<u>Marketing Materials: A Comparison of FCM and DCM Regulatory Requirements</u>

Panel Discussion: To Register or Not to Register?...It Can Be a Hard Question!

FIA Law & Compliance Conference 2026
Thursday, April 16, 2026

Moderator:
Matthew Kulkin, Partner and Chair, Futures and Derivatives Group, WilmerHale

Panelists:
Laurian Cristea, General Counsel, Rothera Exchange and Clearing LLC
Pamela Geraghty, Senior Director, Patomak Global Partners
Suzanne McAulay, Senior Legal Counsel, Marex
Sarah Riddell, Partner, K&L Gates
Yvette Valdez, Partner, Latham & Watkins

I. Introduction

Futures Commission Merchants ("**FCMs**") have historically played a central role in derivatives market transactions. For many years, participants trading on designated contract markets ("**DCMs**") accessed the markets through FCMs. In this structure, FCMs served as the primary access point between the customers looking to trade and the DCMs providing the relevant contracts, soliciting the orders, and executing them on the exchange; while also providing a guarantee for FCM customers at the Derivatives Clearing Organization ("**DCO**") and tackling customer KYC/AML, customer fund segregation, default fund risk management, and financial risk limits.

The intermediated access model allows FCMs and DCMs to provide separate services for market participants and to carry certain responsibilities in connection with derivatives trading. DCMs list and operate the markets, established trading and risk management rules, and maintained self-regulatory functions, while FCMs handle customer-facing activities such as onboarding, account management and margin payment and collection. This structure separates certain obligations between the DCMs focus on market integrity and surveillance, DCOs focus on stability and resilience, while relying on FCMs to manage customer risks. The Commodity Futures Trading Commission ("**CFTC**" or "**Commission**"), which regulates FCMs, DCMs, and DCOs has implemented and maintained rules over several decades to support this market structure in a manner consistent with the CFTC's mission of promoting market stability and customer protection.[1]

The last few years have seen an increase in an alternative market structure, one that contemplates a "direct access" model where market participants directly access a DCMs without an intermediary like an FCM. As this new model continues to evolve, market participants and policymakers are facing questions about whether, and how, the regulatory obligations historically borne by the FCM should be reallocated to the DCM and DCO. These questions include topics such as the treatment of customer funds (held by an FCM in a segregated account), as well as how DCMs will engage with customers through marketing and promotional activities.[2]

This paper focuses on the differences between FCMs and DCMs with respect to customer-facing marketing and promotional materials.

II. FCM Marketing Material Requirements

An FCM is defined as (1) any individual, association, partnership, corporation, or trust

[1] Futures Market Basics, CFTC, https://www.cftc.gov/LearnAndProtect/EducationCenter/FuturesMarketBasics/index2.htm ("Trading commodity futures and options is a volatile, complex and risky venture that is rarely suitable for individual investors or 'retail customers'").

[2] CFTC Staff Seek Public Comment on Direct Clearing by Retail Participants, Press Release (Dec. 18, 2026) https://www.cftc.gov/PressRoom/PressReleases/9158-25 ("…there has been an exponential increase in direct clearing for retail traders, where there are no brokers such as CFTC registered futures commission merchants that protect customer funds and protect against abusive sales and marketing practices.").

(i) who is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery; a security futures product; a swap; any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Commodity Exchange Act ("**CEA**"); a commodity option authorized under section 4c of the CEA; a leverage transaction authorized under section 19 of the CEA; or acting as a counterparty in any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the CEA; and (ii) who, in connection with any of these activities accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; and (2) any person that is registered as a futures commission merchant.[3]

FCMs are required to register with the CFTC in order to operate within the derivatives market.[4] FCMs register as intermediaries, meaning they act on behalf of another person in connection with futures trading.[5] As the federal body overseeing FCMs, the CFTC establishes the overarching statutory and regulatory framework under which FCMs must function, but it has delegated significant supervisory and enforcement responsibilities to the National Futures Association ("**NFA**").[6]

NFA is designated by the CFTC as a registered futures association under the CEA.[7] A registered futures association is a self-regulatory organization ("**SRO**") for the U.S. derivatives industry.[8] SROs are organizations charged with regulating their members within their market or industry segment, subject to oversight by a federal regulator. In the case of the NFA, that federal regulator is the CFTC.[9] The NFA serves as a primary supervisory and enforcement vehicle for most derivatives market participants, ensuring FCM compliance with applicable statutes, CFTC regulations and NFA rules.[10]

FCMs are additionally required by the CFTC and the CEA to register as a member of the NFA. The NFA oversees many aspects of FCM operations, including all communications with the public. The NFA's authority to regulate these communications is provided for under the CEA. Section 17(p)(3) of the CEA requires registered futures associations such as the NFA to establish "minimum standards governing the sales practices of its members and persons associated therewith…"[11] To fulfill this mission, the NFA has adopted a series of Compliance Rules that impose both substantive and procedural requirements on communications.

Such communications include the use and dissemination of marketing materials, for which the NFA published Compliance Rule 2-29: *Communications with the Public and Promotional Materials.* Rule 2-29 defines "promotional material" as including (i) any text of a

---

[3] 17 CFR § 1.3.
[4] About NFA, https://www.nfa.futures.org/about/index.html.
[5] Futures Glossary, CFTC, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#fcm.
[6] About NFA, https://www.nfa.futures.org/about/index.html.
[7] Our Mission, NFA, https://www.nfa.futures.org/index.html.
[8] About NFA, https://www.nfa.futures.org/about/index.html; 17 CFR § 170.
[9] About NFA, https://www.nfa.futures.org/about/index.html.
[10] About NFA, https://www.nfa.futures.org/about/index.html.
[11] 7 U.S.C. §21(p)(3); Interpretive Notices, 9003 – NFA Compliance Rule 2-29: Communications with the Public and Promotional Material, NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9003.

standardized oral presentation, or any communication for publication in any newspaper, magazine or similar medium, or for broadcast over television, radio, internet or other electronic medium, which is disseminated or directed to the public concerning a commodity interest account, agreement or transaction; (ii) any standardized form of report, letter, electronic communication (e.g., email, text message or instant message), circular, memorandum, presentation or publication that is disseminated or directed to the public concerning a commodity interest account, agreement or transaction; and (iii) any other written material disseminated or directed to the public for the purpose of soliciting a commodity interest account, agreement or transaction.[12]

NFA has made clear that this definition is purposefully broad and intended to apply to all forms of communication with the public, though it concedes that routine day-to-day contact with customers is unique.[13] Such routine contact, it clarifies, is only required to abide by the general provisions of the Rule, meaning it is acceptable so long as it is not fraudulent or deceptive, does not involve a high-pressure approach and does not contain any statement indicating that commodity interest trading is appropriate for all persons.[14]

In addition to the general prohibitions, Rule 2-29 also imposes specific prohibitions on the content of marketing materials. Such materials must not be likely to deceive the public, misstate or omit material facts, discuss the possibility of profit without discussing the possibility of loss to the same extent and with the same emphasis, or use specific numbers and statistical information or testimonials unless they meet certain criteria.[15] FCMs must also include a disclaimer if any hypothetical results are referenced and must clearly identify all opinions included in marketing materials.[16]

Rule 2-29 further requires specific supervisory and recordkeeping practices to be adhered to. For example, FCMs must have written policies and procedures in place to ensure compliance with Rule 2-29 itself.[17] All marketing materials must also be approved by designated individuals before they can be posted, and all records must be kept in accordance with Rules 2-29 and 2-10 and CFTC Regulations 1.31 and 1.35(a).[18] For audio and video advertisements, Rule 2-29 specifically requires FCMs to submit the materials to the NFA for review at least ten days prior to their first use.[19]

---

[12] Rule 2-29(h)(i), NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=4&RuleID=RULE%202-29.

[13] Interpretive Notices, 9003 – NFA Compliance Rule 2-29: Communications with the Public and Promotional Material, NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9003.

[14] Interpretive Notices, 9003 – NFA Compliance Rule 2-29: Communications with the Public and Promotional Material, NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9003.

[15] Rule 2-29(b), NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=4&RuleID=RULE%202-29.

[16] Rule 2-29(c) and Rule 2-29(d), NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=4&RuleID=RULE%202-29.

[17] Rule 2-29(e) and Rule 2-29(f), NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=4&RuleID=RULE%202-29.

[18] Rule 2-29(f), NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=4&RuleID=RULE%202-29; Rule 2-10: Recordkeeping, NFA, https://www.nfa.futures.org/rulebooksql/rules.aspx?RuleID=RULE%202-10&Section=4; Sales Practices and Promotional Material, NFA, https://www.nfa.futures.org/members/fcm/regulatory-obligations/sales-practice-promotional-material.html.

[19] Sales Practices and Promotional Material, NFA, https://www.nfa.futures.org/members/fcm/regulatory-obligations/sales-practice-promotional-material.html,

Moreover, while Rule 2-29 applies specifically to marketing materials, it is not the only rule with which FCMs must comply when creating its marketing materials. More general rules such as Rule 2-2, which relates to fraudulent and deceptive practices, and Rule 2-4, which relates to just and equitable principles of trade, also apply. The NFA makes it clear that literal compliance with 2-29 will not shield FCMs from compliance issues related to the content or use of marketing materials if they are deemed to violate any other NFA requirement.[20]

To assist FCMs in preparing compliant materials, the NFA offers a Pre-Review Program which allows FCMs to share the promotional material with NFA ahead of publishing it, to confirm the NFA views it as acceptable. The NFA then provides comments, helping the FCMs understand how to produce materials that are acceptable under the rules.[21]

III. DCM Marketing Material Requirements

A DCM is defined as a board of trade designated by the Commission as a contract market under the CEA and in accordance with the provisions of Part 38 of the Commission's regulations.[22]

In contrast to FCMs, and many other registrant categories, DCMs do not register with the NFA or any other SRO, they are themselves SROs.[23] DCMs register with, and are regulated by, the CFTC. This means, among other things, that DCMs are not NFA members, and are not bound by NFA rules, including those governing marketing materials.

DCMs are instead regulated solely by the CFTC through a principles-based regime, where they must ensure compliance with 23 core principles set forth in Section 5(d) of the CEA and implemented through regulations in 17 CFR § 38.[24] The core principles and associated regulations do not include detailed requirements for how DCMs may present or use marketing materials.

CEA Section 5(d) does not define marketing materials, nor does the CEA have a specific section on promotional interactions with customers. Even the most relevant provisions only provide high-level direction. For example, Core Principles 7 and 8 require DCMs to make accurate information regarding contract terms, rules and trading mechanisms, as well as information on settlement prices, volume, open interest, and ranges, available to the public.[25] Core Principle 12 requires DCMs to protect markets and participants from abusive practices and to promote fair and equitable trading.[26] The Part 38 regulations mirror the core principles quite closely and do not meaningfully expand upon the obligations, neither generally or in the marketing context specifically. Similarly, Appendix B to the Part 38 Rules (Guidance on, and

[20] Interpretive Notices – 9003 https://www.nfa.futures.org/rulebooksql/rules.aspx?RuleID=9003&Section=9.
[21] Sales Practices and Promotional Material, NFA, https://www.nfa.futures.org/members/fcm/regulatory-obligations/sales-practice-promotional-material.html.
[22] 17 CFR § 1.3.
[23] Who Has to Register, NFA, https://www.nfa.futures.org/registration-membership/who-has-to-register/index.html.
[24] 7 U.S.C. § 7(d); 17 CFR § 38.
[25] 17 CFR § 38.400 - Core Principle 7; 17 CFR § 38.450 - Core Principle 8.
[26] 17 CFR § 38.650 - Core Principle 12.

Acceptable Practices in, Compliance With Core Principles)[27] is silent on how DCMs can further comply with Core Principles 7 and 8, specifically, and marketing materials more generally.

Despite the absence of explicit regulatory guidance, recent CFTC enforcement cases against DCMs have begun to clarify the Commission's expectations with respect to false and misleading information being presented to the public. In August of 2024, the CFTC brought an enforcement action against Nasdaq Futures, Inc. for failing to disclose the details of its incentive program to the CFTC and the public.[28] Nasdaq publicly promoted various incentive programs which paid a fixed monthly stipend to market makers, but did not disclose that additional payments were being made to a select number of program participants based on the total volume of contracts those participants traded.[29] More recently, the Commission recently published an Enforcement Advisory in connection with two incidents of misconduct on Kalshi, which Kalshi adjudicated as an SRO according to its internal disciplinary program. One incident involved a political candidate posting a video on social media trading on his own candidacy. The Enforcement Advisory identified this incident as a violation of Section 6(c)(1) of the CEA, and CFTC Regulation 180.1(a)(1) and (3) for use of a manipulative scheme or artifice to defraud, or engaging or attempting to engage in an act, practice or course of business that operates as a fraud on any other person.[30] Although Kalshi addressed the incidents internally, the Commission emphasized its authority to pursue enforcement actions for such violations.[31]

As a result, the use of marketing materials by DCMs is constrained only by the general requirements of the principles and their regulations, such as requirements for fairness, transparency, the prevention of fraud or manipulation and the protection of participants from abusive practices.

IV. Looking Forward

In recent years, the CFTC has begun to ask questions and solicit feedback on various derivatives market structures, and whether any potential amendments should be made to the CFTC's regulatory structure. For example, in December 2025, staff issued a Request for Comment "to better inform the staff's understanding of the issues related to derivatives clearing organizations that provide direct clearing services to retail traders."[32]

While the divergence in regulatory treatment between FCM and DCM marketing materials may have been appropriate for legacy markets, the roles of these registrants has certainly converged in some segments. FCMs historically engaged directly with customers and were involved to some extent with customer trading decisions. DCMs historically did not market directly to customers, and when they did engage in promotional activity, it was often directed

[27] 17 CFR part 38, appendix B.
[28] CFTC Orders Nasdaq Futures, Inc. to Pay $22 Million for Core Principle Violations, Failing to Fully Disclose Incentives, Providing False and Misleading Information, Release No. 8954-24 (Aug. 29, 2024).
[29] CFTC Orders Nasdaq Futures, Inc. to Pay $22 Million for Core Principle Violations, Failing to Fully Disclose Incentives, Providing False and Misleading Information, Release No. 8954-24 (Aug. 29, 2024).
[30] CFTC Enforcement Division Issues Prediction Markets Advisory, Release No. 9185-26 (Feb. 25, 2026).
[31] CFTC Enforcement Division Issues Prediction Markets Advisory, Release No. 9185-26 (Feb. 25, 2026).
[32] CFTC Staff Seek Public Comment on Direct Clearing by Retail Participants (December 18, 2025), *available at* https://www.cftc.gov/PressRoom/PressReleases/9158-25.

toward the markets at large, sophisticated traders in certain professional markets, or to the intermediaries, rather than market participants in retail-focused markets.

As markets, services, and functions continue to evolve, the disparity between FCM and DCM marketing standards becomes more pronounced. Market participants, policymakers, and regulators will continue to monitor these rules, and participants' roles, to make sure the appropriate obligations and customer protection measures remain in place.