foreseeable future. Market participants and their personnel are now accustomed to a new mode of operation, and critical agents (such as traders) may not regularly operate from centralized locations. Internal compliance systems and related policies and procedures were forced to adapt to the rapid developments brought about by the pandemic, ultimately broadening firm capabilities and operations.

The COVID-19 pandemic posed unprecedented challenges to the CFTC, NFA, SROs and regulated entities and their counterparties that required a unique and expedient regulatory response within the framework already established by the NFA, CFTC, SROs and commodity and

derivatives traders. Below we discuss specific actions the CFTC and the NFA have taken to ensure that the businesses continue to operate during the pandemic in the environment of extreme volatility and COVID-19 related restrictions, and as former CFTC Chairman H. Tarbert testified, these steps demonstrate that the CFTC is “on the job.”<sup>22</sup>

### *(e) CFTC’S REQUIREMENTS FOR BCDR UNDER COVID-19*

As further discussed below, CFTC relief in many instances is premised on registrants having and maintaining efficient BCDRs and specifically, only if the BCDR requires in writing that employees must work from locations other than the normal business site, certain relief is available (*e.g.*, time-stamping or recording oral conversations).<sup>23</sup>

Further, CFTC noted that registrants, and specifically with respect to associated persons (APs), “are continuing to exercise appropriate supervision of their APs under business continuity plans, adjusted as they deem prudent in light of social distancing arrangements or other measures in response to the COVID 19 epidemic.”<sup>24</sup> This statement not only confirms that all registrants must have BCDR, but that these policies must be continuously adjusted to meet current requirements.

## 2. CFTC, NFA: RESPONSES TO DISASTERS

### *(a) COVID-19 REGULATORY RESPONSES*

Although the CFTC and NFA established a significant foundation of BCDR regulation prior to the onset of the COVID-19 pandemic (in addi-

tion to that set forth by other regulators such as the SEC,<sup>25</sup> FINRA and U.S. Prudential Regulators), the duration, severity and unpredictability of the pandemic necessitated a more targeted response.<sup>26</sup> As noted above, previous disasters, disruptions and emergencies were of a more sporadic and ephemeral nature, although the effects were undoubtedly catastrophic (*e.g.*, the September 11, 2001 attacks or Hurricane Sandy). No regulator had expected that virtually the entire personnel of regulated entities would be required to work from home under “stay-at-home” state orders and that the pandemic would persist for over a year. Even though telecommunications technologies have significantly improved since 2001, the CFTC and NFA nevertheless had to provide specific relief and guidance.

### *(i) CFTC*

The CFTC’s response tackled the pandemic in five aspects: (i) the day-to-day supervisory guidance to regulated entities during their transition to a predominantly out-of-office and work from home workforce (*e.g.*, periodic calls to SDs to ensure they continue operating); (ii) CFTC staff relief to allow market participants to continue operating while not being able to meet certain regulatory requirements (*e.g.*, voice recordings, time-stamping, or physical presence of personnel); (iii) regulatory relief to extend compliance deadlines in recognition of the pandemic’s lingering effects and nature (*e.g.*, two extensions of the initial margin compliance phases); (iv) market monitoring in the environment of extreme volatility (the crude oil futures negative prices in April 2020); and (v) enforcement, enforcement advisories and monitoring of fraud in the new business environment.

Please see [Appendix 2](#), which lists CFTC

orders and rules promulgated in response to the COVID-19 pandemic. Consistent with BCBS/IOSCO, the CFTC extended compliance deadlines for IM compliance to September 1, 2021 for Phase 5 entities and to September 1, 2022 for Phase 6 entities.

Please also refer to [Appendix 3](#) for an enumerated list of CFTC staff's no-action letters issued in response to the COVID-19 pandemic. These staff relief actions can be grouped into the following categories:

- (i) absence of required personnel due to work from home orders or the inability to ensure physical presence of the employees of the regulated entities-*i.e.*, *locational relief*;
- (ii) inability to record certain conversation, time stamp and maintain such records as an audit trail-*i.e.*, *recordkeeping relief*;
- (iii) inability to timely submit certain reports, such as SD's CCO's annual report-*i.e.*, *reporting relief*;
- (iv) floor brokers and inability of foreign brokers to comply with some provisions of § 30.5-*i.e.*, *supervisory relief*;
- (v) inability to meet certain capital requirements for FCMs and IBs-*i.e.*, *compliance relief*;
- (vi) inability to submit finger-prints for NFA registration for APs and principals-*i.e.*, *technical compliance relief*.

In addition to regulatory relief, the staff of the CFTC continued to police markets for fraudulent activities related to COVID-19 conditions. In July 2020, the CFTC filed its first enforcement complaint against James Walsh of Florida, who committed several violations of the CEA and claimed that: "he was earning even greater trading profits now that the COVID-19 pandemic had impacted the financial markets," and that "the returns in forex continue to grow as the rest of the financial world continues to suffer."<sup>27</sup>

Later, on September 28, 2020, the CFTC charged Kensley Ramos of Georgia in operating an unlawful commodity pool. According to the complaint, "Ramos falsely promised individuals the ability to profit from the COVID-19 pandemic by trading in off-exchange foreign currency (forex) and binary options with guaranteed 300% weekly returns."<sup>28</sup>

In sum, the CFTC has addressed a number of specific regulatory requirements that would have been inadvertently violated due to an impossibility of market participants to comply.<sup>29</sup> It is clear that business practices and technologies that have emerged during 2020/2021 will necessitate a review of CFTC's and NFA's specific and technical requirements.

#### (ii) NFA

The NFA was also tasked with ensuring that its members are able to continue operating with minimal disruption. For example, the NFA issued reporting relief regarding CPO-PQR and CTA-PR filings, compliance notification relief relating to branch office location, and technical compliance with the fingerprinting requirements. Please see [Appendix 4](#) for a list of NFA COVID-19 related actions. In the example of NFA's regulation of "branch offices," under NFA's existing rules-technically a "branch office" is found wherever an AP or a principal works, which can be one's apartment or remote work location. Given that virtually all of NFA's members' APs in a matter of one week started to work from home, technically thousands of new "branch offices" immediately emerged absent notification of NFA, as well as branch managers not satisfying examination requirements (*i.e.*, Series 30) or assurances of general compliance.<sup>30</sup>

As with the CFTC actions, it is clear that the NFA will need to further analyze its rules and interpretive notices to provide greater flexibility to comply with the CEA, CFTC rules and regulations as well as NFA rules in emergency situations.

### (iii) DISCUSSION OF SPECIFIC RELIEF

Recognizing the importance of COVID-19 relief, the CFTC had dedicated a separate webpage for COVID-19 specific relief, orders, advisories as well as related enforcement actions.<sup>31</sup> Most of the relief was issued in the form of time-limited no action letters (NAL), and upon expiry of the relief period several but not all NALs were extended.<sup>32</sup> Below we discuss these CFTC actions in greater detail.

#### (A) *Locational Relief*

Inability to be present physically in the office or the usual place of business for an extended period of time presented many significant practical and regulatory challenges to CFTC registrants and NFA members. Floor brokers (FBs), as the name implies, were unable to be located at or on the trading “floor” of DCMs (to the extent these DCMs still have physical trading floors). Affected FBs were able to receive relief provided that DCM’s BCDR plans allowed in writing and provided for FBs’ off-site locations.<sup>33</sup>

As noted above, the APs listed at a specific branch office location were not able to meet NFA’s “branch office” requirements due to shelter in place state orders, and accordingly additional relief had to be provided to these APs.<sup>34</sup>

#### (B) *Recordkeeping Relief*

##### (1) Time-Stamping

Time-stamping is one of the requirements under CFTC Regulation § 1.35. However, given that some of the employees of SEFs or DCMs were mandated to not be present at their offices, it was impossible to adequately assure that time-stamping of trading records was properly conducted. This relief allows the time-stamping within a minute to meet the § 1.35 conditions.<sup>35</sup>

Similarly, the CFTC followed up with specific relief for SEFs’ voice trading personnel<sup>36</sup> who were not able to be present at SEFs’ normal business sites and therefore were unable to comply with several recordkeeping provisions of the CEA and CFTC Regulations.<sup>37</sup> As with other similar relief, voice trading personnel of SEFs are nevertheless required to create alternative records (*e.g.*, written or electronic) of relevant transactions and the SEFs themselves must continue recording all relevant transactions. Similar relief from CFTC Regulation § 1.35 was issued to DCMs, in addition to relief specific to DCMs, which involved time-stamping block trades as well as exchanges of related position orders.<sup>38</sup>

The CFTC also provided similar time-stamping relief to FCMs and IBs, provided, however, that one of the conditions in such relief stated that the absence from the regular place of business must be required under “the registrant’s written business continuity plan.” The time-stamping record must otherwise be prepared to the nearest minute as required under CFTC Regulations § 1.35 and § 155.3.<sup>39</sup> Similar relief was extended to FBs (provided that they also comply with the requirements of BCDR of DCMs where they have trading privileges);<sup>40</sup> to RFEDs (includ-



ing under CFTC Regulation § 5.18)<sup>41</sup> and to SDs (including under CFTC Regulation § 23.202).<sup>42</sup>

## (2) Oral Communications

As with time-stamping, with respect to recording of oral communications, FCMs and IBs received relief provided that “the personnel required to use recorded lines are required by the registrant’s written business continuity plan to be absent from their normal business site,” the registrants maintain written or handwritten notes where all relevant aspects of the communications are recorded as required under CFTC Regulation § 1.35, and that these notes are provided by the employee to the registrant and maintained under CFTC Regulation § 1.31.<sup>43</sup>

Similar relief was provided to FBs, provided that they comply with BCDR plans of DCMs where they have trading privileges. The same relief was extended to RFEDs,<sup>44</sup> and SDs, including under CFTC Regulation § 23.202.<sup>45</sup>

## (C) Reporting Relief

CFTC provided relief for FCMs, IBs,<sup>46</sup> SDs<sup>47</sup> and SEFs<sup>48</sup> related to furnishing the chief compliance officer (CCO) annual compliance report (ACR) to the CFTC, provided such report was due before September 1, 2020 and provided it was furnished to the CFTC within 30 days of the date when it was otherwise required.

In addition, the CFTC provided relief to registered CPOs from several reporting requirements depending on the size of the CPO. Specifically, with certain conditions, relief applied to filing Form CPO-PQR under CFTC Regulation § 4.27, commodity pool Annual Reports under CFTC Regulations § 4.7(b)(3) and § 4.22(c), and com-

modity pool Periodic Account Statements under CFTC Regulations §§ 4.7(b)(2) or 4.22(b).<sup>49</sup>

## (D) Compliance Relief

As discussed above, FBs that are not located at the DCM’s trading floor technically must register as an IB with the NFA. The CFTC provided relief from IB registration where such displacement occurred, provided that the DCM’s written BCDR plan prohibits the on-site presence of the FB.<sup>50</sup>

Due to unprecedented market volatility, several market participants experienced valuations that far exceeded reasonably expected swaps valuation in the ordinary course of business. An insured depository institution (IDI) filed for CFTC no-action relief from registering as an MSP given an unexpected increase in trading exposures. As a result of the unprecedented volatility in crude oil markets, its AUOE<sup>51</sup> was reasonably expected to exceed the MSP registration threshold. The CFTC issued this relief with the understanding that COVID-19 related market volatility was unprecedented and that the market participant should not be required to register as an MSP, so long as it submitted periodic reports containing recalculated AUOE after the markets return to their expected valuations.

Given that the COVID-19 pandemic had world-wide effects on participants in derivatives and commodities markets, several non-U.S. entities with connections to U.S. markets also sought relief from the CFTC. A number of non-U.S. located entities otherwise exempt from IB registration with the CFTC pursuant to CFTC Regulation § 30.5 (and which are affiliates of FCMs) sought a time-limited no-action position that would permit these 30.5 foreign brokers “to accept orders from persons located in the U.S. for

execution on U.S. contract markets in the event an FCM's registered [APs] are unable to handle the order flow of U.S. customers due to their absence from normal business sites in response to the COVID-19 pandemic."<sup>52</sup> The CFTC issued conditional relief, requiring the non-U.S. IBs to be duly registered in their local jurisdiction, affiliated with registered U.S. FCMs and otherwise able to comply with CFTC Regulation § 30.5.

Subsequent to the enactment of the CARES Act<sup>53</sup> to assist small businesses, several FCMs and IBs participating in the Paycheck Protection Program (PPP) requested relief from the CFTC to allow them to count the proceeds of these loans towards their net capital requirements.<sup>54</sup> The staff of CFTC's DSIO stated: "In order to support an orderly and uniform response to the COVID-19 pandemic, DSIO will not recommend that the Commission take an enforcement action against any FCM or IB that receives a PPP covered loan and, in computing its net capital under Regulation 1.17, adds back to its capital the eligible Forgivable Expense Amount." Under certain conditions, this time-limited relief was issued.

### *(E) Technical Compliance Relief*

CFTC Regulation § 3.10(a)(2) provides that in order to become a registered market participant with the CFTC, an applicant and its APs must meet fingerprinting requirements.<sup>55</sup> In circumstances when principals and APs and other relevant employees of these entities cannot be present at their normal business sites and cannot travel to locations where fingerprints can be obtained, the CFTC provided this time-limited relief under certain conditions (such as due diligence and supervision). Both the CFTC and the NFA recognized that this technical relief was nec-

essary to allow registered market participants to register.

### *(F) Supervisory Relief*

Each of the CFTC relief letters includes, as a necessary pre-condition for relief, a requirement of continued effective and efficient supervision of regulated entities, as well as the existence of written BCDR plans. For example, principals of the registered entity must conduct and provide to NFA results of the criminal background checks to obtain the foreign IB relief from fingerprinting requirements; U.S.-registered FCMs must ensure effective compliance; and to obtain the FB relief, both the FB and the relevant DCM must also ensure compliance as specifically spelled out in DCMs' BCDR plans. For relief relating to time-stamping and recording of oral communications, registered market participants still are required to ensure that the records are kept and maintained and can be provided to the CFTC. Both the CFTC and the NFA recognize that even though supervision may not be in the form as it was exercised before COVID-19, nevertheless supervision must continue to be effective.

### *(b) FRAUD AND OTHER ADVISORIES*

Please refer to [Appendix 5](#) for further details on several CFTC advisories. These advisories can be grouped into the following categories: (i) increased incidence of retail fraud; (ii) potential market disruption and fraud relating to increased market volatility and ETP investing;<sup>56</sup> and (iii) fraud targeting persons unemployed during the COVID-19 pandemic.

## 3. LESSONS LEARNED

NFA's first COVID-19 related advisory on

March 4, 2020<sup>57</sup> advised its members to review their BCDR plans to ensure that they meet NFA's guidance adopted almost 20 years ago subsequent to the September 11, 2001 attacks to make sure that the disruption caused by the COVID-19 pandemic would be mitigated. In addition to their focus on regulated entities, the regulators themselves had to significantly revise their business practices due to the new work from home environment.

Given the unprecedented nature, severity and duration of the pandemic, the regulators could not have fully anticipated and foreseen all steps necessary to ensure continued operations. Overall, however, it is remarkable how both the regulated entities and the regulators themselves adjusted to the new "normal" and were able to mitigate the inconvenience of working from home while also providing the much-needed supervision during unprecedented market volatility.<sup>58</sup>

Inevitably regulatory changes will need to be made to take into account the new practices that have emerged, such as digital supervision of staff almost entirely working from home or the tools implemented to ensure cyber security,<sup>59</sup> or the mechanism designed to mitigate increased volatility to ensure systemic safety in the time of the unprecedented number of margin calls. It is clear, however, that the BCDR tools put in place to date as well as the regulatory and the industry response demonstrated the resilience of commodity derivatives markets.

Analyzing COVID-19 BCDR responses from the regulators and the regulated, the following suggestions can be made:

1. *A Comprehensive BCDR Rule.* The regula-

tors in several instances stopped short of completing and promulgating comprehensive rules on BCDR. With the hindsight towards 2020, the CFTC (and the NFA) should consider promulgating a comprehensive rule that will cover in one place all the relief that was issued in response to the COVID-19 pandemic (see [Appendices 1 through 5](#) on relief and advisories issued). In the event of another major (or minor) disruption, instead of issuing numerous no action letters and ad hoc orders, the CFTC (and the NFA) may go down the list of pre-designated relief items and "activate" all or specific relevant relief—*e.g.*, locational, recordkeeping, reporting, supervisory compliance and technical compliance relief. This would provide advance notice to the market of available relief and will save many hours of work for CFTC (and NFA) staff—especially in situations when each minute counts, as it usually does during severe market disruption events. Conversely, market participants can quickly request specific relief within the predetermined general processes. Even though each market disruption and disaster event poses unique challenges to market participants, the 2013 BCDR Joint Staff Advisory was remarkably prescient identifying the challenges as well as possible solutions for market participants with respect to effective BCDRs. With the COVID-19 experience, the CFTC, NFA and the SROs will be able to be even better prepared for future unexpected events. Further, a comprehensive BCDR rule for regulated CFTC/NFA entities will serve as a useful

guide for market participants that are not required to register with the CFTC/NFA (and may not be subject to CFTC's exclusive jurisdiction), but nevertheless pose systemic risk, such as large commodity traders.

2. *A Review of Existing Regulations.* As the example with “branch offices” under NFA’s rule indicates, the new reality of working from home and prolonged market stress necessitates changes to the rules. It is also certain that some CFTC regulations will need to be revised or amended. Other revisions or adjustments could include ensuring risk management programs adequately address market and liquidity stress scenarios observed during COVID-19, or reviewing bilateral trading documentation for pricing fallback alternatives in the event of market disruption events. Both the CFTC and the NFA should undertake a comprehensive review of their regulations to determine the areas that require revision.
3. *A CFTC-NFA Internal BCDR Policy Response.* As a corollary to the promulgation of the comprehensive BCDR rule for market participants, the rule also needs to spell out CFTC’s response to market disruption to reduce to the minimum the need for CFTC and NFA ad hoc actions.
4. *BCDR Plans Should be Mandatory for Regulated Market Participants And Recommendations Issued for Unregulated Market Participants.* The CFTC and the NFA should promulgate specific rules requiring all its regulated entities to adopt comprehensive and consistent BCDR

plans. In addition, even though many commodity and derivatives traders are not regulated by the CFTC, the CFTC should issue an advisory recommending market practices to be adopted by unregistered market participants.

5. *The CFTC Should Pursue Legislative Change to Broaden the Bankruptcy Code’s Safe Harbor Reach.* The federal bankruptcy code makes various safe harbor exemptions only accessible to certain derivative market participants as determined in legislation pre-dating the Dodd-Frank Act. Expanding these exemptions to additional market participants presenting systemic risk, heightened interconnectedness, and/or contagion to the bilateral marketplace should be at the forefront of actions taken to address prolonged periods of market stress seen during COVID-19. Such an expansion would be informed by the CFTC’s existing assessments of systemic risk in swap markets as promulgated in various rulemakings since passage of Dodd-Frank.

## APPENDIX 1

### BUSINESS CONTINUITY AND DISASTER RECOVERY

#### CFTC:

On July 14, 2010, the CFTC Issues Proposed Business Continuity and Disaster Recovery Regulation for DCMs and DCOs and Conforming Amendments to the Core Principle Guidance Applicable to DCMs.

- The Commodity Futures Trading Commis-

sion (“CFTC” or “Commission”) is proposing a rule that would establish standards for recovery and resumption of trading and clearing operations by designated contract markets (“DCMs”) and registered derivatives clearing organizations (“DCOs”) that the Commission determines to be critical financial markets or core clearing and settlement organizations in the event of a wide-scale disruption affecting such entities’ trading or clearing operations. These proposed standards would require such entities to maintain business continuity and disaster recovery resources sufficient to meet a same-day recovery time objective for trading and clearing, and maintain geographic dispersal of infrastructure and personnel sufficient to enable achievement of a same-day recovery time objective, in the event of a wide-scale disruption. The proposed amendments also revise application guidance and acceptable practices under the Core Principles for DCMs relating to business continuity and disaster recovery matters that would harmonize acceptable practices for DCMs and DCOs.

Link: <https://www.federalregister.gov/documents/2010/07/22/2010-17606/business-continuity-and-disaster-recovery>

On August 23, 2013, SEC, CFTC and FINRA issue joint advisory on business continuity and disaster recovery planning.

- The CFTC’s Division of Swap Dealer and Intermediary Oversight, the SEC’s Office of Compliance Inspections and Examinations (OCIE), and FINRA issued the advisory to encourage firms to review their business continuity plans so as to improve

responses to and reduce recovery time after significant large-scale events.

- Drawing on examination observations, the advisory suggests effective practices in the following areas:
  - Preparation for widespread disruption
  - Planning for alternative locations
  - Telecommunications services and technology
  - Communication plans
  - Regulatory and compliance considerations
  - Reviewing and testing
- Firms can strengthen their business continuity and disaster recovery plans by implementing these practices as appropriate.

#### **NFA**

#### **RULE 2-38. BUSINESS CONTINUITY AND DISASTER RECOVERY PLAN.**

[Adopted effective April 7, 2003. Effective date of Amendments: October 18, 2010; September 30, 2013 and July 1, 2019.]

(a) Each FCM, IB, CPO and CTA Member and each FDM must establish and maintain a written business continuity and disaster recovery plan that outlines procedures to be followed in the event of an emergency or significant business disruption. The plan shall be reasonably designed to enable the Member to continue operating, to reestablish operations, or to transfer its business to another Member with minimal disruption to its

customers, other Members, and the commodity futures markets.

(b) Each FCM, SD and MSP Member and each FDM must provide NFA with, and keep current, the name and contact information for all key management employees, as identified by NFA, in the form and manner prescribed by NFA. In addition, each FCM, SD and MSP Member and each FDM must provide NFA with the location/address and telephone number of its primary and alternative disaster recovery sites.

(c) Each IB, CPO and CTA Member must provide NFA with the name of and contact information for an individual who NFA can contact in the event of an emergency, and the Member must update that information upon request. Each IB, CPO and CTA Member that has more than one principal must also provide NFA with the name of and contact information for a second individual who can be contacted if NFA cannot reach the primary contact, and the Member must update that information upon request. These individuals must be authorized to make key decisions in the event of an emergency.

#### RULE 2-49. SWAP DEALERS AND MAJOR SWAP PARTICIPANTS REGULATIONS

[Adopted effective December 19, 2013. Effective dates of amendments: September 30, 2014.]

(a) Any Swap Dealer or Major Swap Participant Member that violates CFTC Regulation 3.3 or any requirement under Part 23 of the CFTC's regulations, as applicable, shall be deemed to have violated an NFA Requirement.

(b) A Swap Dealer or Major Swap Participant Member must promptly submit any reports, documents or notices, including those required

under CFTC Regulation 3.3 or Part 23 of the CFTC's regulations, and any other supplemental information, to NFA and CFTC, as required by NFA, in the form and manner prescribed by NFA.

#### 9052-NFA COMPLIANCE RULE 2-38: BUSINESS CONTINUITY AND DISASTER RECOVERY PLAN

- Link: <https://www.nfa.futures.org/rulebook/rules.aspx?RuleID=9052§=9>

## APPENDIX 2

### CFTC COVID-19 ORDERS

#### 17 CFR Part 23

#### RIN 3038-AE89

#### Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule

**SUMMARY:** The Commodity Futures Trading Commission ("Commission" or "CFTC") is adopting amendments to the margin requirements for uncleared swaps for swap dealers ("SD") and major swap participants ("MSP") for which there is no prudential regulator (the "CFTC Margin Rule"). Specifically, the Commission is adopting an amendment, along with certain conforming, technical changes, to extend the compliance schedule for the posting and collection of initial margin ("IM") under the CFTC Margin Rule to September 1, 2021, for entities with smaller average daily aggregate notional amounts of swaps and certain other financial products ("Final

Rule”). The compliance schedule currently extends from September 1, 2016 to September 2020. The revised compliance schedule mitigates the potential of a market disruption, which could be triggered by the large number of entities that would come into the scope of the IM requirements at the end of the current compliance schedule on September 1, 2020.

**DATES:** This final rule is effective May 11, 2020.

### **17 CFR Chapter I**

**RIN 3038-AD99, RIN 3038-AE31, RIN 3038-**

**AE32, RIN 3038-AE60, RIN 3038-AE94**

Extension of Currently Open Comment Periods for Rulemakings in Response to the COVID-19 Pandemic

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Extension of currently open comment periods for rulemakings.

**SUMMARY:** The coronavirus disease 2019 (“COVID-19”) pandemic may present challenges to the ability of market participants and other members of the public to submit timely comments on the Commission’s proposed rulemakings. Accordingly, the Commission is extending the comment period for the rulemakings listed herein until the dates specified herein in order to provide market participants and other members of the public an additional period of time to comment on the proposed rulemakings.

**17 CFR Part 23**

**RIN 3038-AE89**

### **Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is adopting amendments to the margin requirements for uncleared swaps for swap dealers (“SD”) and major swap participants (“MSP”) for which there is no prudential regulator (the “CFTC Margin Rule”). Specifically, the Commission is adopting an amendment, along with certain conforming, technical changes, to extend the compliance schedule for the posting and collection of initial margin (“IM”) under the CFTC Margin Rule to September 1, 2021, for entities with smaller average daily aggregate notional amounts of swaps and certain other financial products (“Final Rule”). The compliance schedule currently extends from September 1, 2016 to September 1, 2020. The revised compliance schedule mitigates the potential of a market disruption, which could be triggered by the large number of entities that would come into the scope of the IM requirements at the end of the current compliance schedule on September 1, 2020.

**DATES:** This final rule is effective May 11, 2020.

## **APPENDIX 3**

**CFTC COVID-19 ADVISORIES & STAFF LETTERS**

- **Letter 20-02**

No-Action

Issuance Date: March 17, 2020

**Description:** No-action positions for certain members of designated contract markets and swap execution facilities to facilitate physical separation of personnel in response to the COVID-19 pandemic.

• **Letter 20-03**

No-Action

Issuance Date: March 17, 2020

**Description:** No-action positions for futures commission merchants and introducing brokers to facilitate physical separation of personnel in response to the COVID-19 pandemic

• **Letter 20-04**

No-Action

Issuance Date: March 17, 2020

**Description:** No-action positions for floor brokers to facilitate physical separation of personnel in response to the COVID-19 pandemic

• **Letter 20-05**

No-Action

Issuance Date: March 17, 2020

**Description:** No-action positions for retail foreign exchange dealers to facilitate physical separation of personnel in response to the COVID-19 pandemic

• **Letter 20-06**

No-Action

Issuance Date: March 17, 2020

**Description:** No-action positions for swap dealers to facilitate physical separation of personnel in response to the COVID-19 pandemic

• **Letter 20-07**

No-Action

Issuance Date: March 17, 2020

**Description:** Subject to the conditions specified in the letter, DMO will not recommend that the Commission take an enforcement action against any SEF for the failure to comply with Commission regulations 37.205(a)-(b), 37.400(b), 37.406, 37.1000(a)(1), and 37.1001 to the extent that non-compliance arises from the inability of SEFs to record voice communications as a result of the displacement of voice trading personnel from their normal business sites in connection with the COVID-19 pandemic response.

• **Letter 20-08**

No-Action

Issuance Date: March 17, 2020

**Description:** DMO will not recommend that the Commission take an enforcement action against any SEF or SEF CCO for failure to submit an ACR within the 60-day period pre-



scribed in Commission regulation 37.1501(f)(2), provided that:

- (a) the ACR was required to be submitted to the Commission prior to September 1, 2020, pursuant to Commission regulation 37.1501(f)(2); and
- (b) the ACR is submitted to the Commission not later than 120 days after the end of the SEF's fiscal year.

Additionally, DMO will not recommend that the Commission take an enforcement action against any SEF or SEF CCO for failure to submit the fourth quarter financial report pursuant to Commission regulation 37.1306(d), within the 60-day period prescribed in Commission regulation 37.1306(d); provided, that:

- (a) the fourth quarter financial report was required to be submitted to the Commission prior to September 1, 2020, pursuant to Commission regulation 37.1306(d); and
- (b) the fourth quarter financial report is submitted to the Commission no later than 120 days after the end of the SEF's fiscal year.

● **Letter 20-09**

- No-Action
- Issuance Date: March 17, 2020
- Description:** No action relief for DCMs relating to trading floor closure in connection with the COVID-19 pandemic response.

● **Letter 20-10**

- No-Action
- Issuance Date: March 20, 2020
- Description:** No-action position for excluding certain commodity swaps from inclusion in the major swap participant registration threshold calculation of an insured depository institution

● **Letter 20-11**

- No-Action
- Issuance Date: March 20, 2020
- Description:** No-action positions for commodity pool operators in response to the COVID-19 pandemic

● **Letter 20-12**

- No-Action
- Issuance Date: March 20, 2020
- Description:** No-action position for foreign brokers exempt pursuant to Commission regulation 30.5 to handle U.S. futures market orders in response to the COVID-19 pandemic

● **Letter 20-15**

- No-Action
- Issuance Date: April 22, 2020
- Description:** No-action positions for futures commission merchants and introducing brokers to address net capital treatment of covered loans under the CARES Act in response to the COVID-19 pandemic.

- **Letter 20-16**

- No-Action
- Issuance Date: April 22, 2020
- Description:** No-action position in response to the COVID-19 pandemic for persons required to submit fingerprints in connection with applying for registration as an associated person or being listed as a principal of a registrant

- **Letter 20-17**

- No-Action
- Issuance Date: May 13, 2020
- Description:** DMO, DCO, and DSIO issue this advisory to remind DCMs, FCMs, and DCOs that they are expected to prepare for the possibility that certain contracts may continue to experience extreme market volatility, low liquidity and possibly negative pricing.

- **Letter 20-20**

- No-Action
- Issuance Date: July 14, 2020
- Description:** Time Extension for No-Action Relief previously granted in response to the COVID-19 pandemic for persons required to submit fingerprints in connection with applying for registration as an associated person or to be listed as a principal of a registrant.

- **Letter 20-26**

- No-Action
- Issuance Date: September 11, 2020
- Description:** This no-action letter extends until January 15, 2021, the relief previously provided by CFTC Staff Letter 20-19, which, in turn, extended the time period for certain no-action relief provided in CFTC Staff Letters 20-02, 20-03, 20-04, 20-05, 20-06, 20-07, and 20-09, each issued on March 17, 2020 (the “COVID-19 Letters”).

- **Letter 21-04**

- No-Action
- Issuance Date: January 19, 2021
- Description:** No-action positions for floor brokers and introducing brokers from oral recordkeeping requirements and designated contract markets from audit trail requirements in continued response to the COVID-19 pandemic.

- **Letter 21-05**

- No-Action
- Issuance Date: January 19, 2021
- Description:** Partial continuation of no-action positions to facilitate physical separation of registrant personnel in response to the COVID-19 pandemic. Until April 15, 2021

- **Letter 21-10**

- No-Action
- Issuance Date: April 14, 2021
- Description:** Partial Extension of No-Action Positions to Facilitate Physical Separation of Registrant Personnel in Response to COVID-19 Pandemic. Until September 30, 2021.

## APPENDIX 4

### NFA COVID-19 ADVISORIES

- I-20-10: Information on Coronavirus/COVID-19
  - Issued March 04, 2020
    - Description: NFA encourages each Member to review its BCP and ensure its effectiveness should it need to be activated. Each Member should ensure its current listing of key employees and contact information is accurate, and its BCP should include appropriate measures that allowing it to operate efficiently during a pandemic.
    - Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5208>
- I-20-11: Information on CFTC Regulatory Reporting Requirements
  - Issued on March 12, 2020
    - Description: Market volatility and the spread of the Coronavirus is an increasing reminder to SD Members of their regulatory reporting obligations, including notifying the CFTC if a SD implements a teleworking plan or acti-

vates its BCP where such implementation or activation is for purposes other than testing. NFA and CFTC regulatory coordination has increased during this pandemic.

- Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5213>
- I-20-12: Coronavirus Update—NFA Branch Office Requirements
  - Issued on March 13, 2020
    - Description: Provided Members implement alternative supervisory methods to adequately supervise APs' activities and meet recordkeeping requirements, NFA will not pursue a disciplinary action against a Member that permits APs to temporarily work from locations not listed as a branch office and without a branch manager. Members should ensure these procedures are documented. NFA expects these APs will return to the Member's main office or listed branch office location once a Member firm is no longer operating under contingencies pursuant to its Business Continuity Plan (BCP).
    - Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5214>
- I-20-13: Coronavirus Update—Regulatory Relief
  - Issued on March 18, 2020
    - Description: NFA issued similar relief from NFA requirements as the CFTC's March 17, 2020 no-action relief let-

ters to FCMs, IBs, SDs and FDMs that are designed to facilitate the separation of personnel in response to the COVID-19 pandemic. NFA also provided FDMs a 30-day extension to the filing deadline for Chief Compliance Officer Annual Reports.

- Link: <https://www.nfa.future.org/news/newsNotice.asp?ArticleID=5216>
- I-20-14: Immediate attention required—Financial Requirements Section 12—Increases in required minimum security deposits for forex transactions
  - Issued on March 20, 2020
    - Description: Given market volatility and margin increases implemented by CME and ICE with respect to foreign currency futures, NFA has increased the minimum security deposits required to be collected and maintained by FDMs to 7% for the Norwegian Krone and 10% for the Mexican Peso.
    - Link: <https://www.nfa.future.org/news/newsNotice.asp?ArticleID=5217>
- I-20-15: Coronavirus (COVID-19) Update—Regulatory Relief for CPOs and CTAs
  - Issued on March 23, 2020
    - Description: NFA issued similar relief from NFA requirements as the CFTC’s March 20, 2020 no-action relief letter to CPOs. The relief extends deadlines for upcoming CPO Form PQR filings, pool annual reports and periodic

account statements for pool participants. NFA also extended deadlines for CTA Form PR filings due on or before April 30, 2020.

- Link: <https://www.nfa.future.org/news/newsNotice.asp?ArticleID=5218>
- I-20-16: Coronavirus (COVID-19) Update—Regulatory Relief for IBs
  - Issued on March 26, 2020
    - Description: NFA issued automatic relief for all independent IB Members by providing a 30 calendar day extension for filing certified financial reports for fiscal years ending in December 2019 through March 2020. NFA is also providing all independent IB Members with a 10 business day extension for filing the semi-annual, quarterly or monthly reports for reporting periods ending February through April 2020.
    - Link: <https://www.nfa.future.org/news/newsNotice.asp?ArticleID=5219>
- I-20-17: FCM and IB Members—FinCEN Issues a Special Notice in Response to the COVID-19 Pandemic and Updates List of FATF-Identified Jurisdictions with AML/CFT Deficiencies:
  - Issued on April 08, 2020
    - Description: NFA encourages FCM and IB Members to review the Financial Crimes Enforcement Network’s (FinCEN) recent Notice which provides information about complying with Bank Secrecy Act (BSA) and anti-

money laundering (AML) obligations during the COVID-19 pandemic. Additionally, Member FCMs and IBs should review FinCEN's recently-updated list of FATF-identified jurisdictions with AML/CFT deficiencies.

Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5222>

● I-20-19: Coronavirus (COVID-19) Update—Regulatory Relief for FCMs and IBs

- Issued on April 23, 2020

Description: NFA issued similar relief from NFA requirements as the CFTC's April 23, 2020 no-action relief letters to FCMs and IBs. The relief permits any FCM or IB that receives a Paycheck Protection Program-covered loan to add back to its capital the eligible forgivable expense amount under the PPP when computing adjusted net capital under CFTC Regulation 1.17.

Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5224>

● I-20-20: Coronavirus (COVID-19) Update—Relief from Fingerprinting Requirements

- Issued on April 27, 2020

Description: NFA issued similar relief from NFA requirements as the CFTC's April 24, 2020 no-action letter regarding fingerprinting requirements. The temporary relief releases registrants and applicants for registration who satisfy the requirements

of the CFTC's no-action letter from fingerprinting requirements until within thirty days of NFA announcing the resumption of fingerprint processing.

Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5225>

● I-20-24: Coronavirus (COVID-19) Update—Extension to Certain Regulatory Relief for FCMs, RFEDs, FDMs, IBs and SDs

- Issued on June 12, 2020

Description: NFA issued similar relief from NFA requirements as the CFTC's June 9, 2020 no-action letter to FCMs, RFEDs (i.e., FDMs), IBs and SDs. This Notice extends through September 30, 2020 certain no-action relief issued in response to the COVID-19 pandemic.

Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5242>

I-20-29: Coronavirus (COVID-19) Update—Extension to Relief from Fingerprinting Requirements

- Issued on July 20, 2020

Description: NFA issued similar relief from NFA requirements as the CFTC's July 17, 2020 no-action letter to registrants and applicants for registration listing a principal, and for applicants for associated person (AP) registration. This relief from fingerprinting requirements extends through the earlier of September 30, 2020 or the date on

which NFA notifies the public that it has resumed processing fingerprints.

- Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5253>

- I-20-32: Coronavirus (COVID-19) Update—Extension to Certain Regulatory Relief for FCMs, RFEDs, IBs and SDs

- Issued on September 15, 2020

- Description: NFA issued similar relief from NFA requirements as the CFTC's June 9, 2020 no-action letter to FCMs, RFEDs (i.e., FDMs), IBs and SDs. This Notice extends through January 15, 2021 certain no-action relief issued in response to the COVID-19 pandemic.

- Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5279>

- I-20-35: Coronavirus Update—Relief from the On-Site Annual Inspection of Branch Offices and Guaranteed IBs

- Issued on October 01, 2020

- Description: Although Members must conduct the required annual inspection of each branch office and/or guaranteed IB by December 31, 2020, NFA issued relief allowing firms to conduct these inspections remotely this year.

- Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5287>

- I-20-37: Coronavirus Update—Expiration of Temporary Relief from Fingerprinting Requirements

- Issued on October 06, 2020

- Description: On September 29, 2020, the CFTC's DSIO issued an alert stating that the temporary relief from fingerprinting requirements to registrants and applicants for registration listing a principal, and for applicants for AP registration, has expired. Therefore, as of October 1, 2020, these individuals must submit fingerprints on an applicant fingerprint card, which are available at facilities offering fingerprinting services. Additionally, all persons currently relying on DSIO's no-action letter and NFA relief from the fingerprinting requirements and APs that have been granted a temporary license must submit a fingerprint card to NFA by November 2, 2020.

- Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5289>

- I-21-05: Coronavirus Update—Limited Extension to Certain Relief for FCMs and IBs

- Issued on January 25, 2021

- NFA issued similar relief from NFA requirements as the CFTC's two January 19, 2021 no-action letters. This Notice:

- Extends through April 15, 2021 certain no-action relief for FCMs and IBs with respect to regulatory obligations for time-stamping of orders; and
- Extends through March 31, 2021 certain no-action relief for IBs with respect to regula-

tory obligations for record-keeping of oral communications.

- Link: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5323>

## APPENDIX 5

### CFTC ADVISORIES

<https://www.cftc.gov/coronavirus>

#### **Customer Advisory: Be on Alert for Frauds Seeking to Profit from Market Volatility Related to COVID-19**

The Commodity Futures Trading Commission advises the public to be on alert for frauds seeking to profit from recent market volatility related to COVID-19. Fraudsters commonly use major news events, such as the spread of COVID-19, to add credibility to their cons or manipulate emotions. You can better protect yourself by learning to recognize common mental biases that everyone has, as well as common fraud tactics—and by taking a few preventative steps. Reporting frauds you encounter can also help protect others during these challenging times.

#### **Customer Advisory: Beware of Fee Scams Targeting Workers Sidelined by COVID-19**

The Commodity Futures Trading Commission advises the public that unregistered brokers selling binary options, foreign exchange (forex) programs, and cryptocurrencies are targeting people who lost their jobs due to the coronavirus outbreak. The scams are primarily conducted on social media and via messaging apps. The fraudsters convince their victims they can earn unrealistically high profits from home, but later force the victims to pay excessive “fees” and “taxes”

to get their supposed earnings. The profits are not real and the fraudsters disappear when the victims stop paying.

#### **Article: Isolated? Don’t Make Snap Investment Decisions**

Social isolation and financial strain can make people more vulnerable to fraud. If someone approaches you with an investment or trading opportunity, consider running it by someone you know and trust first.

#### **Staff Advisory: Risk Management and Market Integrity under Current Market Conditions**

DMO, DCO, and DSIO issued this advisory to remind DCMs, FCMs, and DCOs that they are expected to prepare for the possibility that certain contracts may continue to experience extreme market volatility, low liquidity and possibly negative pricing.

#### **Customer Advisory: Learn About Risks Before Investing in Commodity ETPs or Funds**

Trading vehicles that use futures contracts or other commodity interests may be organized as exchange-traded products or mutual funds, but that does not necessarily mean they will behave like traditional exchange-traded funds or mutual funds that invest in stocks, bonds or other asset classes.

#### **Article: Don’t be Re-Victimized by Recovery Frauds**

During COVID-19, be on alert for recovery frauds. If you have fallen victim to a fraud, offers to recover your lost funds can turn out to be just another scam. Here are the warning signs you

should look for and tips to help you avoid recovery frauds.

### **Article: 6 Steps to Take after Discovering Fraud**

Have you fallen victim to a fraud during the COVID-19 pandemic? These steps can help protect you from further theft, inform you about how to lodge a fraud complaint, and offer guidance to avoid fraud in the future.

### **Customer Advisory: Beware of Gold and Silver Schemes Designed to Drain Your Retirement Savings**

Some unregistered gold and silver dealers are advising investors to use relaxed retirement plan distribution rules in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to buy precious metals. But customers should talk to qualified retirement, tax, or legal advisors first.

### **ENDNOTES:**

<sup>3</sup>The World Health Organization declared the coronavirus disease 2019 (COVID-19) outbreak a global pandemic on March 11, 2020.

<sup>4</sup>Over roughly the last two decades: Asian and emerging markets collapsed in 1997-98, requiring massive IMF bailouts with ripple effects in U.S. financial markets causing the LTCM hedge fund collapse of 1998, which resulted in a bailout engineered by the U.S. Treasury Department and Federal Reserve Bank of New York; the September 11, 2001 World Trade Center attacks caused the loss of life and disrupted operations of several financial firms; Hurricane Katrina (Aug. 2005) caused multibillion dollar damages to the New Orleans economy and infrastructure; the 2008 financial crisis rendered numerous U.S. financial institutions insolvent and severely disrupted payment systems; Hurricane Sandy (Oct. 2012) shut down New York, disabled lower

Manhattan and all but destroyed the records of DTCC; Hurricane Harvey (Aug. 2017) shut down the greater Houston metropolitan area making its infrastructure inoperable; and of course the 2019/20/21 COVID pandemic, the 2021 freeze in Houston and the ransomware cyberattack on Colonial Pipeline in May 2021. Of course, the escalating global climate change is a disaster of a continuous and pervasive impact that is also manifesting itself in numerous smaller, but incrementally significant events impacting U.S. and global financial markets.

<sup>5</sup>In 2020 alone, mortality in the U.S. increased 33% from the previous year (<https://www.census.gov/library/stories/2021/03/initial-impact-covid-19-on-united-states-economy-more-widespread-than-on-mortality.html>); 42% of U.S. households either lost a job or got a pay cut (<https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>); and over half of the world population was placed under lock-down/stay-at-home orders ([https://en.wikipedia.org/wiki/COVID-19\\_recession](https://en.wikipedia.org/wiki/COVID-19_recession)).

<sup>6</sup>This paper considers only BCDR planning and guidance set forth by the CFTC and the NFA and excludes other U.S. agencies and bodies (such as the SEC and Prudential Regulators).

<sup>7</sup>Hurricane Sandy resulted in the closure of equities and options markets on October 28<sup>th</sup>-29<sup>th</sup>, 2012.

<sup>8</sup>CFTC Release No 6667-13, August 16, 2013.

<sup>9</sup>The BCDR Joint Staff Advisory states, at p. 1: “Remote access is an important component of business continuity planning. Firms should consider their employees’ ability to work from home during a crisis and determine what steps can be taken to ensure adequate staffing during a crisis event. Firms should also consider enhancing the capabilities of staff that work from home by identifying technology and communications products and services that could increase efficiency. Since the use of remote access relies heavily on fully functional telephone and internet service, firms should consider alternatives to telework in their BCPs, particularly for key



control functions such as compliance, risk management, back office operations and financial and regulatory reporting.”

<sup>10</sup>Business Continuity and Disaster Recovery, 75 FR, 42633 (July 22, 2010).

<sup>11</sup>Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>12</sup>CFTC Regulations, Part 23, Business Continuity and Disaster Recovery, 17 CFR § 23.603, 77 FR 20128 (June 4, 2012).

<sup>13</sup>U.S. v. Deutsche Bank AG (No.1:16-cv-6544) (Aug. 18, 2016).

<sup>14</sup> See SEF Core Principles, 78 FR 33476 (June 4, 2013).

<sup>15</sup>Business Continuity and Disaster Recovery, 75 FR, 42633 (July 22, 2010).

<sup>16</sup> See e.g., ICE’s BCDR plan at [https://www.theice.com/publicdocs/ice/notifications/adhoc/110000231367/ICE\\_Business\\_Continuity-bp.pdf](https://www.theice.com/publicdocs/ice/notifications/adhoc/110000231367/ICE_Business_Continuity-bp.pdf).

<sup>17</sup>CME’s Rule 983 requires: “983. DISASTER RECOVERY AND BUSINESS CONTINUITY All clearing members must have written disaster recovery and business continuity policies and procedures in place to ensure they are able to perform certain basic operational functions in the event of a significant internal or external interruption to their operations. At a minimum, the following areas must be considered in the firm’s policies and procedures, depending on the firm’s size and its business and product mix: A. Clearing members must have procedures in place to allow them to continue to operate during periods of stress or to transfer accounts to another fully operational clearing member with minimal disruption to either the Exchange or their customers. In order to satisfy this requirement, clearing members must perform: 1. Periodic testing of disaster recovery and business continuity plans. 2. Duplication of critical systems at back up sites. 3. Periodic back-up of critical information. B. Key Staff Contacts. Clearing members must maintain and, at the request of the Exchange, provide accurate and complete information for their key person-

nel. Clearing members must inform the Exchange in a timely manner whenever exchange to their key personnel is made. C. Additional and/or Alternative Requirements. Exchange staff may prescribe additional and/or alternative requirements in order for clearing members to comply with this Rule.”

<sup>18</sup>CME Notice of Disciplinary Action, 12-CH-1210, In re Cunningham Commodities, LLC., (June 19, 2013) <https://www.cmegroup.com/notices/clearing/2016/06/12-CH-1210.html>.

<sup>19</sup> See e.g., <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4540>.

<sup>20</sup> <https://www.nfa.futures.org/members/self-exam-questionnaire.html#appendixb>.

<sup>21</sup>For example, the SEC issued an advisory in June of 2016 under Rule 38a-1 of the Investment Company Act of 1940 (Investment Company Act) in response to an incident at one of its regulated funds (<https://www.sec.gov/investments/im-guidance-2016-04.pdf>) and, subsequently on June 28, 2016, the SEC proposed a rule requiring investment advisers adopt business continuity and transition plans (SEC Proposes Rule Requiring Investment Advisers to Adopt Business Continuity and Transition Plans).

<sup>22</sup>Statement of CFTC Chairman Heath P. Tarbert Regarding COVID-19 Before the FSOC Principals Meeting, March 26, 2020 <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement032620>.

<sup>23</sup> See e.g., CFTC Letter 20-03, March 17, 2020.

<sup>24</sup>Id.

<sup>25</sup>The SEC, as the CFTC, has set up a separate webpage where its regulatory actions in response to COVID-19 pandemic are enumerated. <https://www.sec.gov/sec-coronavirus-covid-19-response>.

<sup>26</sup>CFTC, in response to COVID-19 pandemic, established a separate webpage for ease of reference. <https://www.cftc.gov/coronavirus>; likewise, the NFA established a separate webpage to address NFA compliance issues in relation to the COVID-19 pandemic. <https://www.nfa.futures.or>

[g/coronavirus/index.html](https://www.cftc.gov/coronavirus/index.html).

<sup>27</sup>See *CFTC v. James Frederick Wash*, Case 1:20-cv-00725, Filed 07/07/20. <https://www.cftc.gov/PressRoom/PressReleases/8195-20>.

<sup>28</sup>See *CFTC v. K Ramos*, Case 3:20-cv-02985-X, Filed 09/28/20. <https://www.cftc.gov/PressRoom/PressReleases/8258-20>.

<sup>29</sup>Separately, both regulated and unregulated market participants had to deal with a number of force majeure events when either they or their counterparties were unable to comply with contractual provisions and their obligation due to COVID-19 state or federal shelter in place orders.

<sup>30</sup><https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5214>.

<sup>31</sup>A full list of all coronavirus related relief can be found here: <https://www.cftc.gov/PressRoom/PressReleases/8176-20>.

<sup>32</sup>For example, the most recent CFTC Letter 21-10, April 13, 2021, only extended relief applicable to FBs working in remote environment until September 30, 2021.

<sup>33</sup>CFTC Letter 20-04, March 17, 2020 provided relief as follows: “Any requirement to be physically located in any pit, ring, post, or other place provided by a contract market pursuant to the definition of “floor broker” in Commission regulation 1.3 if the FB is required by the written business continuity plan of any designated contract market to be absent from such place.”

<sup>34</sup>NFA has stated that it will not pursue a disciplinary action against an NFA member that permits APs to temporarily work from locations not listed as a “branch office” and without a branch manager provided that the member implements and documents alternative supervisory methods to adequately supervise the APs’ activities and meet its recordkeeping requirements. See NFA Notice I-20-12 Coronavirus Update—NFA Branch Office Requirements, available at: <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5214>.

<sup>35</sup>CFTC Letter 20-02, March 17, 2020.

<sup>36</sup>CFTC Letter 20-07, March 17, 2020.

<sup>37</sup>This relief provides that the Staff of the

CFTC will not initiate an enforcement actions for “failure to comply with the following Commission regulations: 37.205(a)-(b), 37.400(b), 37.406, 37.1000(a)(1), and 37.1001 to the extent that non-compliance arises from the inability of SEFs to record voice communications as a result of the displacement of voice trading personnel from their normal business sites in connection with the COVID-19 pandemic response.”

<sup>38</sup>CFTC Letter 20-09, March 17, 2020. This no action letter specifically recognized that “DCMs’ ability to produce a complete audit trail and meet other audit trail-related requirements under DCM Core Principles 4 and 10 and Commission regulations thereunder will be compromised.”

<sup>39</sup>CFTC Letter 20-03, March 17, 2020.

<sup>40</sup>CFTC Letter 20-04, March 17, 2020.

<sup>41</sup>CFTC Letter 20-05, March 17, 2020.

<sup>42</sup>CFTC Letter 20-06, March 17, 2020.

<sup>43</sup>CFTC Letter 20-03, March 17, 2020.

<sup>44</sup>CFTC Letter 20-05, March 17, 2020.

<sup>45</sup>CFTC Letter 20-06, March 17, 2020.

<sup>46</sup>CFTC Letter 20-03, March 17, 2020.

<sup>47</sup>CFTC Letter 20-06, March 17, 2020.

<sup>48</sup>CFTC Letter 20-08, March 17, 2020. This letter conditions that the ACR was supposed to be submitted to the CFTC before September 1, 2020 and would be submitted within 120 days of the end of SEF’s fiscal year.

<sup>49</sup>CFTC Letter 20-11, March 20, 2020.

<sup>50</sup>CFTC Letter 20-04, March 17, 2020.

<sup>51</sup>CFTC Letter 20-10, March 20, 2020, explains: “Substantial position” in “other commodity swaps” is defined in Commission regulation 1.3 to mean (a) \$1 billion in daily average aggregate uncollateralized outward exposure; or (b) \$2 billion in (i) daily averaged aggregate uncollateralized outward exposure, plus (ii) daily average aggregate potential outward exposure. “Aggregate uncollateralized outward exposure” (“AUOE”) is calculated with respect to each swap counterparty in a given major swap category by: “[D]etermin[ing] the dollar value of the

aggregate current exposure arising from each of its swap positions with negative value (subject to [permitted netting]) in that major category by marking-to-market using industry standard practices; and deduct[ing] from that dollar amount the aggregate value of the collateral the person has posted with respect to the swap positions. The aggregate uncollateralized outward exposure shall be the sum of those uncollateralized amounts across all of the person's swap counterparties in the applicable major category. "Current exposure" under the AUOE calculation is based on daily averages over all business days (as of close) in a fiscal quarter."

<sup>52</sup>CFTC Letter 20-12, March 31, 2020.

<sup>53</sup>Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub.L. 116-136 (March 27, 2020).

<sup>54</sup>CFTC Letter 20-15, April 22, 2020.

<sup>55</sup>CFTC Letter 20-16, April 24, 2020, explained: "Regulation 3.10(a)(2) requires each applicant for registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant to accompany its registration application with a Form 8-R for each natural person listed as a principal of the applicant, along with the fingerprints of the natural person on a fingerprint card provided by NFA. Regulation 3.12(c)(3) requires each person applying for registration as an AP to accompany his or her Form 8-R with the applicant's fingerprints on a fingerprint card provided by NFA." Also see the extension of this letter by Letter 20-20, July 14, 2020.

<sup>56</sup>CFTC notes in No Action Letter 20-10, March 10, 2020 that: "Crude Oil WTI (NYM \$/bbl) Front Month contract price on March 13, 2020 closed at \$31.73 compared to \$61.06 on

December 31, 2019."

<sup>57</sup><https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5208>.

<sup>58</sup>CFTC Chairman H. Tarbert discussed CFTC's experience with COVID-19 BCDR in a November 2020 lecture: "We did all of this while people were engaged in the new reality, in what we're doing right now-social distancing. We had never thought about how do people trade from home. It wasn't something that we had really thought about, but by working with NFA, by working with the exchanges and the clearinghouses, we were able to make social distancing work in a way that didn't shut down the markets. Business continuity plans by market participants were absolutely critical and they indicated to us, the CFTC, as I mentioned before, we're the only ones that can issue letters saying, "Yes that's technically what the law says or what the regulation says, but given the circumstances we're going to relieve you of that." Remarks Of CFTC Chairman Heath P. Tarbert On Self-Regulation At Northwestern University's Brodsky Family JD-MBA Lecture, Exchange News Direct, November 20, 2020.

<sup>59</sup>On Friday, May 7, 2021, a ransomware cyberattack shut down the largest pipeline on the East Coast causing panic gasoline buying, shortages of gas and the skyrocketing gas prices. Apparently, even the alleged perpetrator of the attack - DarkSide did not intend the shutdown of Colonial Pipeline and only wanted the ransom payment. This indicates how significant a cyber-attack can be and how vulnerable the infrastructure is. A similar attack on a financial institution may cause devastating and irreparable consequences especially in the environment when still most of office workers are working remotely. <https://www.wsj.com/articles/colonial-pipeline-hack-shows-ransomware-emergence-as-industrial-scale-threat-11620749675>.

