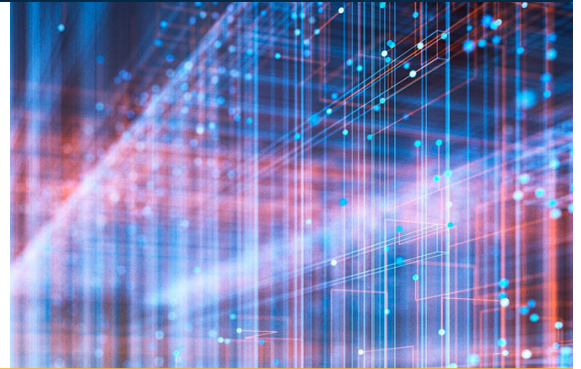


Client Alert | April 6, 2023

NFA Adopts New Digital Asset Commodity Requirements



The National Futures Association (NFA) recently adopted NFA Compliance Rule 2-51 (Rule), which imposes new requirements – including disclosure requirements – on NFA Members and their personnel that engage in “digital asset commodity” activities – currently limited to activities involving Bitcoin and Ether.¹ According to NFA’s proposal of Rule 2-51, with “[w]ell over 100 NFA Members [reporting] to NFA that they engage in business activities related to digital assets, both in commodity interest and spot markets,” NFA perceived a gap in its ability to oversee spot digital asset markets. The Rule is intended to address this perceived gap.

The effective date for NFA Compliance Rule 2-51 is May 31, 2023.

Summary

NFA Compliance Rule 2-51 imposes new anti-fraud requirements, just and equitable principles of trade obligations and supervisory responsibilities on NFA Members and their personnel in connection with digital asset commodity activities, including spot or cash market activities. Rule 2-51 also imposes the disclosure requirements set forth in NFA Interpretive Notice 9073, which means that any CPO or CTA Member of NFA engaging in digital asset commodity activities must abide by the enhanced/additional disclosure requirements outlined in that Interpretive Notice.²

Key Observations

The CFTC’s jurisdiction over spot digital assets is limited to anti-fraud and anti-manipulation authority with respect to digital assets that are “commodities.” NFA’s jurisdiction is similarly limited. NFA is limiting the scope of Rule 2-51 to the only two digital assets – Bitcoin and Ether – that are commodities (because, among other things, they have related futures contracts certified for listing).³ NFA notes though that it could amend the Rule in the future to cover additional digital assets that are identified as “commodities.”

In light of the evolving definition of “digital asset commodity,” NFA Members engaged in digital asset activities should take note of CFTC actions in which the CFTC identifies additional digital assets as

continued on next page

commodities. Most recently, for example, in its enforcement action against Changpeng Zhao and three entities that comprise the Binance platform,⁴ the CFTC identified Litecoin, Tether, BUSD and other digital assets as commodities. As a result, Rule 2-51 could soon be amended to include a broader group of digital assets within the term “digital asset commodity.” We note, however, that even if the Rule is not amended, NFA Members must still comply with the disclosure requirements of Interpretive Notice 9073, which apply more broadly to any “virtual currency.”



[Susan Gault-Brown](#)

202.507.5171 | sgault-brown@stradley.com



[Peter M. Hong](#)

202.419.8429 | phong@stradley.com



[Christian Lee](#)

215.564.8687 | clee@stradley.com

¹ NFA submitted the proposed Rule to the Commodity Futures Trading Commission (CFTC) for review on Feb. 28, 2023, and invoked the “ten-day” provision of Section 17(j) of the Commodity Exchange Act (CEA), which permits the NFA to make any rule changes or amendments effective ten days after receipt by the CFTC unless, within those ten days, NFA requests review or approval by the CFTC or the CFTC notifies NFA of its intent to review the filing. See National Futures Association, Proposed NFA Compliance Rule 2-51: Requirements for Members and Associates Engaged in Activities Involving Digital, Asset Commodities, Feb. 28, 2023, available at <https://www.nfa.futures.org/news/PDF/CFTC/030223-Proposed-CR-2-51.pdf>.

² National Futures Association, Interpretive Notice 9073: Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities, Oct. 31, 2018, available at <https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9073>.

³ See Section 1a(9) of the CEA (defining the term commodity).

⁴ See CFTC v. Changpeng Zhao, Binance Holdings Limited, Binance Holdings (IE) Limited, Binance (Services) Holdings Limited, and Samuel Lim.