

[Latham & Watkins Financial Institutions Industry Group](#)

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## Effective October 31, 2018: New NFA Virtual Currency Disclosure Requirements

***The NFA will soon require CPO, CTA, FCM, and IB member firms to provide various disclosures warning investors of virtual currency spot and derivatives trading risks.***

New disclosure requirements warning customers, counterparties, and investors of the risks of engaging in virtual currency transactions will come into effect on October 31, 2018 for certain National Futures Association (NFA) member firms. Late this past summer, the NFA submitted a proposed interpretive notice to the US Commodity Futures Trading Commission (CFTC) applicable to NFA member firms registered as futures commission merchants (FCMs), introducing brokers (IBs), commodity pool operators (CPOs), and/or commodity trading advisors (CTAs and, collectively with FCMs, IBs, and CPOs, NFA Members) (the Notice).<sup>1</sup>

The Notice requires NFA Members to provide advisories to customers engaging in underlying or spot virtual currency transactions and virtual currency derivative transactions warning them of the risks of substantial loss in trading in virtual currencies. In particular, the NFA's prescribed disclosures underscore the fact that — notwithstanding such activity being conducted by, with, or through an NFA Member — the NFA does not possess regulatory oversight of spot (or “cash”) virtual currency markets. The new enhanced disclosure requirements set forth in the Notice (NFA Virtual Currency Disclosure Requirements) will become effective on October 31, 2018 (Effective Date).<sup>2</sup> NFA Members must provide updated disclosures to existing customers, counterparties, and/or investors, as applicable, if they have engaged in virtual currency derivatives trading *prior to* the Effective Date. CPO/CTA member firms are also required to provide updated disclosures to existing investors in commodity pools and managed account programs for which such CPO/CTA has entered into underlying or spot virtual currency transactions prior to the Effective Date.

Notably, while the Notice will affect only NFA Members, operators of commodity pools and advisors of managed accounts not directly subject to the NFA Virtual Currency Disclosure Requirements (e.g., those relying on an exemption or other relief from CFTC registration and NFA membership) may still wish to consider the extent to which they should incorporate into their offering documents and promotional materials some of the prescribed disclosures as a means of best practice.

The NFA will provide training on the requirements for NFA Members prior to the Effective Date.<sup>3</sup> This *Client Alert* includes a table summarizing the NFA Virtual Currency Disclosure Requirements for each NFA Member category.

## Required Virtual Currency Disclosures

The Notice mandates separate disclosures for underlying or spot virtual currency transactions, on the one hand, and virtual currency derivative transactions, on the other. However, NFA Members transacting or otherwise conducting business in the virtual currency markets should consider whether including both sets of disclosures may be appropriate if it may potentially be unclear whether a particular virtual currency transaction is a spot versus a derivative transaction due to current legal and regulatory uncertainty regarding what constitutes “actual delivery” in the virtual currency context for purposes of the retail commodity rules under Section 2(c)(2)(D) of the Commodity Exchange Act, as amended (the CEA).<sup>4</sup>

Notably, the NFA neither defined an “underlying virtual currency transaction” nor did it distinguish such a transaction from a “spot” virtual currency transaction or a virtual currency derivative transaction. The term “underlying virtual currency transaction” could include a broad range of products including, *inter alia* — and in addition to spot and derivatives transactions — virtual currency sales embedded in investment structures such as the Simple Agreement for Future Token (the SAFT),<sup>5</sup> variations and modifications of the SAFT (e.g., the Simple Agreement for Future Tokens or Equity [the SAFTE]), convertible notes with an embedded virtual currency participation right or conversion component, or any similar investment structure or agreement to the foregoing.<sup>6</sup> To err on the side of caution, absent further clarification from the NFA, the authors of this *Client Alert* would recommend that NFA Members disclose all transactions with an embedded virtual currency feature or otherwise related to virtual currency.

The table on the following page summarizes the new NFA Virtual Currency Disclosure Requirements.

	Scope of Virtual Currency Activities	Standardized Language / Prescribed Deliverable	Other Disclosure Requirements	Timing of Disclosure	Format / Manner of Disclosure
<b>NFA VIRTUAL CURRENCY DISCLOSURE REQUIREMENTS</b>					
<b>FCMs/IBs</b>	Underlying/spot virtual currencies	Yes	Not specified	(i) At or before the customer engaging in any underlying/spot virtual currency activity with or through the FCM/IB  (ii) No “look-back” specified for existing underlying/spot virtual currency customers	<b>Eligible contract participants (ECPs):</b> May provide through FCM/IB website  <b>Retail customers:</b> Must provide in writing/electronically in a prominent manner
	Virtual currency derivatives	Yes	Not specified	(i) At or before the customer first engaging in a virtual currency derivatives transaction with or through the FCM/IB  (ii) By November 30, 2018, for existing virtual currency derivatives customers/counterparties	<b>ECPs:</b> May provide through FCM/IB website  <b>Retail customers:</b> Must provide in writing/electronically in a prominent manner
<b>CPOs/CTAs</b>	Underlying/spot virtual currencies in pool / managed account	Yes	Customized disclosures tailored to activities of such pool / managed account	(i) Prior to accepting an investment from any solicited prospective investors  (ii) By November 21, 2018, for existing disclosure/offering documents	Must include (with standardized language prominently displayed) in relevant disclosure/offering document(s) and promotional materials
	Virtual currency derivatives in pool / managed account	No	Customized disclosures tailored to activities of such pool / managed account	(i) Prior to accepting an investment from any solicited prospective investors  (ii) By November 21, 2018, for existing disclosure/offering documents that are materially incomplete	Must include in relevant disclosure/offering document(s) and promotional materials
	Underlying/spot virtual currencies outside of pool / managed account	Yes	Not specified	Upon distribution/use of promotional material related to the CPO/CTA member firm’s underlying/spot market virtual currency activities	Must prominently display in relevant promotional materials

Failure to comply with the new NFA Virtual Currency Disclosure Requirements under the Notice could be considered to be violations of NFA Compliance Rules 2-4 (requiring that NFA Members “observe high standards of commercial honor and just and equitable principles of trade”)<sup>7</sup> and 2-29 (requiring NFA

Members' promotional materials to include all material information necessary to ensure that such material is not misleading).<sup>8</sup>

This *Client Alert* summarizes the enhanced NFA Virtual Currency Disclosure Requirements in further detail below.

## **FCM/IB Customer Disclosures**

### **Underlying or Spot Virtual Currency Transactions**

FCMs and IBs must provide specific NFA-prescribed disclosure language<sup>9</sup> to their customers and counterparties with which the FCM/IB engages in underlying or spot virtual currency transactions. The NFA Virtual Currency Disclosure Requirements mandate that an FCM/IB provide these disclosures either (i) on the FCM/IB member firm's website (for customers/counterparties that are ECPs) or (ii) in written or electronic form, displayed in a prominent manner to ensure that the customer is aware of the disclosure (for non-ECP or "retail" customers).

### **Virtual Currency Derivative Transactions**

FCMs and IBs must provide their virtual currency derivatives customers with both (i) the December 2017 NFA investor advisory warning of the risks of trading virtual currency futures (the NFA Bitcoin Futures Advisory)<sup>10</sup> and (ii) the December 2017 CFTC advisory regarding virtual currency trading risk.<sup>11</sup> The purpose of these advisories is to remind investors that, just like any other speculative investment, trading futures on virtual currencies has certain benefits and risks. The advisories urge customers to conduct their own due diligence before investing in virtual currency futures contracts, be aware of the inherent volatility of these investments, and be wary of sales pitches and fraudsters that ask investors to "act now" and seek to capitalize on the current popularity of virtual currencies. The prescribed advisories inform customers that, given the leveraged nature of virtual currency futures contracts, even a small move against a customer's initial position can result in a large loss. Finally, the advisories remind investors that the fact that virtual currencies may be traded on regulated exchanges does not mean that the underlying virtual currency markets are regulated in any manner.

In anticipation of the rapidly approaching Effective Date, the Futures Industry Association (FIA) has issued an updated version of its Uniform Futures and Options on Futures Risk Disclosures to align with the NFA Virtual Currency Disclosure Requirements for FCMs.<sup>12</sup>

### **Application to Existing Customers**

If an FCM/IB member firm's customer has previously engaged in virtual currency **derivatives** trading with or through the FCM/IB, then the FCM/IB must provide that customer with the prescribed NFA and CFTC advisories by November 30, 2018. However, the NFA did not specify a "look-back" in the Notice that would require FCMs/IBs to update disclosures previously given to existing customers/counterparties in the **underlying or spot** virtual currency markets.

## **CPO/CTA Commodity Pool and Managed Account Disclosures**

### **Underlying or Spot Virtual Currency Transactions**

Prior to accepting an investment from a pool participant or managed account client, CPOs and CTAs engaging in underlying or spot virtual currency transactions in commodity pools (whether exempt or non-exempt)<sup>13</sup> or managed account programs must provide that solicited prospective investor with specific NFA-prescribed disclosure language,<sup>14</sup> along with a separate disclosure that is tailored to the relevant pool / trading program's underlying or spot virtual currency trading activities. CPO/CTA member firms

must include both sets of disclosures in the pool / trading program's disclosure documents, offering documents, and related promotional materials.

When drafting a customized set of "robust disclosures" for a particular pool / trading program, the NFA urges CPO/CTA member firms to specifically consider the following nine factors (each of which is described in further detail in the Notice):<sup>15</sup>

- Unique features of virtual currencies
- Price volatility
- Valuation and liquidity
- Cybersecurity
- Opaque spot market
- Virtual currency exchanges, intermediaries, and custodians
- Regulatory landscape
- Technology
- Transaction fees

Affected CPOs/CTAs must include disclosures addressing each one of the nine enumerated categories that apply to the contemplated underlying or spot virtual currency activities of the relevant pool / trading program for which the disclosure/offering document(s) and promotional material(s) are being provided. Importantly, the NFA stressed that these nine categories do not represent an exhaustive list of considerations that may be relevant to a particular pool / trading program's underlying or spot virtual currency trading activities, and CPO/CTA member firms must consider whether additional areas of concern exist for each pool / trading program and, if so, include additional disclosures in the relevant disclosure/offering document(s) and promotional material(s).<sup>16</sup> Firms should carefully consider their virtual currency disclosures for each separate pool / trading program, and should revisit any preferred disclosure language on a regular basis to ensure that their disclosure/offering document(s) and promotional material(s) reflect current best practices and adequately capture any developments in the virtual currency space that may introduce new risks that should be included in the CPO/CTA member firm's virtual currency disclosures.

### **Virtual Currency Derivative Transactions**

CPOs and CTAs engaging in virtual currency derivative transactions in a pool / trading program must provide disclosures in the relevant disclosure/offering document(s) and promotional material(s), prior to accepting an investment from any solicited prospective pool participant or managed account client.<sup>17</sup> While these disclosures are not required to contain any standardized language or address any enumerated factors (though the NFA did provide a number of specific examples, including the risks related to volatility, margin requirements, and restrictions on virtual currency derivatives trading activity), CPOs/CTAs should disclose (i) the risks associated with engaging in virtual currency derivatives and (ii) the impact these risks could have on the performance of the commodity pool or managed account.<sup>18</sup>

### **Application to Existing Commodity Pools and Managed Account Programs**

If a CPO/CTA member firm has used a disclosure/offering document that is materially incomplete in light of the Notice, the CPO/CTA must (i) provide updated virtual currency disclosures to existing investors in the affected pool / trading program and, (ii) where the relevant disclosure/offering document has been or is required to be filed with the NFA under Part 4 of the CFTC's regulations (Part 4), file the updated disclosure/offering document with the NFA before it is used, in each case by November 21, 2018.<sup>19</sup>

### **Other CPO and CTA Disclosures**

CPOs and CTAs engaging in underlying or spot virtual currency activities with customers or counterparties outside of any commodity pool or managed account program must prominently display specific NFA-prescribed disclosure language in their relevant promotional materials.<sup>20</sup>

### **Growing NFA Virtual Currency Efforts**

The Notice represents the latest in a series of recent NFA efforts to address virtual currency trading.<sup>21</sup> In December 2017, the NFA published the NFA Bitcoin Futures Advisory and began imposing the following additional reporting requirements on NFA Members:

- Each FCM member firm (for which the NFA is the designated self-regulatory organization [DSRO]) must notify the NFA if it decides to offer its customers or non-customers the ability to trade any virtual currency futures product. Additionally, FCMs for which the NFA is the DSRO must also report certain information regarding virtual currency futures contracts on their daily segregation reports.<sup>22</sup>
- Each IB member firm must notify the NFA if it solicits or accepts (or begins soliciting or accepting) any orders in virtual currency derivatives, by amending the firm-level section of its annual questionnaire. For each calendar quarter, IBs that solicit or accept orders for virtual currency derivatives must also report the number of accounts they introduced that executed one or more virtual currency derivatives transactions during that calendar quarter.<sup>23</sup>
- CPO and CTA member firms must notify the NFA if they operate a commodity pool or manage an account for which it has executed a transaction involving a virtual currency or virtual currency derivative. For each calendar quarter, CPOs/CTAs that have executed a transaction involving virtual currencies or related derivatives must also report the commodity pool(s) / managed account(s) that have executed such transactions during that calendar quarter.<sup>24</sup> Notably, the NFA omitted any specific references to “underlying or spot” virtual currency transactions, and instead referred to “transactions involving virtual currencies” when implementing the new quarterly reporting requirement last December.

On May 3, 2018, the NFA published a notice to FCM and IB member firms, urging FCMs/IBs to review the virtual currency-related frequently asked questions published by the US Treasury Department's Office of Foreign Assets Control (OFAC), to ensure that their anti-money laundering programs address OFAC regulatory obligations relating to virtual currency transactions and the use of virtual currency wallets.<sup>25</sup>

In furtherance of its regulatory function,<sup>26</sup> the NFA issued the Notice based on its concern regarding the substantial risk of loss in both the spot and derivatives virtual currency markets, and investors' lack of awareness both in regards to that risk, and of the fact that the NFA has limited regulatory authority in the virtual currency spot trading markets.<sup>27</sup>

## Key Takeaways

NFA Members should move quickly to begin complying with the new NFA Virtual Currency Disclosure Requirements in anticipation of the October 31 deadline, including by:

- Evaluating which pools / trading programs will require updated and revised disclosures
- Ensuring those new disclosures are provided to customers, counterparties, and/or investors, as applicable, within the NFA's prescribed compliance timeline
- Updating their forms accordingly

Notably, the enhanced NFA Virtual Currency Disclosure Requirements apply to all registered CPOs and CTAs, including those benefiting from the "lighter" (*i.e.*, exempt from some, but not all, Part 4 requirements) registration regime under CFTC Rule 4.7, and apply equally to all of a CPO/CTA member firm's commodity pools, regardless of whether the CPO/CTA is treated as being exempt from registration under Part 4 (*e.g.*, under CFTC Rules 4.13 and 4.14) with respect to the commodity pool(s) in question.<sup>28</sup> And, while the Notice does not apply to non-registered CPOs and CTAs relying on an exemption from registration or exclusion from the CPO definition (*e.g.*, under CFTC Rules 4.5, 4.13, or 4.14) or funds / managed accounts that are not subject to CFTC registration because they only transact in the spot virtual currency markets, these operators/advisors may nevertheless wish to consider including similar investor disclosures in their offering documents and promotional materials as a means of best practices in light of the CFTC's broad antifraud and anti-manipulation enforcement authority in the spot virtual currency markets.

Finally, the NFA emphasized that, in the context of drafting a customized disclosure regarding a CPO/CTA member firm's underlying or spot virtual currency activities in commodity pools / managed account programs, the nine specific areas of concern addressed in the Notice should not be read as an exhaustive list and are subject to change as "the risks associated with trading virtual currencies or virtual currency derivatives...vary over time[.]"<sup>29</sup> As a result, CPOs/CTAs should carefully consider their virtual currency disclosures on a case-by-case basis for each of their affected pools / trading programs, and should revisit their preferred forms on a regular basis to ensure that their disclosure/offering document(s) and promotional material(s) reflect current best practices and adequately capture any developments in the virtual currency space that may introduce new risks that should be included in the virtual currency disclosures for each pool / trading program.



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**Endnotes**

- <sup>1</sup> Nat’l Futures Ass’n, Proposed Interpretive Notice: Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities (proposed July 20, 2018), <https://www.nfa.futures.org/news/PDF/CFTC/InterpretiveNoticeRegardingMembersVirtualCurrencyDisclosures.pdf> (Interpretive Proposal); Nat’l Futures Ass’n, Interpretive Notice 9073: Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities, <https://www.nfa.futures.org/rulebook/rules.aspx?Section=9&RuleID=9073>.
- <sup>2</sup> Nat’l Futures Ass’n, Notice I-18-13, Effective date of Interpretive Notice establishing disclosure requirements for NFA Members engaging in virtual currency activities (Aug. 9, 2018), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5036> (NFA Notice I-18-13).
- <sup>3</sup> See NFA Notice I-18-13.



- <sup>4</sup> See Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60335 (proposed Dec. 20, 2017) (proposing amendment of 17 C.F.R. pt. 1), <https://www.gpo.gov/fdsys/pkg/FR-2017-12-20/pdf/2017-27421.pdf>. For further discussion, please refer to Latham's *Client Alert* regarding the CFTC's virtual currency delivery proposal: CFTC Proposes Interpretation of "Actual Delivery" for Virtual Currencies, *Client Alert* No. 2268 (Jan. 19, 2018), <https://www.lw.com/thoughtLeadership/CFTC-interpretation-actual-delivery-virtual-currencies>.
- <sup>5</sup> See Juan Batiz-Benet, Jesse Clayburgh & Marco Santori, The SAFT Project: Toward a Compliant Token Sale Framework (Oct. 2, 2017), <https://saftproject.com/static/SAFT-Project-Whitepaper.pdf>; Simple Agreement for Future Token, <https://saftproject.com/static/Form-of-SAFT-for-token-pre-sale.docx> (last visited July 29, 2018).
- <sup>6</sup> It is not entirely clear whether the NFA meant to use "underlying" and "spot" as two separate concepts, or if it was merely using two different words to describe a single concept. Notably, the NFA referred only to "spot" (and not "underlying") virtual currency transactions when notifying NFA Members of the effective date of the new NFA Virtual Currency Disclosure Requirements. See NFA Notice I-18-13; see also Interpretive Proposal at 9 ("NFA's Board is also concerned that FCM and IB Member customers may not understand that although they may be engaging in **spot virtual currency** activities with an NFA Member, NFA does not have regulatory oversight over those activities. Therefore, the Interpretive Notice also requires that FCM and IB Members offering services in **spot market virtual currencies** provide customers with a standardized disclosure that specifically states that NFA does not have regulatory oversight authority over **underlying or spot virtual currency** products or transactions or virtual currency exchanges, custodians or markets."), 10 ("NFA's Board is also concerned that pool participants and managed account customers understand the limitations of NFA's regulatory oversight with respect to **spot virtual currency** transactions being done in a commodity pool, exempt pool or through a managed account program. Therefore, the proposed Interpretive Notice requires any CPO or CTA Member that operates a pool, exempt pool or trading program that trades **spot market virtual currencies** to include a standardized disclosure addressing the limits of NFA's oversight and informing investors that...there currently is no sound or acceptable practice that NFA can use to verify the ownership and control of **underlying/spot virtual currencies**." (emphasis added)).
- <sup>7</sup> See Nat'l Futures Ass'n, Rule 2-4: Just and Equitable Principles of Trade, <https://www.nfa.futures.org/rulebook/rules.aspx?Section=4&RuleID=RULE%202-4>.
- <sup>8</sup> See Nat'l Futures Ass'n, Rule 2-29: Communications with the Public and Promotional Material, <https://www.nfa.futures.org/rulebook/rules.aspx?Section=4&RuleID=RULE%202-29>.
- <sup>9</sup> FCM/IB member firms must include the following disclosure language to underlying or spot virtual currency customers/counterparties:
- [NAME OF NFA MEMBER]** IS A MEMBER OF NFA AND IS SUBJECT TO NFA'S REGULATORY OVERSIGHT AND EXAMINATIONS. HOWEVER, YOU SHOULD BE AWARE THAT NFA DOES NOT HAVE REGULATORY OVERSIGHT AUTHORITY OVER UNDERLYING OR SPOT VIRTUAL CURRENCY PRODUCTS OR TRANSACTIONS OR VIRTUAL CURRENCY EXCHANGES, CUSTODIANS OR MARKETS.
- Interpretive Proposal at 3.
- <sup>10</sup> Nat'l Futures Ass'n, NFA INVESTOR ADVISORY—FUTURES ON VIRTUAL CURRENCIES INCLUDING BITCOIN (Dec. 1, 2017) <https://www.nfa.futures.org/investors/investor-advisory.html> (NFA Bitcoin Futures Advisory).
- <sup>11</sup> Interpretive Proposal at 2, 9; see NFA Bitcoin Futures Advisory; U.S. Commodity Futures Trading Comm'n, CFTC CUSTOMER ADVISORY: UNDERSTAND THE RISKS OF VIRTUAL CURRENCY TRADING (Dec. 18, 2017), [https://www.cftc.gov/sites/default/files/idc/groups/public/@customerprotection/documents/file/customeradvisory\\_urvct121517.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@customerprotection/documents/file/customeradvisory_urvct121517.pdf).
- For introduced accounts, the prescribed NFA and CFTC advisories may be provided by either the FCM or IB member firm. See Interpretive Proposal at 2, 9.
- <sup>12</sup> See Futures Industry Ass'n, FIA UNIFORM FUTURES AND OPTIONS ON FUTURES RISK DISCLOSURES, 18-22 (Sept. 26, 2018), [https://www.fiadocumentation.org/fia/regulatory-disclosures\\_1/fia-uniform-futures-and-options-on-futures-risk-disclosures-booklet-pdf-version-2018](https://www.fiadocumentation.org/fia/regulatory-disclosures_1/fia-uniform-futures-and-options-on-futures-risk-disclosures-booklet-pdf-version-2018).
- <sup>13</sup> Notably, the NFA specifically called out exempt pools in the Notice, so these enhanced disclosure requirements apply to CPO/CTA member firms in respect of commodity pools for which such CPO/CTA is treated as being exempt from registration under Part 4. However, since the Notice only directly applies to NFA members, non-member CPOs/CTAs relying on an exemption from registration with respect to their commodity pools (e.g., under CFTC Rules 4.13 and 4.14) are not technically required to comply with the Notice's enhanced disclosure requirements. See Interpretive Proposal at 3, 10.
- <sup>14</sup> CPO/CTA member firms must prominently display the following language in the disclosure/offering document(s) and promotional material(s) for any pool / trading program in which the CPO/CTA will engage in underlying or spot virtual currency transactions:
- [NAME OF NFA MEMBER]** IS A MEMBER OF NFA AND IS SUBJECT TO NFA'S REGULATORY OVERSIGHT AND EXAMINATIONS. **[NAME OF NFA MEMBER]** HAS ENGAGED OR MAY ENGAGE IN UNDERLYING OR SPOT VIRTUAL CURRENCY TRANSACTIONS IN A **[COMMODITY POOL OR MANAGED ACCOUNT PROGRAM]**. ALTHOUGH NFA HAS JURISDICTION OVER **[NAME OF NFA MEMBER]** AND ITS **[COMMODITY POOL OR MANAGED ACCOUNT PROGRAM]**, YOU SHOULD BE AWARE THAT NFA DOES NOT HAVE REGULATORY OVERSIGHT AUTHORITY FOR UNDERLYING OR SPOT MARKET VIRTUAL CURRENCY PRODUCTS OR TRANSACTIONS OR VIRTUAL CURRENCY EXCHANGES, CUSTODIANS, OR MARKETS. YOU SHOULD ALSO BE AWARE THAT GIVEN CERTAIN

MATERIALS CHARACTERISTICS OF THESE PRODUCTS, INCLUDING LACK OF A CENTRALIZED PRICING SOURCE AND THE OPAQUE NATURE OF THE VIRTUAL CURRENCY MARKET, THERE CURRENTLY IS NO SOUND OR ACCEPTABLE PRACTICE FOR NFA TO ADEQUATELY VERIFY THE OWNERSHIP AND CONTROL OF A VIRTUAL CURRENCY OR VALUATION ATTRIBUTED TO A VIRTUAL CURRENCY BY **[NAME OF NFA MEMBER]**.

Interpretive Proposal at 7.

<sup>15</sup> Interpretive Proposal at 4-6.

<sup>16</sup> See Interpretive Proposal at 4 (“The guidelines are not an exhaustive list of disclosure items, and Members should not necessarily limit their disclosures to those areas discussed in this Interpretive Notice. NFA recognizes that the risks associated with trading virtual currencies or virtual currency derivatives will vary over time, and this Interpretive Notice may be supplemented in the future.”), 10 (“The Interpretive Notice makes clear that CPOs and CTAs are expected to customize their disclosure documents and offering documents to address the unique risks related to their particular activities. Therefore, the Interpretive Notice requires CPO and CTA Members to address the areas discussed in the Interpretive Notice that are applicable to their activities but to also discuss any other risks not mentioned that are applicable to their offering.”).

<sup>17</sup> See NFA Notice I-18-13.

<sup>18</sup> See Interpretive Proposal at 7-8 (“The risks associated with the unique features of engaging in virtual currency derivatives should be disclosed and the impact these risks may have on a pool’s or managed account program’s performance should be explained.”).

<sup>19</sup> See NFA Notice I-18-13.

<sup>20</sup> CPO/CTA member firms must prominently display the following language in any promotional material(s) related to its underlying or spot virtual currency activities unrelated to any pool / trading program:

**[NAME OF NFA MEMBER]** IS A MEMBER OF NFA AND IS SUBJECT TO NFA’S REGULATORY OVERSIGHT AND EXAMINATIONS. HOWEVER, YOU SHOULD BE AWARE THAT THE NFA DOES NOT HAVE REGULATORY OVERSIGHT AUTHORITY OVER UNDERLYING OR SPOT VIRTUAL CURRENCY PRODUCTS OR TRANSACTIONS OR VIRTUAL CURRENCY EXCHANGES, CUSTODIANS, OR MARKETS.

Interpretive Proposal at 8.

<sup>21</sup> Among the significant virtual currency developments that have occurred over the past few years, the NFA specifically credited the launch of bitcoin futures in December 2017 with inspiring the NFA to draft the Notice. See Interpretive Proposal at 8; see also U.S. Commodity Futures Trading Comm’n, CFTC BACKGROUNDER ON OVERSIGHT OF AND APPROACH TO VIRTUAL CURRENCY FUTURES MARKETS (Jan. 4, 2018), [https://www.cftc.gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/backgrounder_virtualcurrency01.pdf).

<sup>22</sup> Nat’l Futures Ass’n, Notice I-17-27, Additional reporting requirements regarding virtual currency futures products for FCMs for which NFA is the DSRO (Dec. 6, 2017), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4973>.

<sup>23</sup> Nat’l Futures Ass’n, Notice I-17-29, Additional reporting requirements for IBs that solicit or accept orders in virtual currency products (Dec. 14, 2017), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4975>; see Nat’l Futures Ass’n, Notice I-18-07, Reminder to update annual questionnaire regarding virtual currencies (March 27, 2018), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4999> (NFA Notice I-18-07).

<sup>24</sup> Nat’l Futures Ass’n, Notice I-17-28, Additional reporting requirements for CPOs and CTAs that trade virtual currency products (Dec. 14, 2017), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4974>; see NFA Notice I-18-07.

<sup>25</sup> Nat’l Futures Ass’n, Notice I-18-09, FCMs and IBs should review OFAC FAQs addressing virtual currency transactions (May 3, 2018), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5003>; see Dep’t of the Treasury, Office of Foreign Asset Control, OFAC FAQs: Sanctions Compliance, Questions on Virtual Currency (Topics 559-563) (March 19, 2018), [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_compliance.aspx#vc\\_faqs](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx#vc_faqs).

<sup>26</sup> The NFA has acted as the self-regulatory organization (SRO) for the US derivatives industry since 1982, following the CFTC’s formal designation of the NFA as a “registered futures association” under Section 17 of the CEA. See 7 U.S.C. § 21; see also Nat’l Futures Ass’n, ABOUT NFA, <https://www.nfa.futures.org/about/index.html> (last visited Aug. 3, 2018).

<sup>27</sup> As a reminder, the CFTC regulates the swaps and futures markets, and retains general enforcement authority to police against manipulation and fraud in the spot virtual currency markets, but does not otherwise have the authority to regulate or require licensing of entities engaging in transactions in the underlying virtual currency markets or any related spot market trading. See, e.g., 7 U.S.C. §§ 6c(a), 9, 12(a)(5), 15; 17 C.F.R. § 180.1; see also Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41398 (July 14, 2011), <https://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17549.pdf>. The CFTC first established that virtual currencies are “commodities” subject to CFTC enforcement authority in 2015. See *In re Coinflip, d/b/a Derivabit, et al.*, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, CFTC Docket No. 15-29 (Sept. 17, 2015), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliporder09172015.pdf>. For further discussion, please refer to Latham’s *Client Alert* regarding the Derivabit order: Latham & Watkins, Cryptocurrencies Are Commodities: CFTC’s First Bitcoin Enforcement Action, *Client Alert* No. 1874 (Sept. 21, 2015), <https://www.lw.com/thoughtLeadership/LW-CFTC-first-bitcoin-enforcement-action>.

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<sup>28</sup> See *supra* text accompanying note 13.

<sup>29</sup> Interpretive Proposal at 4.