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Retail Trading in the Digital Age

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<u>Speakers</u>:

Renato Mariotti — *Partner, Paul Hastings*

Joshua Riezman — *Chief Legal and Strategy Officer, GSR*

Nicholas Wendland — *Of Counsel, Foley & Lardner*

Sean Yoo — *Assistant General Counsel, Active Trader, Robinhood Derivatives*

Brian Young — *Partner, Jones Day*

Supervising the Finfluencer: Firm Liability for Third-Party Promotional Content in the Age of Social Media

By: Renato Mariotti and William Farrell

I. The Rise of the "Finfluencer"

As the number of retail investors trading derivative products has increased, firms have begun to engage with so-called "finfluencers" to attract new customers. The use of finfluencers, while permissible in certain circumstances, must be undertaken with caution to ensure compliance with applicable NFA rules and CFTC regulations.

Retail trading exploded during the COVID-19 pandemic, as Millennials and Gen Z turned to trading applications and social media, including applications that access futures and derivatives markets.[1] So-called "retail swarms," acting on speculation in social media posts, drove volatility and generated headlines.[2] The meteoric rise of prediction markets—which are largely fully-collateralized markets servicing retail traders—has driven additional retail demand to derivative markets.[3]

To reach this new customer base, some registrants have turned to "finfluencers," who use social media to give advice on trading-related issues, including platforms, trends, and specific instruments.[4] At times, this advice includes efforts to encourage their audience to trade specific instruments, using language that some consider analogues to manipulative activity.[5]

In December 2024, the host of the third-most popular podcast with over 2.5 million

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[1] *See* NASAA, *Informed Investor Advisory: Finfluencers* (Aug. 2022), https://www.nasaa.org/64940/informed-investor-advisory-finfluencers/?qoid=investor-advisories.
[2] *See, e.g.*, Alan M. Malz, *The GameStop Episode: What Happened and What Does It Mean?*, CATO INST. (Fall 2021),
https://www.cato.org/sites/cato.org/files/2021-10/cj-41n3-4.pdf.
[3] *See* Dan Santaromita & Hannah Vanbiber, *Prediction markets are coming to sport in a big way. Here's what you need to know*, The NEW YORK TIMES (Jan. 12, 2026),
https://www.nytimes.com/athletic/6826803/2025/12/23/prediction-markets-sports-what-you-need-to-know/.
[4] *See supra* note 1.
[5] *Id.*

followers launched a memecoin that hit a market capitalization of nearly $491 million before plummeting 95% to $25 million in a matter of hours.[6] The podcast host reportedly received an up-front payment of $125,000 to promote the memecoin, 50% of the net trading proceeds, and 10% of the coin's supply.[7] A class action lawsuit was filed against the coin's creators, alleging that they illegally sold and promoted an unregistered security.[8] Although last year the SEC indicated that memecoins are collectables, the lawsuit remains active.[9] This example underscores that finfluencers can create or magnify potential liability, particularly if they are not properly supervised, given that many lack sufficient knowledge or training to understand the applicable CFTC and NFA regulations.

The promotional activities of finfluencers have attracted significant scrutiny from regulatory agencies, particularly after the SEC's enforcement actions during the Biden administration. In October 2022, the commission charged a well-known influencer for failing to disclose a $250,000 payment she received to promote a cryptocurrency to her social media followers.[10] The influencer settled the matter by agreeing to pay $1.26 million in penalties plus interest and committing to a three-year ban on endorsing any "crypto asset securities."[11] This enforcement action serves as a high-profile warning that regulators may pursue enforcement actions against finfluencers who mislead investors by failing to disclose the nature and amount of

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[6] *See* Conor Murray, *'Hawk Tuah' Creator Hailey Welch Criticized for Memecoin Launch After Price Crashes*, FORBES (Dec. 5, 2024, 4:58 PM), https://www.forbes.com/sites/conormurray/2024/12/05/hawk-tuah-creator-haliey-welch-criticized-for-chaotic-memecoin-launch-in-latest-bizarre-internet-stunt/.
[7] *See* Miles Klee, *Hawk Tuah Girl Breaks Silence After Meme Coin Crash and Class Action Suit*, ROLLING STONE (Dec. 20, 2024), https://www.rollingstone.com/culture/culture-news/hawk-tuah-meme-coin-haliey-welch-crypto-1235213606/.
[8] *See* Complaint at 26-27, Rodriguez Mena v. Schultz, et al., No. 1:24-cv-08965 (E.D.N.Y. 2024), https://www.wolfpopper.com/siteFiles/Cases/Hawk_Tuah_Class_Complaint.pdf.
[9] Press Release, Sec. and Exch. Comm'n, Div. of Corp. Fin., Staff Statement on Meme Coins (Feb. 27, 2025), https://www.sec.gov/newsroom/speeches-statements/staff-statement-meme-coins.
[10] Press Release, Sec. and Exch. Comm'n, SEC Charges Kim Kardashian for Unlawfully Touting Crypto Sec. (Oct. 3, 2022), https://www.sec.gov/newsroom/press-releases/2022-183.
[11] *Id.*

their compensation. As discussed below, the actions of influencers, if not properly supervised by the firms that utilize them, can create potential liability for those firms.

Firms working with finfluencers must pay careful attention to their obligations under CFTC regulations and NFA rules to ensure that they do not become liable for the finfluencer's actions. Although the enforcement climate has changed in recent years, the actions of finfluencers can generate litigation, and a firm's failure to meet its obligations under CFTC regulations and NFA rules can be used to support a plaintiff's litigation position. Accordingly, it is important for firms to ensure compliance with relevant CFTC regulations and NFA rules, which require virtually all registrants to supervise finfluencers as Associated Persons ("APs").

II. CFTC Regulation: 17 C.F.R. § 1.3

Registrants may be held liable for the actions of APs. 17 C.F.R. § 1.3 defines APs as "any natural person who is associated in any of the following capacities with" six different kinds of firms.[12]

1. Futures Commission Merchants ("FCMs")

For FCMs, influencers may be APs when they act as employees. The definition of APs for FCMs, pursuant to 17 C.F.R. § 1.3, includes any partner, officer, or employee (or any person occupying a similar status or performing similar functions) who solicits or accepts customers' orders.[13] Under this definition, an influencer may become an AP of an FCM if he or she performs similar functions as certain employees of an FCM. For example, if certain FCM employees were tasked with promoting the FCM to retail customers, and an influencer was paid to perform a similar function, the FCM may be held liable for the contents of the influencer's posts pursuant to Section 2(a)(1)(B) of the CEA or be liable for failing to supervise the influencer pursuant to

[12] 17 C.F.R. § 1.3 "Associated person".
[13] *Id.*

CFTC Regulation 166.3.[14]

2. *Introducing Brokers ("IBs"), Commodity Pool Operators ("CPOs"), Commodity Trading Advisors ("CTAs"), Leverage Transaction Merchants ("LTMs"), and Swap Dealers ("SDs")*

For IBs, CPOs, CTAs, LTMs, and SDs, influencers may be APs when acting as agents. The definition of APs for these entities, pursuant to 17 C.F.R. § 1.3, includes any partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions) who solicits or accepts customers' orders. Under this definition, an influencer may become an AP of these entities if he or she acts as an agent by soliciting orders in exchange for compensation. For example, if an influencer is paid by the entity to solicit his or her audience to become customers through social media posts, the entity may be held liable for the contents of the influencer's posts pursuant to Section 2(a)(1)(B) of the CEA or be liable for failing to supervise the influencer pursuant to CFTC Regulation 166.3.[15]

III. NFA Regulation: Compliance Rule 2-29

17 C.F.R. § 3.12 requires firms to register their APs with the National Futures Administration, and NFA members are liable for the acts of their APs.[16] Accordingly, any firm working with a finfluencer who may arguably be considered an AP must ensure that the AP adheres to the promotional standards prescribed by NFA Compliance Rule 2-29, which explicitly applies to both the firm and APs.[17] These standards include presenting fair and balanced content, including clear risk disclosures, avoiding any guarantees of return, avoiding cherry-picking examples of past performance, and including conspicuous paid sponsorship disclosures.[18]

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[14] 7 U.S.C. § 2(a)(1)(B); 17 C.F.R. § 166.3.
[15] *Id*.
[16] *Supra* note 12.
[17] *See* NFA Compliance Rule 2-29 ("No FCM, IB, CPO, or CTA Member *or Associate*") (emphasis added).
[18] *See id.* at 2-29(b)(1-6).

1. Fair and Balanced Content

NFA Compliance Rule 2-29 requires that all promotional materials be fair, balanced, and not misleading. Communications must not emphasize the possibility of profit without giving equal prominence to the risk of loss.[19] As the NFA explains, "[a]ny mention of the possibility of profit" must be accompanied by an "equally prominent statement of the risk of loss," and the overall communication must be evaluated for balance based on its "overall impact."[20] Factors such as font size, placement, frequency of references, and tone all bear on whether the communication is balanced.[21]

Moreover, under NFA Interpretive Notice 9037, these standards also apply to digital communications, including websites and social media. Any public-facing content related to commodity interests—whether posted directly by the firm or on its behalf—is treated as promotional material and must comply with Rule 2-29's balance requirement.[22]

2. Clear and Prominent Risk Disclosures

Closely related to balance is the requirement that the firm must provide clear, specific, and prominent risk disclosures. Generalized statements such as, "all trading involves risk" are insufficient.[23] Instead, disclosures must address the "significant risk of loss" unique to futures and derivatives trading.[24] The NFA emphasizes that disclosures must be conspicuous and cannot be obstructed or hidden by hyperlinks or small font buried at the bottom of a caption.[25] For

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[19] *See id.* at 2-29(b)(3).
[20] *See* NFA Interpretive Notice 9025.
[21] *See id.*
[22] *See* NFA Interpretive Notice 9037.
[23] *See A Guide to NFA Compliance Rule 2-29: Commc'ns with the Pub. and Promotional Material*, NAT'L FUTURES ASS'N (June 2005) https://velocitylaw.com/Library/CommoditiesFuturesRegistrationExemptions/Guide%20to%20NFA%20Compliance%20Rule%202-29,%20Promotional%20Material.pdf.
[24] *See id.*
[25] *Supra* note 20.

electronic communications, disclaimers must "immediately precede or follow" the relevant discussion.[26]

3. *Prohibition on Guarantees of Return*

Rule 2-29 prohibits promotional material from making statements that guarantee profits or imply that successful trading outcomes are assured.[27] Communications may not include claims that customers will achieve specific returns unless those claims are demonstrably representative of overall customer performance.[28] Even implied guarantees suggesting that trading is easy or suitable for everyone have been found to violate NFA standards because they mislead investors about the inherent risks and uncertainties of trading.[29]

4. *Avoiding Cherry-Picking Performance*

The NFA strictly prohibits firms from misleading investors by cherry-picking examples of past performance.[30] Cherry-picking can take multiple forms, including highlighting the most profitable trades or accounts; using testimonials that reflect unusually successful outcomes; and presenting select historical data that exaggerates performance.[31] To mitigate this risk, Rule 2-29 requires that performance presentations be complete, balanced, and accompanied by appropriate disclosures.[32] For example, past performance must include the disclaimer that "past results are not necessarily indicative of future results" and any data presented must not omit material information that would render it misleading.[33]

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[26] *Supra* note 20.
[27] *See* NFA Interpretive Notice 9033.
[28] *See id.*
[29] *Supra* note 23.
[30] *See* NFA Compliance Rule 2-29(b)(6).
[31] *See id.* at (b)(5-6).
[32] *See id.* at (c)(1).
[33] *See id.*

5. *Conspicuous disclosure of Paid Sponsorship*

When promotional content includes testimonials, endorsements, or influencer participation, firms must clearly and prominently disclose any compensation arrangements.[34] This requirement aligns with the NFA's broader principle that promotional material must not mislead customers regarding the independence or objectivity of the speaker.[35] This principle applies to paid social media endorsements so that potential customers can properly evaluate the credibility and bias of the content they are consuming. Importantly, in Interpretive Notice 9037, the NFA clarified that firms remain responsible for the promotional content disseminated through third parties, including influencers and other non-member platforms.[36] If a firm solicits leads or benefits from such content, it "will be responsible for supervising the content of such platforms" and may face disciplinary action for any misleading or non-compliant statements.[37]

IV. Practical Takeaways for Firms

Finfluencers can arguably be viewed as "agents" or a "person occupying a similar status or performing similar functions" as an "employee" under relevant CFTC regulations, requiring these individuals to register as Associated Persons under CFTC regulations and NFA rules and causing registrants to be liable for their actions and responsible for supervising their activities "relating to its business" as a registrant pursuant to CFTC Regulation 166.3.[38] Accordingly, firms can be held responsible for supervising third-party social media content to ensure it meets the requirements of NFA Compliance Rule 2-29. Registrants should ensure that finfluencers they pay provide fair and balanced content, clear risk disclosures, and the conspicuous reporting of all

[34] *See* NFA Compliance Rule 2-29(b)(6).
[35] *See id.*at (b)(1-2).
[36] *See* NFA Interpretive Notice 9037.
[37] *Supra* note 34 at (b)(e).
[38] 17 C.F.R. § 166.3.

influencer compensation. Properly supervising finfluencers paid by registrants is vital to protect them from significant penalties and regulatory scrutiny.